

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, (Court – II)
SPECIAL BENCH
KOLKATA

IA(I.B.C)/699(KB)2022
and
IA(I.B.C)/1094(KB)2023
in
C.P. (IB)/302/KB/2021

*An application under Section 60(5) of the Insolvency and Bankruptcy Code,
2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016;*

In the matter of:

(1) **Mr. Amit Sharma**, 2A, Chowringhee Square, Kolkata – 700069;

... Applicant

-Versus-

(1) **Mr. Avishek Gupta**, Resolution Professional of Sarga Hotel Private Limited,
CK-104, Sector 2, Salt Lake, Kolkata – 700091, West Bengal;

... Respondent

Date of hearing: 13/07/2023

Date of pronouncing the order: 18/10/2023

Coram:

Smt. Bidisha Banerjee : **Member (Judicial)**

Shri Balraj Joshi : **Member (Technical)**

Appearances (via video conferencing/physically)

For **SRA** : Mr. Sudipta Sarkar, Sr. Adv.
: Mr. Ranjan Bachawat, Sr. Adv.
: Mr. D.N. Sharma, Adv.
: Mr. Arindam Guha, Adv.
: Ms. Arpita Dey, Adv.

For **Rishima Sa Investment** : Mr. Debnath Ghosh, Adv.
: Mr. Satyaki Mukherjee, Adv.
: Ms. Mini Agarwal, Adv.

For **Rare Asset ARC** : Mr. Swatarup Banerjee, Adv.
: Mr. Rahul Auddy, Adv.
: Mr. Aditya Gooptu, Adv.

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For **RP** : Ms. Manju Bhutoria, Adv.
: Mr. Surajit Dasgupta, Adv.
: Mr. Souvik Majumdar, Adv.
: Mr. Avishek Gupta, RP.

For Applicant in
IA(I.B.C.)/642(KB)2023 : Ms. B. Gayatri, Adv.
: Mr. Akhilesh L. Kamle, Adv.

For J.C. Flower ARC in
IA(I.B.C)/1271(KB)2022 : Mr. Abhinav Sasisht, Sr. Adv.
: Mr. Saptarshi Saha, Adv.
: Mr. Arindam Mrinal Pal, Adv.

In **IA 699 of 2022** : Mr. Rajesh Bohra, Adv.
: Ms. Sangeeta Bohra, Adv.
: Mr. Arun Gupta, CA.

For **Suspended Board of Directors** : Mr. Shaunak Mitra, Adv.
: Ms. Tanusree Paul, Adv.

For **SIDCL** : Mr. Saurav Jain, Adv.

For Applicant in
IA(I.B.C.)/1039(KB)2022 : Ms. Sanjana Nandi, Adv.

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. Heard Ld. Counsels.
2. This application has been preferred against rejection of EOI by the RP, to seek the following relief inter alia: -
 - (i) Resolution Plan approved by the CoC, if submitted by the Resolution Professional for approval of this Hon'ble Authority may not be considered and Applicant should be given the opportunity first to submit the Resolution Plan.
3. Ld. Counsel for the applicant would canvas the following arguments: -
 - (a) The respondent RP has rejected its EOI having stated as under: -



-
- (i) The rejection of EOI by the Respondent is completely wrong despite the fact that the Applicant (as nominated lead Applicant along with other consortium investors) has filed the EOI after completing the criteria of net-worth and turnover as mentioned for criteria of submitting the EOI and in the category of consortium investors.
- (ii) In case of consortium bidding, the requirement of Tangible Net Worth of INR 25 Crores or more and minimum turnover of INR 50 Crores for the nominated lead member of the consortium is that such criteria should be met by one lead applicant as opposed to an amorphous group which has no legal sanctity and whose constituents have simply come together to pool their net worth and turnover in order to meet the minimum eligibility criteria specified for the lead applicant in the detailed IEOI. It was never the intention that parties who are otherwise unable to individually meet the eligibility criteria specified for the lead applicant, may come together in order to form a ‘group’ for the sole purpose of achieving indirectly what they could not achieve directly, i.e., meeting the eligibility set out I in the detailed IEOI for bidding by a consortium of investors/bidders.

4. The Ld. Counsel for the applicant would canvas the following arguments: -

- (i) That the Respondent has rejected EOI by falling into grave error that the criteria of nominated lead applicant has to be met by one lead applicant only.
- (ii) This criteria can be met by the group also; there is no restriction even in the EOI.
- (iii) That the lead applicant has to be an individual corporate / individual person. Whereas, lead applicant has to be nominated person only, which is in the present case is the Group and representative by Mr. Amit Sharma.
- (iv) In the present case, the EOI has been submitted by following parties: -
- (1) Mr. Sitaram Sharma
 - (2) Mr. Amit Sharma
 - (3) Mironda Minmetals Pvt. Ltd.

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(4) R S Finance Pvt. Ltd.

(5) Sidhgiri Holdings Pvt. Ltd.

The first four parties are related to one family group only and fifth party is an independent coporate.

- (v) All these five parties are persons as defined under Section 3 (23) (c) of the IBC and hence eligible to submit the EOI as Resolution Applicants as defined in section 5(25) of IBC:

“**persons**” includes –

- (a) an individual;
- (b) a Hindu Undivided Family;
- (c) a company;
- (d) a trust;
- (e) a partnership;
- (f) a limited liability partnership; and
- (g) any other entity established under a statute,

And includes a person resident outside India;”

- (vi) The Respondent has not defined the term of lead applicant and also the term of group. The Respondent has nowhere mentioned in EOI that the lead applicant has to be individual / one party. What the Respondent has mentioned in EOI that the nominated lead applicant should have the net-worth of Rs. 25 Crores and turnover of Rs. 50 Crore. The Applicant is part of the Mironda Group consisting of first four parties and has been nominated as lead applicant vide MOU dated 17.05.2022.

- (vii) The details of net-worth and turnover of all five parties are as follows: -

Sl. No.	Name of Entity	Net-tangible Assets (Rs. in Crore) as on 31.03.2021	Turnover (Rs. in Crore) for the FY 2020-21	Proportion of holding in the Consortium (%)

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A.	Mironda Group	39.80	214.61	78%
1.	Mironda Minmetals Pvt. Ltd.			
2.	R S Finance Pvt. Ltd.			
3.	Sitaram Sharma			
4.	Amit Sharma			
B.	Sidhgiri Holdings Pvt. Ltd.	12.77	121.44	22%
	Total (A+B)	52.57	366.05	100%

- (viii) All the parties to consortium have nominated Mr. Amit Sharma and entire compliances as provided for bidder under consortium investor has been complied with. Even declaration and authorisation have been annexed.
- (ix) That four parties belong to one group, and with the total net-worth of Rs. 39.80 Crore and turnover more than Rs. 100 Crore as against the fact that required net-worth is Rs. 25 Crore and required turnover is Rs. 50 Crore. The Applicant is representative of the nominated lead applicant (Mironda Group). Mironda Group is therefore qualifying as lead applicant.
- (x) The Applicant was eligible from day one to file the EOI and the Respondent has wrongly rejected the EOI and therefore, the Respondent should be directed to accept the EOI of the Applicant and give the opportunity to the Applicant to submit the Resolution Plan.
- (xi) It is held in Hon'ble Supreme Court vide judgment dated 25.01.2019 in **Writ Petition (Civil) No. 99 of 2018, in the matter of Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.**
“RESOLUTION PROFESSIONAL HAS NO ADJUDICATING POWERS.”
- (xii) Further in **Committee of Creditors of Essar Steel India Limited Through Authorised Signatory vs. Satish Kumar Gupta & Ors.** it has been held that the role of the resolution professional under the Code and the Regulations is not adjudicatory but administrative.



- (xiii) The RP once having received the EOI with due eligibility was supposed to bring to the notice of COC immediately for technical issues and not adjudicated upon the eligibility of the applicant, all by himself.
- (xiv) The Respondent has thus violated IBC, and settled legal position and has restricted entry of genuine bidders by his own judicial wisdom, which he doesn't have.

5. The respondent RP would submit as under: -

- (i) The Applicant submitted its EOI on 18 May 2022. The EOI was submitted by the Applicant as a 'Consortium' between Mironda Group and Sidhgiri Holdings Private Ltd. ("Sidhgiri"). The 'Mironda Group' was stated to further comprise of 2 Individuals and 2 companies. The composition of the Mironda Group was stated by the Applicant to be as follows:
- a) Mironda Minmetals Pvt. Ltd.
 - b) R S Finance Pvt. Ltd.
 - c) Sitaram Sharma
 - d) Amit Sharma
- (Collectively referred to as the "Mironda Group")
- (ii) The RP evaluated the EOI submitted by the Applicant as per the eligibility criteria detailed in the IEOI and found the Applicant to be ineligible as per the said criteria to participate in the resolution process of the Corporate Debtor. Accordingly, the RP sent an email dated 24 May 2022 informing that the Applicant does not meet the minimum net worth criteria of INR 50 Crores. That the net worth of the 'Mironda Group' is stated to be INR 39.80 Crores as per the CA certificate dated 17 May 2022 submitted by the Applicant.
- (iii) The Applicant vide email dated 28 May, 2022, was asked to clarify how the Applicant as a whole could be considered a 'person' under Section 5(25) of the Insolvency and Bankruptcy Code, 2016 ("Code"). The Applicant was asked to explain as to which category of 'person' would Mironda Group fall under. Vide its response dated 28 May, 2022, the



Applicant stated that as a group, as financial investors and as a ‘consortium of investors’, the Applicant falls under the category of corporates.

- (iv) The RP has already explained vide its email on 30 May, 2022 that Mironda Group (being a group simpliciter) does not fall under any of the categories of ‘person’ as defined under Section 3 (23) of the Code and therefore, cannot fall within the definition of ‘resolution applicant’ under Section 5 (25) of the IBC. This being so, neither can the Consortium between Mironda Group and Sidhgiri be considered as a valid consortium for the purpose of submission of EOI for the Corporate Debtor nor can Mironda Group be considered as satisfying the requirement of being a lead applicant having a Tangible Net Worth of INR 25 Crores or more and turnover of INR 50 Crores. Without prejudice, it is further noted that none of the individual constituents of Mironda Group or Sidhgiri individually have a Tangible Net Worth of INR 25 Crores or more and minimum turnover of INR 50 Crores.”
- (v) As per Section 25 (2)(h) of the resolution professional RP has a duty “invite prospective resolution applicants, **who fulfil such criteria as may be laid down by him with the approval of committee of creditors**, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans”. Hence only such PRAs who fulfil the eligibility criteria laid down by the CoC can participate in the resolution process of a corporate debtor and submit a resolution plan.
- (vi) In the present case, the following eligibility criteria was decided by the CoC:

A. Corporates, partnerships, trusts, government organizations, limited liability partnerships (LLPs) and Individuals

The Prospective Resolution Applicant should have



-
- a) a consolidated **Group Tangible Net Worth of INR 50 crores** or more and a minimum **turnover of INR 100 Crore**, as per the latest available audited annual accounts which shall not be earlier than March 31, 2021; and
- b) In the event the bid is made by a special purpose vehicle or a subsidiary of a holding company, the net worth and turnover criteria must be satisfied by either the bidder or its controlling company.

C. Proposals by Consortium of Investors

- a) Proposal by Consortium shall be made by a nominated lead applicant who should have authority to bind, represent and take decisions on behalf of the Consortium and must have a minimum profit/voting share of 26% in the Consortium. **Such a nominated lead applicant should have Tangible Net Worth of INR 25 crores or more and turnover of INR 50 Crore, as per the latest available audited financial statements which shall not be earlier than March 31, 2021, OR should have total assets under management (AUM) / loan portfolio or committed funds available for investment/deployment in India Companies or Indian assets of at least INR 125 crores as per the latest available audited financial statements which shall not be earlier than March 31, 2021, in case of a Consortium of financial investors.**

- (vii) Therefore, the lead applicant of the consortium should have a Tangible Net Worth of INR 25 crores or more and turnover of INR 50 Crore. Notably, no member of this purported consortium individually fulfils this criteria, that is to say that out of a total of 5 members of the consortium (4 of the Mironda Group and Sidhgiri), not a single member has Tangible Net Worth of INR 25 crores or more and turnover of INR 50 Crore.

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- (viii) The claim of the Applicant that ‘Mironda Group’, as a whole, is the lead applicant and that as a whole, the ‘Mironda Group’ fulfils the criteria of the Lead Partner, whereas the 4 entities / individuals together forming the Mironda Group collectively have Tangible Net Worth of INR 25 crores or more and turnover of INR 50 Crore and ‘Mironda Group’ is an amorphous group of 2 individuals and 2 corporates does not fall under any of the categories of ‘person’ as defined under Section 3(23) of the Code and therefore cannot fall under the definition of ‘resolution applicant’ under Section 5(25) of the IBC.
- (ix) In case of a Consortium, the eligibility criteria should be met by one lead applicant as opposed to an amorphous group which has no legal sanctity and whose constituents’ have simply come together to pool their net worth and turnover in order to meet the minimum eligibility criteria specified for the lead applicant in the detailed IEOI.

6. We have considered the rival contentions and perused records.
7. A Consortium is a group of entities that collaborate to achieve a common objective to leverage their common resources and expertise to have a wider and significant reach.

“Britanica defines “Consortium” as a group of people, companies etc. that agree to work together.

While Law Lexicon defines “Consortium” as two or more parties acting together as a partnership or joint venture. A Consortium Bank is a bank whose shareholders consist of a group of other banks. The members of a consortium as in this case is either an individual or a company. When the EOI suggests that the lead member should meet the criteria, it cannot be overstretched or construed to mean the Consortium itself, but one of its individual partners (person) or corporate partner (company).

A lead member should be the entity designated to be the lead member by the members of the Consortium for submitting the Resolution Plan or a Resolution Applicant on behalf of the Consortium.

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Thus, applicant Amit Sharma, being nominated as the lead member of the Consortium must fulfil the criteria as an individual and not jointly with the other members of the Consortium. As such the rejection of the EOI, by the RP cannot be faulted with.

8. Hence, **IA(I.B.C)/699(KB)2022 and IA(I.B.C)/1094(KB)2023** is thus **dismissed.**

(Balraj Joshi)
Member (Technical)

(Bidisha Banerjee)
Member (Judicial)

Order signed on this, the 18th day of October, 2023.

AR.