

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 53/KB/2024

In

Company Petition (IB) No. 100/KB/2019

***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:

Lomat International NV

... Operational Creditor.

Verses

Wearit Global Limited

... Corporate Debtor.

And

IN THE MATTER OF:

**Mr. Manish Kumar, suspended director of Wearit Global Limited
(under CIRP)**

... Applicant.

Verses

**Rachna Jhunjunwala, Resolution Professional of the Corporate
Debtor.**

... Respondent No. 1.

And

Committee of Creditors of Wearit Global Limited

... Respondent No. 2.

Date of Pronouncement: June 05, 2024.

CORAM:

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI. D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

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APPEARANCE:

For the Applicant:

**Mr. Joy Saha, Sr. Adv.
Mr. Dripto Majumdar, Adv.
Mr. Sumit Biswas, Adv.
Mr. R. Bhowmick, Adv.
Mr. C. Mitra, Adv.**

For the Resolution Professional:

**Mr. Shaunak Mitra, Adv.
Mr. Pranay Agarwal, Adv.
Ms. Sreya Choudhury, Adv.
Ms. R. Jhunjunwala, RP.**

ORDER

PER D. Arvind, Member (Technical)

1. This Court is congregated through hybrid mode.
2. Heard the Learned Senior Counsel/ Learned Counsel for the parties.
3. This instant application has been preferred by **Mr. Manish Kumar**, hereinafter referred to as "**Applicant**" against **Rachna Jhunjunwala**, Resolution Professional, hereinafter referred to as "**Respondent No. 1**" and **the Committee of Creditors (CoC)** of Wearit Global Limited (Corporate Debtor), hereinafter referred to as "**Respondent No. 2**" under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, for brevity "I&B Code" seeking the following direction from this Adjudicating Authority as under:

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- a) Direct the Respondents to relax the eligibility criterion requirement of the minimum tangible net worth of Rs.15 crores for the applicant/ promoter of Corporate Debtor in view of the settled position of law;*
- b) The Respondent No.1 be directed to accept the Expression of Interest of the Applicant as Prospective Resolution Applicant under Section 240A of IBC since Corporate Debtor is a deemed MSME;*
- c) An order of stay be passed in respect of Agenda No.5 of the Minutes of the Meeting of the 3rd CoC of Corporate Debtor held on 20th December, 2023 till the disposal of this application;*
- d) Pass such other order or orders which this Tribunal may deem fit and proper in the circumstances of the case.*

Factual Matrix:

- 4.** The Corporate Debtor is a registered MSME under MSME Act, 2006 from 14.12.2021 and on 08.04.2022, it was put into CIRP by this Adjudicating Authority. Upon admission of the Corporate Debtor in CIRP, the Resolution professional (RP) published the invitation for Expression of Interest (EoI) on 20.11.2023. The Last date of receipt of the EoI was fixed on 20.12.2023.
- 5.** That, the Applicant, being the suspended director of the Corporate Debtor, requested the RP through a letter dated 20.12.2023, to allow the relaxation in eligibility criterion i.e., the requirement of the minimum tangible net worth of Rs. 15 Crore, apropos the submission of the EoI as well as the Resolution Plan.

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6. That, the issue of exemptions of the eligibility criteria for the applicant as being an MSME was deliberated upon at the 3rd CoC meetings on 20.12.2023, wherein the CoC did not agree to provide the relief as sought by the applicant. Further, the CoC noted that the applicant has also not submitted the requisite EMD. Further, on 22.12.2023, the RP through email forwarded the copy of the minutes of 3rd CoC meeting informed the applicant that none of the secured lender have agreed to provide the relief sought by the applicant sought in the eligibility criteria being an MSME.
7. On 4th CoC meeting convened on 30.12.2023, it was deliberated under the agenda item no. 2 that the applicant, the suspended director had not submitted the EMD and did not meet the eligibility criteria. Thus, he has been excluded from the provisional list of Prospective Resolution Applicants.

Applicant's submissions:

8. The Learned Senior Counsel, Mr. Joy Saha, appearing on behalf of the applicant submits that the I&B Code itself recognizes the necessity of exemptions to the MSME promoters under Section 240A. Further, he has referred the Insolvency Law Commission Report, 2018 which says that "*the rationale for this relaxation is that a business of an MSME attracts interest primarily from a promoter of an MSME and may not be of interest to other resolution applicants.*" Further, he relied on the judgement of

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the Hon'ble Apex Court in ***Hari Babu Thota*** in **Civil Appeal No. 4422/2023** reported at **[2023] 16 S.C.R. 917 : 2023 INSC 1056**, wherein the true import of the introduction of Section 240A under I&B Code has been discussed and laid down that:

*“22. [...] Thus, to opine that it is the initiation of the CIRP proceedings which is the relevant date, cannot be said to reflect the correct legal view and thus, we are constrained to observe that the law laid down in Digambar Anand Rao Pagle (supra) case by the Tribunal is not the correct position in law and **the cut off date will be the date of submission of resolution plan.**”*

(Emphasis Added)

- 9.** Thus, he submits that even the promoter of a MSME Corporate Debtor which received the registration under MSME post-CIRP is permitted to submit a resolution plan.
- 10.** Further, it is contended that an MSME promoter need not compete with other Resolution Applicants to regain the control over the Corporate Debtor as it falls under 'exceptional circumstances' which is envisaged by the Hon'ble NCLAT in ***Saravana Global Holdings Ltd. v. Bafna Pharmaceuticals Ltd.***, being **Company Appeal (AT) (Insolvency) No. 203 of 2019**, reported in **MANU/NL/0280/2019**.

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11. Further, it is asserted that the refusal of the CoC to consider the applicant's EoI on the ground of not meeting the net worth criteria is contrary to the I&B Code as well as the commercial prudence. In any event, if the applicant actually had a net worth criterion, the Corporate Debtor would not be gone into CIRP, and the applicant could have prevented CIRP of the Corporate Debtor on a 21 Crore claim. Reliance is placed on the following decisions permitting relaxation of the eligibility or net worth criteria:

a) *R. Raghavendran vs. C. Raja John* in **Civil Appeal No.2552/2022 reported in **(2023) ibclaw.in 107 SC.****

b) *K. Satheesh Babu Rajesh vs. Mr. George Varkey, Resolution Professional of Propyl Packaging Limited* in I.A.(IBC) No. 64/KOB/2021 in IBA No.52/KOB/2019 reported in **(2021) ibclaw.in 61 NCLT.**

c) *Mr. Haridas Krishna Kumar Vs. Mr. G.Kalpana, RP of M/s Feno Plast Ltd.* in IA No.805/2023 in CP(IB) No. 10/7/HDB/2023 reported in **(2023) ibclaw.in 371 NCLT.**

12. Further, the Learned Senior Counsel would submit that it has been incorrectly contended that EMD is mandatorily required to be furnished by a MSME promoter and in this regard, reliance has been placed by the RP on the decision of this

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Adjudicating Authority in the ***Mr. Rajesh Kumar Damani Vs. Mr. Jitendra Lohia (M/s Pami Metals Pvt. Ltd. – Corporate Debtor)*** in **IA(IBC) No. 900 /KB/2022 In C.P.(IB) No. 64/KB/2019** reported in **(2022) ibclaw.in 792 NCLT**. However, as will be apparent from paragraph 18 of the said judgment, when the said matter was taken up “... *the Ld. Senior Counsel appearing for the applicant stated that he was prepared to deposit the required amount of EMD...*”. It is on the basis of the promoter volunteering to submit an EMD and thus, the matter was reverted to the CoC, and the RP was directed to consider the promoter’s plan. No law has been laid down regarding non-consideration of an EoI in the absence of the EMD.

Per contra, the RP submits:

- 13.** That, the eligibility criteria is fixed by the CoC based on their commercial wisdom and thus, relaxation of such will come within the ambit of the ‘commercial wisdom’ of the CoC.

- 14.** Further, it is submitted that the Refundable Security Deposit of Rs. 10 Lakh to be deposited at the time of submission of the EoI and refundable EMD of Rs. 2.5 Crore also to be furnished at the time of submission the Resolution Plan should not be waived off for an effective CIRP. Further, the submission of refundable security deposit and refundable EMD indicates the seriousness of the applicant is also a kind of assurance that the Resolution Applicant(s) is/are seriously interested in revising

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the Corporate Debtor and not merely participating a probable business attempt or delaying the CIRP or making it an infructuous effort.

Analysis and Findings:

- 15.** We are sentient of the objectives the I&B Code as enshrined in the Preamble of the Code is to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders.

- 16.** We have noted the Report of Insolvency Law Committee, 2018, for brevity “ILC Report” that the rationale for the exempting MSME entity from competing with other Resolution Applicants as the MSMEs are the bedrock of the Indian economy. The intent is not to push them into Insolvency or liquidation and affect the livelihood of employees and workers of MSMEs rather promote their entrepreneurship by granting exemptions to corporate debtors which are MSMEs by permitting a promoter who is not a wilful defaulter, to bid for the MSME in insolvency. The rationale for this relaxation is that a business of an MSME attracts interest primarily from a promoter of an MSME and may not be of interest to other resolution applicants.

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- 17.** Hence, we are of the considered view, keeping the objective of the Code as well as the ILC Report and the decisions referred by the Learned Senior Counsel, that as various relaxations have already been provided under Section 240A of the Code, further, relaxation to satisfy the financial solvency possessed by the MSME Promoter will not serve the object of the code. To ensure a feasible and viable resolution plan to revive the business of the Corporate Debtor and to attain the objective of value maximization of the asset of a corporate insolvent person especially where public money is involved, an exemption of from satisfying the Net worth is uncalled for.
- 18.** Further, we have noted the submission of the Learned Senior Counsel that the decision rendered in **Rajesh Kumar Damani (Supra)** is wrongly interpreted as in that matter the promoter voluntarily furnishing the EMD and thus, the matter was reverted to the CoC. We would refer the relevant portion of the decision rendered in **Rajesh Kumar Damani (Supra)** that:

“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,

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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.

*21. [...] 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.

(Emphasis Added)

- 19.** As various exemptions and relaxations are catered to the MSME, including the exemption provided in Section 240A of the I&B Code to MSME sector, and we are of the view that furnishing EMD and Security Deposit, which is refundable in nature if the Plan of the Resolution Applicant including the MSME Promoter fails in the bid, denotes the seriousness and solemnity of the Resolution Applicant which indicates the affirmation that the Applicant is honestly interested in reviving the business of the Corporate Debtor but not merely

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participating as a probable attempt to regain the control over its business or vitiate the CIRP of the Corporate Debtor. In the case in hand, the MSME promoter who has already defaulted and subsequently, its company has undergone into CIRP for its default, can be relaxed from the net worth criterion for submitting its plan but not be waived off from depositing the Security Deposit at time of submission of its EoI and the EMD at time of submission of its Resolution Plan.

- 20.** Hence, we allow the relaxation to the eligibility criteria of “Net Worth” in respect of the Applicant and direct the RP to allow its EoI and Plan pursuant to the publication of the “Form – G” **upon furnishing and depositing the required Security Deposit and EMD.**
- 21.** In terms view above, the instant Interlocutory Application being **I.A. (IB) No. 53/KB/2024** is **disposed of** accordingly.
- 22.** Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

**D. Arvind
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

This Order is signed on the 05th Day of June, 2024.

Bose, R. K. [LRA]