

IN THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH - BENGALURU
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)
(through web based video-conferencing platform)

I.A 555 of 2023

In

CP (IB) No.9/BB/2022

Under Sections 60 (5) of IBC, 2016

R/w. Rule 11 of the NCLT Rules, 2016

IN THE MATTER OF I.A 555 OF 2023

Atharv Intertrade Private Limited

... Applicant

Versus

Mr. Shivadutt Bannanje,

RP for Dnyanyogi Shri Shivakumar Swamji Sugars Limited

... Respondent

Order delivered on: 06.10.2023

Coram: 1. Hon'ble Justice (Retd.) T. Krishnavalli, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Parties/Counsels Present:

For Applicant : Shri Srinivas Raghvan
Shri Vineeth Reddy
RP : Shri Raghuram Cadambi

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. This Application has been filed on 01.08.2023 by **Atharv Intertrade Private Limited**, (Applicant), U/s. 60(5) of the IBC, 2016 R/w. Rule 11 of the NCLT Rules, 2016 against Mr. **Shivadutt Bannanje**, RP of Corporate Debtor (Respondent), seeking to declare that Clause A(1)(c) and Clause D of detailed Invitation to Expression of Interest (EOI) dated July 10, 2023 requiring Earnest Money Deposit (EMD) amount of INR 15,00,00,000/- to be submitted along with EOI to be declared exorbitant and unreasonable, and to declare Clause D (d) of Annexure C of detailed Invitation to EOI dated July 10, 2023 for forfeiture of amount of EMD as unreasonable and contrary to CIRP Regulations. Further, it has been requested to

direct the Respondent to accept/consider the EOI submitted by the Applicant along with EMD of 50,00,000/-. In this case, vide order dated 02.06.2023 in I.A. 339 of 2022, it was held that the constitution of COC was invalid since it comprised of related parties to the Corporate Debtor; and the RP was directed to reconstitute the CoC. Hence, the COC has been reconstituted and now the requirement of EMD in the EOI has been contested in this I.A.

2. Brief facts of the case, which are relevant to the issue in question, and as narrated by the applicant are as follows:

1. This Adjudicating Authority has admitted C.P.(IB)No. 9/BB/2022 vide Order dated 07.03.2022, by initiating CIRP in respect of the Corporate Debtor, and Shri Shivadutt Bannanje was appointed as the IRP. Consequently, vide order dated 30.05.2022, the IRP was appointed as RP of the Corporate Debtor.

2. As per the Form G dated 10.07.2023, the last date of receipt of EOI was 25.07.2023. The applicant sought detailed invitation to EOI from the RP and same was shared with the Applicant on 24.07.2023 by the respondent.

3. On perusal of terms of detailed invitation to EOI, the Applicant came to know that a non-interest bearing refundable EMD equivalent to amount of INR 15,00,00,000/- was required to be submitted for the purpose of submitting EOI for participating in the CIRP of the corporate debtor. However, fixing of such exorbitant amount as EMD at the stage of mere submission of EOI is harsh, unreasonable and completely discouraging to the prospective resolution applicants. It is also stark contrast to the other 'CIRP' wherein requirement of deposit of EMD is not stipulated or a nominal amount is proposed so as to ensure that as many entities participate in the resolution of a stressed company. Further, detailed invitation to EOI also provides for forfeiture of EMD deposited by prospective resolution applicants on various extraneous grounds, which is also arbitrary and whimsical, thus disincentivize an interested bidder to participate in CIRP of the Corporate debtor.

4. However, it is to be noted that on 25.07.2023, the applicant as per the requirement of Form G and detailed EOI issued by respondent submitted its EOI to the respondent. Along with EOI, the applicant issued an explanatory letter dated July 25, 2023 highlighting that EMD amount specified in detailed invitation to EOI is significantly higher than usual. To

further demonstrate its genuine and bonafide interest in the efficacious resolution of the Corporate debtor, the Applicant transferred an amount of INR 50,00,000/- in the concerned account of the corporate debtor as EMD for submission of EOI with the Respondent.

5. However, the Respondent vide its email dated 26.7.2023 communicated to the Applicant that the EOI submitted by the applicant is incomplete as amount of INR 15,00,00,000/- has not been deposited and rejected the EOI submitted by the applicant on this ground alone.

3. The learned Counsel for the Respondent, has filed statement of objections Vide diary no. 4258 dated 16.08.2023, by contending that the respondent received multiple expressions of interest from five prospective applicants. Out of these, three prospective resolution applicants have complied with the mandatory condition of Rs. 15,00,00,000/- to participate in the CIRP process, which is refundable. Further, stated that the CoC's decision was made, having due regard to the nature of the business of corporate debtor, which is capital-intensive. Importantly, the CoC also noticed that there was enormous debt on the books of the corporate debtor which included admitted claims to the tune of Rs.411.05 crores as on 13.08.2023. Given this huge sum, the CoC correctly believed that only prospective resolution applicant with a certain financial wherewithal and liquidity must be considered.
4. The learned Counsel for the applicant filed written submissions vide diary no. 4509 dated 29.08.2023 stated as follows:

i) On perusal of terms of detailed invitation to EOI, the Applicant came to know that a non-interest bearing refundable EMD equivalent to amount of INR 15,00,00,000/- (Indian Rupees Fifteen Crore Only) was required to submitted for the purpose submitting EOI for participating in the CIRP of the Corporate Debtor. The relevant extract of detailed EOI is reproduced below for ready reference:

Submission of an amount refundable Earnest Money Deposit (“EMD”) along with the EOI

Further, the Prospective Resolution Applicants shall be required to submit a non-interest bearing refundable EMD equivalent to INR 15,00,00,000/- (Indian Rupees Fifteen Crores Only), for the purpose submitting an expression of interest for participating in the CIRP Process. The detailed procedure for submitting an EMD is provided under Annexure – C to this Invitation.”

ii). It is submitted to this Hon'ble Tribunal that as per the detailed invitation of EOI issued by the Respondent, minimum net worth is stipulated as 25 Crores the relevant extract of detailed invitation of EOI is reproduced below for ready reference –

“A. For Body Corporates (Any private limited company or public limited company registered under the Companies Act or Limited Liability Partnership (LLP):

- *Minimum net worth of INR 25 Crores (Rupees Twenty-Five Crores only) for immediately preceding financial year.”*

iii). Thus, it is clearly evident that when minimum net worth prescribed for submission of EOI is Rs 25 Crores for the submission of the Resolution Plan and keeping an amount of Rupees 15 Crores at the time of submitting EOI, which is 60 percent of the minimum amount of net worth required to submit the Resolution is completely arbitrary.

iv). Furthermore, it is also submitted to this Hon'ble Tribunal that as per the RFRP submitted by the Respondent, the performance guarantee which is required to be furnished by the Successful Resolution Applicant is also fixed at 15 Crores, which is equal to the EMD submitted at the stage of submission of EOI. *The performance guarantee is an amount used to safeguard the creditors in the event of non-implementation of resolution plans by the successful resolution applicants and fixing EMD at submission of EOI and performance guarantee at the same amount proves the fact the CoC in deciding the eligibility criteria didn't exercise its commercial wisdom judiciously.*

v). Furthermore, the Section 25 of the Code, more specifically 25(2)(h) states the RP shall 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.* Therefore, it is submitted to this Hon'ble Tribunal that as per Section 25(2)(h), the commercial wisdom of CoC in fixing the eligibility criteria during EOI stage shall have regard to the scale of operations of the CD and in the instant case, as per the audited financials, the Corporate Debtor generated 18 crores of revenue from operations in year 2020 and no

operational revenue from thereon and also, the total tangible assets of CD as per the audited financials stand at 39 Crores. Therefore, fixing 15 crores of EMD to submit EOI for the CD of this Scale is completely unreasonable and seems like an attempt to restrict the market participation, which is fundamental aspect of the Code. The table depicting the financial summary of the Corporate Debtor is attached hereto as **Annexure-C**.

vi). Furthermore, it is also submitted to this Hon'ble Tribunal that the Corporate Debtor received resolution plan earlier, however due to reconstitution of the CoC, the form G was republished, and it is important to note here that the total amount in the approved resolution plan earlier was 81 crores and stipulated EMD of 15 crores for submission of EOI is even higher than the 10 percent of the approved resolution amount, which is flabbergasting.

vii). To further demonstrate its genuine and *bonafide* interest in the efficacious resolution of the Corporate Debtor, the Applicant has already transferred an amount of INR 50,000,00/- (Indian Rupees Fifty Lakh Only) in the concerned account of the Corporate Debtor as EMD for submission of EOI with the Respondent. Further, the applicant relied on the judgments as under

1. *Swiss Ribbons Pvt. Ltd vs Union of India (2019) 4 SCC 17*
 2. *Gujarat Urja Vikas Nijam Limited vs. Amit Gupta (2021) ibclaw.in 44 SC*
 3. *Dwakadhish Sakhar Karkhana vs Pankaj Joshi (2021) ibclaw.in 280 NCLAT*
 4. *Kannan Tiruvengandam Vs M.K. Shah Exports Ltd & Ors, Company Appeal (AT) (Insolvency) No 203 of 2018*
5. The learned Counsel for the respondent filed written submissions vide diary no. 4505 dated 29.08.2023 stated as follows:

i) The CoC and the Respondent, being the Resolution Professional of the Corporate Debtor, as stipulated under section 25(2)(h) of the Code read with Regulation 36A(4), are solely responsible for fixing the eligibility criteria for prospective resolution applicants, which would form a part of the detailed expression of interest.

ii) In the present case, based on deliberations at the 12th Meeting of the CoC dated 07.07.2023, the refundable EMD criterion was fixed. The preliminary question for determination is whether at all such a criterion can be challenged before this Hon'ble Tribunal.

iii) The CoC has, after detailed deliberations, at the 12th Meeting of the CoC dated 07.07.2023 [Annexure R1, Statement of Objections, Page 14], the CoC unanimously resolved to impose an eligibility criterion of having a refundable earnest money deposit of Rs. 15,00,00,000/- (Rupees Fifteen Crores only) [Annexure R1, Statement of Objections, Pages 19-20]. The CoC decided this criterion based on its knowledge in the operations of the Corporate Debtor, as well as the likelihood of recovery – as it is empowered to do under section 25(2)(h) of the Code and Regulation 36A(4) of the CIRP Regulations.

iv) In the present case, having regard to the complexity and scale of operations of the business of the Corporate, this criterion of refundable EMD is eminently fair and reasonable for the following reasons:

a) In the present case, the Corporate Debtor operates within the sphere of procuring sugarcane and manufacturing sugar along with its ancillary products. This particular business is notably capital-intensive, demanding prompt cash liquidity from potential successful resolution applicants.

b) The total debt of the Corporate Debtor as on 13.08.2023 was Rs. 411.05 Crores – therefore, it is only reasonable for the CoC to have a criterion where only serious applicants with the necessary financial might to repay large parts of the debt and revive the Corporate Debtor, are shortlisted. Hence a refundable deposit of Rs. 15 Crores – which is a small sum relative to the total debt of the Corporate Debtor;

c) The CoC wanted to avoid a situation where a resolution applicant who does not have the necessary financial resources, gets a plan approved, and thereafter defaults on payments due. Therefore, the CoC felt that immediate liquidity was an important criterion for a prospective resolution applicant.

d) Given that the CIRP in the present case was directed to be started afresh (discarding the earlier round), the CoC was of the view

that more stringent criteria for prospective resolution applicants be introduced.

v) It is further explained that three other resolution applicants have already submitted their detailed EOIs along with the refundable EMD of Rs. 15,00,00,000/- (Rupees Fifteen Crores only), and any interference at this stage, at the behest of a person who has merely paid Rs. 50,00,000/- (Rupees Fifty Lakhs only) would be grossly unfair.

vi) It is plainly in consonance with Regulation 36A(4)(d) – which only prohibits CoC's from collecting a fee or a non-refundable deposit, which is not the case presently. A refundable EMD is duly permitted, and included as a matter of course in most CIRPs.

vii) The Applicant has also attempted to suggest that merely because a forfeiture clause in respect of the EMD is provided, the EMD requirement was illegal and contrary to Regulation 36A(4)(d). This submission is also contrary to the CIRP Regulations for the following reasons:

a. Nowhere in the CIRP Regulations is forfeiture of EMD on the occurrence of some events prohibited;

b. In fact, in certain circumstances, the CIRP Regulations themselves contemplate forfeiture – for instance, under Regulation 36A(7)(f), a prospective resolution applicant may be asked to forfeit his EMD should there be a breach of an undertaking;

c. The CIRP Regulations do not provide anywhere that apart from Regulation 36A(7)(f), no forfeiture can be provided.

viii) Therefore, merely because there is a forfeiture clause would not make the same violative of the CIRP Regulations. Further, the forfeiture clause [Application, Pages 31-32] only provides for forfeiture in a limited set of circumstances, which does not fall foul of any of the CIRP Regulations. In fact, the Applicant cannot have any grievance in respect of the forfeiture clause, since it has not been sought to be exercised as against him. In fact, when he paid a meagre part of the EMD, i.e., Rs. 50,00,000/- (Rupees Fifty Lakhs only), since his EOI was rejected, the Respondent immediately offered to refund the same by way of its email dated 01.08.2023. [Statement of Objections, Page 30]. Further, the respondent relied on the judgments as under:

1. *Kannan Tiruvengandam v. M.K. Shah Exports Limited and others, Company Appeal (AT) (Insolvency) No. 203 / 2018.*

2. *IMR Metallurgical Resources AG v. Ferro Alloys Corporation Limited, Company Appeal (AT) (Insolvency) No. 272 / 2020*

3. *JM Financial Asset Reconstruction Company Limited v. M/s Well-Do Holdings and Exports Private Limited and others Company Appeal (AT) (Insolvency) No. 134 / 2019*

6. Heard learned Counsel for the Applicant and for the Respondent. We have carefully perused the pleadings on record by the respective parties.
7. This Application has been filed challenging the requirement of Rs.15 crore as Earnest Money Deposit ('EMD') to be submitted along with Expression of Interest ('EOI'). It has been explained by the Respondent/RP that this amount of Rs.15 crore as EMD was duly approved by the CoC in its 12th meeting held on 07.07.2023. The copy of the Minutes of the Meeting was filed along with the Statement of Objection filed vide diary no.4258 dated 16.08.2023, which has been perused. During this meeting, the Chairperson of the CoC apprised the Members the provisions of Regulation 36A(4) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; according to which the invitation for EOI shall not require payment of any fee or any non-refundable deposit. Therefore, the Resolution was unanimously passed by the CoC for a refundable EMD of Rs.15 crore by the Prospective Resolution Applicant for participation in the CIRP.
8. The contention raised by the Applicant in its submissions is that fixing of Rs.15 crore as EMD for submission of EOI is unreasonable and lacks application of mind on the part of the COC. For this purpose, the Applicant has also referred to the fact that as against the net worth criterion of Rs.25 crore, the EMD of Rs.15 crore was exorbitant. It is further stated that in accordance with Section 25(2)(h) of the IBC, the criteria laid down with the approval of the CoC has to be with regard to the complexity and scale of operation of the business of the Corporate Debtor; and considering the scale of operation and financials of the Corporate Debtor including its tangible assets, the amount of Rs.15 crore as EMD was unreasonably high.

9. On the other hand, the Respondent/RP has emphasised that the requirement of Regulation 36A(4) has been fulfilled since the EMD is refundable. Secondly, this is unanimously approved by the COC which is empowered as per Section 25(2)(h) as well as Regulation 36A(4). It is further emphasised that the forfeiture Clause would not make it violative of the Regulations, as the forfeiture was provided only for a specific set of circumstances.
10. The RP/Respondent has placed reliance on the judgment of *Kanan Tiruvengadam v. M.K. Shah Exports Ltd. and Ors., Company Appeal (AT)(Insolvency) No.203/2018* in which, it has been observed as under: “*we are of the opinion that the question of eligibility criteria regrading requirement of minimum tangible net worth for one or other category of Resolution Applicants and other criteria are matter which can be dealt with by expert committee like Committee of Creditors, we hold that the Adjudicating Authority has no jurisdiction to sit in appeal over the decision of expert bodies relating to eligibility criteria till it is not shown that the same is perverse or against any of the provisions of I&B Code or existing law*”.
11. It is further contended that this matter of reasonability of the amount of EMD should be left to the wisdom of the CoC, as held by the Hon’ble NCLAT in the abovementioned judgment and therefore, this application is liable to be dismissed.
12. Having considered the abovementioned reasons including the Hon’ble NCLAT’s decision referred to above, we are of the considered opinion that this issue of fixing of refundable EMD and its reasonableness is a matter which comes within the scope of ‘Commercial Wisdom’ of the CoC. Hence, this Adjudicating Authority is not inclined to interfere with the decision of the CoC.
13. Accordingly, **I.A. No.555 of 2023 in C.P.(IB)No.09/BB/2022** is hereby **dismissed**.

-Sd/-

MANOJ KUMAR DUBEY
MEMBER (TECHNICAL)

-Sd/-

T. KRISHNAVALLI
MEMBER (JUDICIAL)