

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 134 of 2019
(arising out of order dated 23rd January, 2019 passed by National Company Law Tribunal, Hyderabad Bench, in I.A. Nos. 409 of 2018, 410 of 2018 and 450 of 2018 C.P. (IB) No. 282/7/HDB/2017)

IN THE MATTER OF:

**JM Financial Asset Reconstruction
Company Ltd.**

...Appellant

Versus

**M/s. Well-Do Holdings and Exports
Pvt. Ltd. & Ors.**

... Respondents

Present:

For Appellant :

**Mr. Ramji Srinivasan, Senior Advocate with
Mr. Shubhkarta Chakroborti, Mr. Dhruv Malik,
Mr. Kamendra Singh, Ms. Sylona Mohapatra, Mr.
Nikhil Ramdev and Mr. Sagar Chakravarty,
Advocates**

For Respondents :

**Ms. Neha Singh and Ms. P. Kumari, Advocates for
R-1**

**Mr. Arun Kathpalia, Senior Advocate with
Mr. Rambabu, Advocate for R-2**

Mr. Ankur Kashyap, Advocate for R-3

**Mr. Ramji Srinivasan, Senior Advocate with
Mr. Shubhkarta Chakroborti, Mr. Dhruv Malik,
Mr. Kamendra Singh, Ms. Sylona Mohapatra, Mr.
Nikhil Ramdev and Mr. Sagar Chakravarty,
Advocates for R-4**

Company Appeal (AT) (Insolvency) No. 136 of 2019

IN THE MATTER OF:

**Resolution Professional of
Sevenhills Healthcare Pvt. Ltd.**

...Appellant

Versus

**M/s. Well-Do Holdings and Exports
Pvt. Ltd. & Ors.**

...Respondents

Present:

For Appellant :

**Mr. P.S. Narasimha, Senior Advocate with
Mr. Krishnendu Dutta, Mr. Sitesh Mukherjee, Mr.
Yugank Goel, Mr. Siddharth Ranade, Ms. Manani
Bharati and Ms. Niharica Khanna, Advocates**

For Respondents :

**Ms. Neha Singh and Ms. P. Kumari, Advocates for
R-1**

**Mr. Adi Narayan Rao, Senior Advocate with
Mr. Mullapudi Rambabu and Mr. Sridhar, Advocates
for R-2**

**Mr. Arun Kathpalia, Senior Advocate with
Mr. Ankur Kashyap, Advocate for R-3**

Company Appeal (AT) (Insolvency) No. 165 of 2019

IN THE MATTER OF:

B.R. Shetty & Anr.

...Appellants

Versus

Sevenhills Healthcare Pvt. Ltd. & Ors.

...Respondents

Present:

For Appellant :

**Mr. Abhinav Vasisht, Senior Advocate with
Mr. Aslam Ahmed, Ms. Rachna Jain, Mr. Sumant
Nayak, Ms. Nitya Chadha, Mr. Samiron Borkatak and
Ms. Kritika Angirish, Advocates**

For Respondents :

**Mr. Mullapudi Rambabu and Mr. N. Eswara Rao,
Advocates for R-2**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The appellants, the 'Resolution Professional', 'JM Financial Asset Reconstruction Company Limited' (Financial Creditor) and 'Dr. B.R. Shetty and another' (Resolution Applicants) have preferred these appeal against the common order dated 23rd January, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad. By the impugned order, the Adjudicating Authority disposed of all the three applications, two preferred by the 'promoter' and another by the 'resolution applicant' and instead of approving the 'resolution plan' already approved by the 'Committee of Creditors' and instead of passing order under Section 31 of the Insolvency and Bankruptcy Code, 2016 (for short the '**I&B Code**') have remitted the matter with direction which amounts to initiation of resolution process *de novo* from the stage of calling of 'Expression of Interest'.

2. For proper appreciation, it is desirable to note the relevant dates as stated below:

The application for initiation of 'corporate insolvency resolution process' against 'Sevenhills Healthcare Private Limited' (Corporate Debtor) was admitted on 13th March, 2018 and 'Interim Resolution Professional' was appointed. The 'Resolution Professional invited 'Expression of Interest' on 14th May, 2018 and pursuant to which received 'Expression of Interest' from 18 'Resolution Applicants'. As per the decision of the 'Committee of Creditors' an 'Earnest Money Deposit' ('**EMD**') of Rs.100 Crores was required to be deposited by the 'Resolution Applicants' as in many cases it was seen that

after approval of the 'resolution plan', the 'resolution applicants' do not turn up. 17' Resolution Applicants' who had submitted 'Expression of Interest' did not submit the 'resolution plan' having not deposited the amount and backed out in view of exorbitant amount of earnest money of Rs.100 Crores as fixed. The 'Resolution Plans' which were in accordance with Section 30(2) were required to be placed before the 'Committee of Creditors' who approved the 'resolution plan' submitted by one 'M/s. BRS Ventures Investment Limited' (**'BRSVIL'**) on 8th September, 2018.

3. The approved 'resolution plan' of the 'BRSVIL', as approved by the 'Committee of Creditors', was submitted for approval before the Adjudicating Authority under Section 31 of the I&B Code.

4. In spite of such application under Section 31(1) filed by the 'Resolution Professional', the Adjudicating Authority adjourned the matter for number of dates. Number of times request was made by 'Resolution Professional' to pass appropriate orders and in spite of the same the Adjudicating Authority adjourned the matter.

5. The 'promoter' through its General Manager thereafter had taken up the matter on 19th August, 2018 through email and requested to explain as to how it had participated in the 'corporate insolvency resolution process' without informing the 'Confidentiality Agreement'. But no reply was given by the 'BRSVIL'. At this stage, the 'Confidentiality Agreement' was brought to the notice of the 'Resolution Professional' by 'Promoter' through General Manager vide *email* dated 2nd September, 2018 but the plan having been approved the 'Resolution Professional' did not submit any reply.

6. It was at this stage an application was filed by Dr. Jitendra Das Maganti, 'shareholder and promoter' of the 'Corporate Debtor' who alleged

that the 'Resolution Professional' is acting hand in glove with the 'successful resolution applicant' ('BRSVIL'). It was further submitted that the total outstanding dues admitted by the 'Resolution Professional' was Rs.1356.89 crores but the 'Resolution Professional' has fixed the requirement of Earnest Money Deposit (EMD) of Rs.100 Crores. According to the 'Promoter' it was exorbitant and the conditions of renew/extension and the clause of forfeiture are untenable. Therefore, it was alleged that all the 17 'Potential Resolution Applicants' have backed out. It was further alleged that the fixing of 'Earnest Money Deposit' was completely discouraging to the potential resolution applicants and it is in stark contrast to the other 'corporate insolvency resolution process' which was initiated against M/s. Viceroy Hotels Limited; M/s. Electrosteels Limited and M/s. Essar Steel India Limited.

7. Another Interlocutory Application 410/2018 was filed by 'M/s. Well-Do Holdings and Exports Private Limited', one of the member of the 'Consortium' and 'resolution applicant', who initially expressed its interest for the 'Resolution Plan'.

8. It was alleged by the said 'resolution applicant' that the 'expression of interest' was issued on 14th May, 2018 and prescribing net worth of at least Rs.200 Crores at the group level for application in the immediate preceding for the financial year for a body corporate or a member of consortium. According to 'M/s. Well-Do Holding and Exports Private Limited' the net worth of the said applicant was around Rs.2900/- Crores as on 31st March, 2017. The plea taken by the said applicant was that on 1st June, 2018, 'Resolution Professional confirmed the eligibility of the applicant and invited it for submission of a 'resolution plan' and the 'request for proposal' was made available to the applicant on 28th June, 2018 and an addendum to the same

was made available on 19th July, 2018. It was alleged that Clause 4.9.5 read with 4.12.6 of the 'request for proposal' read that the 'Earnest Money Deposit' would be returned to the 'successful resolution applicant'. It was also alleged that only one appears to have submitted the 'resolution plan' as harsh provisions were made relating to requisition of 'earnest money deposit'. The time to submit the 'resolution plan' was extended up to 9th August, 2018 for setting up an unrealistic threshold for mere submission of the 'resolution plan'.

9. The third Interlocutory Application No. 450/2018 was also filed by one of the shareholder of the 'Corporate Debtor' who claimed that he had invested the amount of Rs.570.20 Crores since October, 2008 to June, 2014 and they hold 49.90% in the paid-up capital of the 'Corporate Debtor'. The said shareholder was aggrieved by the fact that their legal and vested rights have been illegally, mischievously and conveniently ignored by the 'Resolution Professional'.

10. The Adjudicating Authority on hearing the parties instead of passing the order under Section 31, referring to different decisions, which according to it were not relevant held that the 'Earnest Money Deposit' of Rs.100 Crores by any standard considering the quantum and size of the debt of the 'corporate debtor' is huge sum which is likely to be forfeited by 'Resolution Professional'/'Committee of Creditors' as specified in the request for proposal. The Adjudicating Authority held that the forfeiture of amount of earnest money of Rs.100 Crores, which is a huge sum is harsh and burdensome and unnecessary at the stage of submission of 'resolution plans'. While holding so, the Adjudicating Authority also directed to exclude certain period of 'corporate insolvency resolution process' and directed the 'Resolution

Professional' to invite fresh 'expression of interest' and consider the 'resolution plans' in the manner envisaged under the 'I&B Code' and furnish the complete information to the 'resolution applicants'. The 'Resolution Professional' was also directed to take the approval of the 'Committee of Creditors' and ensure that the quantum of 'earnest money deposit' does not exceed any reasonable sum that is based on the total claims admitted or any other valid basis. There shall not be any non-refundable or forfeiture component thereof.

11. Learned counsel appearing on behalf of the appellants submitted that the Adjudicating Authority had no jurisdiction to entertain the Interlocutory Applications at the final stage as the 'resolution plan' had already been approved by the 'Committee of Creditors' or was pending for consideration under Section 31 of the I&B Code.

12. It was further submitted that all the Interlocutory Applications were afterthought and were not filed when the 'expression of interest' were called for and no challenge was made at the appropriate stage. Further according to the appellants, the Adjudicating Authority cannot sit in appeal over the financial decision of the 'Committee of Creditors' which was entitled to fix quantum of the 'earnest money deposit' at Rs.100 Crores, has been held to be arbitrary or excessive.

13. According to the appellants, the finding of the Adjudicating Authority that the 'earnest money deposit' is unreasonable and is not based on any financial matrix and if the total amount is taken into consideration, it will be evident that Rs.100 Crores 'earnest money deposit' is not excessive.

14. Learned counsel for the respondent have taken similar plea as taken before the Adjudicating Authority in support of the applications.

15. We have heard the learned counsel for the parties and perused the impugned order.

16. It is not in dispute that the 'Resolution Professional' fixed the 'earnest money deposit' as per decision of the 'Committee of Creditors' and issued 'Information-Memorandum' and invited 'expression of interest' on 14th May, 2018. Total 18 'expression of interest' were received from the 'resolution applicants' but 17 'resolution applicants' did not choose to deposit Rs. 100 Crores. It is also not in dispute that 'M/s. BRS Ventures Investment Limited' (BRSVIL) not only deposited a sum of Rs.100 Crores towards 'earnest money deposit' but also filed a 'resolution plan'.

17. It is also not disputed that other 17 'resolution applicants' have not deposited Rs.100 Crores and they have also not submitted the 'resolution plan' within the time. The total debt outstanding as admitted by the 'resolution professional' on 5th September, 2018 was Rs.1356.89 Crores and the requirement of the 'expression of interest' is Rs.100 Crores , which is less than the outstanding dues.

18. Finding of the Adjudicating Authority that the amount of Rs.100 Crores is equal to paid-up capital is also not based on record.

19. It is true that the clause relating to forfeiture of Rs.100 Crores was arbitrary but persons having not challenged the 'expression of interest' published on 14th May, 2018, till the 'resolution plan' was approved by the 'Committee of Creditors', we are of the view that after approval of 'resolution plan', it was not open to any person to challenge the same.

20. The shareholders and promoters being ineligible to file the 'resolution plan' under Section 29A, they have no right to raise their grievance with

regard to the 'expression of interest' published on 14th May, 2018 fixing 'earnest money deposit' of Rs.100 Crores.

21. In this background, it was not open for the Adjudicating Authority to entertain Interlocutory Application Nos. 409/2018 and Interlocutory Application Nos. 450/2018, which were filed by the 'shareholders' and 'promoters', who were ineligible to submit the 'resolution plan' and that too after approval of the 'resolution plan' by the 'Committee of Creditors'.

22. Interlocutory Application Nos. 410/2018 filed by 'M/s. Well-Do Holdings and Exports Private Limited', one of the part of consortium is an afterthought. The 'Resolution Professional' has intimated the said applicant on 1st June, 2018 that its eligibility is confirmed and invited the applicant to submit the 'resolution plan' within the period. The 'request for proposal' was made available to the said applicant on 28th June, 2018 and the addendum to the 'request for proposal' was made available on 19th July, 2018. Clause 4.9 relating to the 'earnest money deposit' was there but it was not challenged by the said applicant till August, 2018. The last date for submitting the 'resolution plan' was 9th August, 2018 but the aforesaid 'resolution applicant' had not filed the plan nor deposited the 'earnest money'. In this background, it was not open to the Adjudicating Authority to entertain the I.A. No. 410/2018 filed by 'M/s. Well-Do Holdings & Exports Pvt. Ltd.', after approval of the 'resolution plan' of 'M/s. BRS Ventures Investment Limited' (BRSVIL).

23. In '*Arcelor Mittal vs. Satish Kumar Gupta*' reported in (2019) 2 SCC 1, the Hon'ble Supreme Court noticed a similar situation where 'resolution plan' approved by the 'Committee of Creditors' was before Adjudicating Authority for its approval. The Hon'ble Supreme Court held that at that stage no application before the Adjudicating Authority is maintainable as there being

no vested right or fundamental right in the 'resolution applicant' to have its 'resolution plan' approved and as no adjudication has been done. The Hon'ble Supreme Court also held that the Adjudicating Authority, acting quasi-judicially can determine whether the 'resolution plan' is violative of the provision of law including Section 29A of the 'I&B Code', after hearing the arguments of the 'resolution applicant' as well as the 'Committee of Creditors, after which an appeal can be preferred from the decision of the Adjudicating Authority. Once the 'resolution plan' is approved by the 'Committee of Creditors' and has been placed before the Adjudicating Authority, the determination of the Adjudicating Authority can be challenged before the Appellate Tribunal or before the Hon'ble Supreme Court under Section 62 of the I&B Code, if the question of law arises out of such order.

24. In the present case, we find that two Interlocutory Applications preferred by the shareholders and promoters were not maintainable, as they were not eligible as 'resolution applicants'. The other 'resolution applicant' namely '*M/s. Well-Do Holdings and Exports Private Limited*' having not submitted the 'resolution plan' within the time nor the 'earnest money'. Further, '*M/s. Well-Do Holdings and Exports Private Limited*' having not moved before the Adjudicating Authority before the last date of submission of the 'resolution plan' and the Interlocutory Applications was filed without challenging the approved 'resolution plan', the Interlocutory Application should have been rejected.

25. For the reason aforesaid, we set aside the impugned order dated 23rd January, 2019 and remit the matter to the Adjudicating Authority with directions to pass appropriate order under Section 31, taking into consideration the 'resolution plan' of '*M/s. BRS Ventures Investment Limited*

(*BRSVIL*)' as approved by the 'Committee of Creditors'. The Adjudicating Authority, acting as quasi-judicial authority, will find out as to whether the 'resolution plan' is in consonance with Section 30(2) of the I&B Code or not after hearing the parties preferably within three weeks from the date of receipt or production of this judgment. The appeals are allowed with aforesaid observations and directions.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

New Delhi

8th April, 2019.

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