

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court-II)**

KOLKATA

IA(IBC) No. 900 /KB/2022

In

C.P.(IB) No. 64/KB/2019

An application under section 60(5) of the IBC,2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016.

In the Matter of:

Sreenath Finvest Private Limited & Ors

....Financial Creditors

-versus-

Pami Metals Private Limited

.... Corporate Debtor

And

In the matter of

Mr. Rajesh Kumar Damani

.... Applicant

Versus

Mr. Jitendra Lohia & Ors.

... Respondents

Date of Hearing : 28/09/2022

Date of pronouncing the order: 30/09/2022

Coram:

Mr. P. Mohan Raj, Member (Judicial)

Mr. Balraj Joshi, Member (Technical)

Appearances (via Video Conferencing/ Physical):

- | | |
|---------------------------------|---------------|
| 1. Mr. Jishnu Saha, Sr. Adv. | For Applicant |
| 2. Abhijit Sarkar, Adv. | |
| 3. Ms. Urmila Chakraborty, Adv. | |

- | | |
|----------------------------|--------------|
| 1. Mr Shaunak Mitra, Adv. | For RP |
| 2. Ms.Meenakshi Manot,Adv. | |
| 3. Jitender Lohia | RP in person |

ORDER

Per: Balraj Joshi, Member (Technical):

1. This Court convened through video conferencing.
2. This application bearing IA No. 900/KB/2022 filed by Mr. Rajesh Kumar Damani praying for directions upon the CoC and the RP to forthwith allow the applicant to make EMD of Rs. One Crore and to consider the resolution plan submitted by the applicant by involving the applicant in the deliberations pertaining thereto and other consequential relief.

Facts of the case

3. CIRP was directed to commence against the Corporate Debtor namely **Pami Metal Private Limited** on November 03, 2021. RP made a public announcement inviting creditors to lodge their claims on 17th November, 2021. As per the Form-G, the last date of receipt of EOI was 2nd February, 2022 and last date for submission of resolution plan was March 16, 2022.
4. Pursuant to the publication of Form-G, the applicant had submitted EOI vide email dated 2nd February 2022 and the EOI of the applicant was considered by the RP and processed and subsequently the applicant had attended 5 meetings of the CoC. During ensuing discussions, the applicant made clear that he being an Ex. Promoter of the Corporate Debtor which is a MSME is exempted from the

submission of the EMD along with the proposal. However, this submission of the applicant was not taken into consideration. Subsequently, the RP vide email dated 16th June, 2022 stated that all the resolution plans would be placed before the CoC for further consideration and that the resolution of the applicant may not be considered as the applicant has not submitted EMD amount of Rs. One Crore. Copies of the email exchanged have been placed at Annexure A-13 of the application.

5. It is averred that 6th meeting of CoC was held on June 22, 2022 and discussions were held on the resolution plan submitted by the Prospective Resolution Applicants. In the meeting the applicant being the suspended member of the Board of Directors of the Corporate Debtor was present. The RP informed that resolution plan of the applicant was not being considered as he had failed to deposit required EMD amount amounting to Rs. One Crore.
6. It is pertinent to mention that though the applicant had duly submitted his plans within the due date, the EMD was not submitted as the applicant claimed exemption for furnishing EMD under the privileges extended to MSME category.
7. On the importance attached to the MSMEs in the Indian economy, the applicant has relied on Para 79 in **Swiss Ribbons judgment** by the Hon'ble Supreme Court which inter-alia has cited para 27.4 of the ILC report which reads as under:

27.4 Regarding the first issue, the code is clear that default of INR one lakh or above triggers the right of a financial creditor or an operational creditor to file for insolvency. Thus, the financial creditor or the operational creditor of MSMEs may take it to

*insolvency under the code. However , given that MSMEs are the bedrock of the Indian economy, and the intent is not to push them into liquidation and affect the livelihood of employees and workers of the MSMEs , the committee sought it fit to explicitly grant exemptions to corporate debtors which are MSMEs by permitting a promoter who is not a wilful defaulter to bid for the MSMEs in insolvency.***The rationale for this relaxation is that a business of an MSME attracts interest primarily from an promoter of an MSME and may not be of interest to other resolution applicants.**

8. Further relying on the judgement of the NCLAT in the case of Saravana Global Holdings, in a subsequent decision in the case of Mr. C. Raja John versus Mr. R.Raghavendran & Others passed in Company Appeal (AT) (CH) (INS) No. 207 of 2021, the Hon'ble NCLAT held (in paragraphs 21 to 28) that by the amendment to section 240 A of the Code of 2016, the legislature expressed its intention to encourage the promoters of MSME to file resolution plans which were viable, feasible and fulfilled the other criteria laid down by the Code.
9. Notwithstanding the fact that the petitioner's name had been published in the list of prospective resolution applicants by the RP on two occasions, at the fifth COC meeting the RP represented to the COC that the petitioner was ineligible as he had not put in the requisite earnest money deposit. In such circumstance, at the sixth sitting of the COC the petitioner went with the draft of the earnest money of Rs. one Crore and offered to deposit the same only to ensure that his plan was not summarily rejected. Even such offer of

the petitioner was not accepted by the RP or the COC. It is then that the petitioner filed the present application.

10. Regarding the Earnest money exemption, the Applicant has relied on the circular of No. F.20/2/2014-PPD(Pt.) dated 25.07.2017 issued by Ministr of Finance , Govt. of India, which deals with the revision in Rule 170(i) of the GFR 2017, which exempts the MSMEs from furnishing bid security. It is further submitted by the applicant that the similar concessions have been afforded to other promoters by the Hon'ble Chennai and Kochi Benches of the NCLT vide references **Ajay Agarwal vs a Ashok Magnetics Ltd. reported in [2019] 108 taxmann.com (NCLT- Chennai) [09-11-2018]** and the decision in the case of **K. Satheesh Babu Rajesh vs Mr. George Varkey in I.A. (IBC) No. 64/KOB/2021.**
11. After coming to know that his plan could not be considered in absence of the EMD and also noting that all the Bank accounts of the applicant were frozen being a Director/Promotor of the Corporate Debtor due to which it was not possible for the applicant to deposit the earnest money., and as a via media, he also enquired whether he could take a 3rd party route for deposition of the EMD, so that his plan could be considered. The applicant states that all through he had understanding that his resolution plan is receiving consideration without EMD as he had been participating in various meetings of CoC and participating in the associated processes.
12. It is also mentioned on page 22 of the petition at para 25 that two resolution plans which have been received were far less in value than the plan submitted by the applicant .

Submissions by Ld. Counsel for RP

13. It has been contended by the Ld. Counsel that the MSME Amendment that was introduced in IBC namely Section 240A was only for limited purpose of exemption from Section 29A(c), (h). No further exemption for MSME has been granted. Under Section 240A(2) power has been granted to the Central Government to issue notifications to exempt MSMEs from further provisions but no such Notification under IBC has been issued by the Central Government to exempt MSMEs from submitting EMD. Legislative intent behind Section 240A is very clear i.e., that it is limited only to exemption under Section 29A(c) and (h) and no other provision. Thereafter at the 5th CoC meeting Held on 11.4.2022 the non-compliance by the Applicant was discussed in detail in the presence of the Applicant at pages 82,85 and 86 of the Application at Annexure A12)
14. Thereafter at the 6th CoC meeting held on 22nd June 2022 the non-compliance by the Applicant in not furnishing the EMD was further discussed (@pages 90, 97 to 100 of the Application, Annexure A14).
15. However, the present Application was not filed in February or in April or in June but was filed in late August 2022. There is no explanation for the delay and the Applicant is not deserving of any reliefs having come at the last possible moment.
16. Today, Ld. Counsel for the RP and RP himself were present in the court and they stated that they are not agreeable to the contention of the applicant that the MSME participants are exempted from

submitting EMD, but they also stated that they don't have any reservation in considering the resolution plan submitted by Mr.Damani provided necessary EMD is deposited and the matter can be again put up before the CoC for consideration subject to condonation of the delay in filing the resolution plan.

17. The Ld. Counsel for the RP was however agreeable that the plan can be put before the CoC for which the delay in the submission of the Resolution plan would need to be condoned, the plan of the Applicant has to be legally compliant and supported by valid EMD and the same would then be considered by COC. In any event, the steps taken so far including consideration by COC of Plans by other two Resolution Applicants cannot be disturbed.

Analysis and findings

18. We have gone through the pleadings and heard the Ld. Counsel for the RP and the Ld. Senior Counsel for the applicant. The present situation has arisen mainly because of the plan being submitted without the requisite EMD. Even though the plan has been submitted and even considered by the CoC but was termed as non-compliant primarily due to lack of deposition of the EMD as required. Noting the fact that after initial contentions of exemption, the applicant had offered to deposit the necessary EMD, the present case essentially can be seen as the one seeking for condoning of delay in depositing the Earnest Money. Today when the matter was heard, the Ld. Senior Counsel appearing for the applicant stated that he was prepared to deposit the required amount of EMD provided he gets an assurance that his plan would be considered by the CoC afresh.

19. The use of the word ‘afresh’ has been made in view of the observation of the 7th minutes of the CoC, wherein it has been recorded that :

“Moreover the decision of not considering the submission of third party EMD at stage and the resolution of Mr. Damani was reconfirmed by the CoC members as well. It was further stated by CoC members that they had also gone, through the resolution plan of Mr. Rajesh Kumar Damani, which was circulated by RP though email and prima facie the plan was found not to be feasible and viable. It was also stated by the CoC that the resolution plan of Mr. Rajesh Kumar Damani specifies that he would raise substantial amount from friends and relatives, which is very vague and the plan further specifies to sell the Howrah unit for making payment to the creditors, whereas plan submitted by others are found to be feasible and viable which stipulated towards complete revival of the corporate debtor”.

20. When the CoC had decided not to entertain the plan submitted by the applicant, it is not understood as to why the same was considered and commented on in an off handed manner by the CoC in the 7th meeting.
21. Further the applicant has stated in the application at page 22 para 25 that the resolution plan submitted by the applicant is far better and more conducive to the revival and rehabilitation of the Corporate Debtor and is also valued at Rs.15 Crores as compared to other two plans which are Rs.10.51 Crores and Rs. 9.0 Crores respectively. We also note the submissions of the applicant that even though the CoC

did not consider the EMD exemption available to the MSME, however considering the various exemptions and relaxations given to the MSME including the exemption provided in Section 240A of the code to MSME sector and relying on the ratio of the **Swiss Ribbons** (supra), we are inclined to grant the relief sought as set out herein.

22. Thus keeping in mind the main objective of the Code which is the maximization of the value of the Corporate Debtor vis-à-vis the facts and circumstances of the case as brought out herein above, We hereby revert the matter back to CoC and RP to consider the resolution plan submitted by the applicant subject to depositing of required EMD of Rs.One Crore within two days from the date of order.
23. It is made clear that the CoC shall consider the plan on its merits, with an open mind, uninfluenced by the fact that the delay occurred thus far is hereby condoned.
24. Subsequent enabling steps be taken by the CoC and RP accordingly without necessitating any further extension in the resolution process, due to this relief.
25. Accordingly, IA(IBC) No. 900 /KB/2022 shall stand disposed of.
26. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Balraj Joshi)
Member (Technical)

(P.Mohan Raj)
Member (Judicial)

Order signed on, this 30th day of September, 2022

