

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

Comp. App. (AT) (CH) (Ins.) No. 110 of 2023

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the `Impugned Order` dated 28.02.2023 in

I.A. No.192/2022 in C.P. (IB) No.196/BB/2020, passed by

the `Adjudicating Authority`, National Company Law Tribunal,

Bengaluru Bench)

In the matter of:

Hari Babu Thota

Resolution Professional of Shree Aashraya Infra-Con Ltd.

#41/1, 2nd Floor, 11th Cross, 8th Main

2nd Block, Jayanagar, Bengaluru – 560 011.

..... Appellant

Present:

For Appellant : Mr. Anant Merathia, Advocate

J U D G M E N T

[Per; Ms. Shreesha Merla, Member (Technical)]:

1. Dissatisfied by the `Impugned Order` dated 28.02.2023, in I.A. No.192/2022 in C.P. (IB) No.196/BB/2020, passed by the `Adjudicating Authority`, (National Company Law Tribunal, Bengaluru Bench, Bengaluru), dismissing the Application, whereby and whereunder the Resolution Professional (`RP`)/the Appellant herein sought for approval of the Resolution Plan, the RP preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as

‘The Code’). By the ‘Impugned Order’, while rejecting the Resolution Plan, the ‘Adjudicating Authority’ has observed as follows:

“viii). Moreover, it was also pointed out in the above decision that though the Corporate Debtor was incorporated in the year 1995, it never sought registration as MSME and it was expressly denied in the Expression of Interest (EOI) issued by the RP pursuant to the order for initiation of CIRP. It was also noted that there were pending Avoidance Applications pending against the Corporate Debtor; though not decided one way or the other, which leads to disqualification under Section 29A(g). Therefore, the NCLT, New Delhi has rejected the claim of eligibility under Section 29A r.w.s 240A of IBC based on such MSME certificate which was obtained subsequent to the initiation of CIRP.

ix). Similar observation has been made in the order dated 12.01.2021 by the Hon’ble NCLAT in the case of Harkirat Singh Bedi vs the Oriental Bank of Commerce & Anr. in Company Appeal (AT)(Ins.) No.40 of 2020 in which also considering that the date of registration as MSME was subsequent to initiation of CIRP, it was held that the erstwhile promoter, being the Appellant was ineligible to take the benefit of Section 240A; and therefore was not qualified under Section 29A.”

2. Learned Counsel for the Appellant appearing for the RP has submitted that the Section 7 Application filed by ‘Shree Aashraya Souhard Credit Society Limited’ was admitted on 06.04.2021 and the first Committee of Creditors (‘CoC’) Meeting was held on 13.08.2021. While so, the ‘Corporate Debtor’ got registered under the Micro, Small and Medium Enterprises Development Act, 2006, (‘MSME Act’) as an MSME entity, on the advice of the RP to obtain the certificate while

keeping the 'Corporate Debtor' as 'a Going Concern'. The Expression of Interest ('EoI') was reissued in 'Form – G' on 09.08.2021 and the Promoters of the 'Corporate Debtor' submitted their 'EoI' on 08.09.2021 for submission of a Resolution Plan for revival of the 'Corporate Debtor'. Upon receipt of the Resolution Plan and the Affidavit under Section 29-A of the Code, the Resolution Professional placed the same before the CoC for approval. The Members of the CoC advised the Resolution Applicants to submit the revised terms of the Plan, which was placed before the 6th CoC Meeting held on 28.01.2022 and the same was approved by the CoC with 100% Voting Share. I.A. 192/2022 was preferred by the Appellant RP on 08.02.2022 seeking approval of the Resolution Plan which was rejected by the 'Adjudicating Authority' vide the 'Impugned Order'.

3. Learned Counsel for the Appellant submitted that the Resolution Applicant does not disqualify under the primary conditions as specified in Section 29-A of the Code and, therefore, even if the MSME status provided to the 'Corporate Debtor' is not valid, the Resolution Applicants are not barred under any provisions of the Section 29-A. Learned Counsel for the Appellant drew our attention to the Affidavit submitted by the Appellant on 29.01.2022, the extract of which is reproduced as hereunder:

“i. Are not undischarged insolvent;

ii. Are not willful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;

iii. Do not have an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as Non-Performing Asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 and no financial sector regulator issued any guidelines under any other law for the time being in force;

iv. Have not been convicted for any offence punishable with imprisonment –

for two years or more under any Act specified under the Twelfth Schedule; or

for seven years or more under any law for the time being in force:

v. Are not disqualified to act as a director under the Companies Act, 2013;

vi. Are not prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

vii. Have not been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;

viii. Have not executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under

this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;

ix. Are not subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India;

x. Do not have a connected person not eligible under clauses (a) to (i);

...”

4. It is seen from the record that the Appellant/RP observed that there were some ‘preferential transactions’ amounting to Rs.1,70,74,000/- made by the ‘Corporate Debtor’ and filed I.A.26/2022 which is still pending before the ‘Adjudicating Authority’. It was submitted by the Promoters of the ‘Corporate Debtor’ before the ‘Adjudicating Authority’ on 09.12.2022 that they are ready and willing to complete the Project and execute the ‘Agreement of Sale’, after approval of the Resolution Plan by the Tribunal. The ‘Adjudicating Authority’ has observed that instead of the Resolution Applicant giving an Affidavit as required under Regulation 39(1)(a), it was a RP who had given Affidavit that none of the Resolution Applicants are ineligible under the provisions of Section 29-A of the Code. It is seen from the record that the MSME Certificate is dated 15.07.2021, while the Corporate Insolvency Resolution Process (‘CIRP’) was initiated on 06.04.2021. A perusal of the Minutes of the CoC Meetings shows that there was no discussion regarding the reasons that

the RP has given advised for registration of the 'Corporate Debtor' as an MSME subsequent to the initiation of the CIRP. The Affidavit under Section 29-A was signed on 22.10.2021, whereas the copy of the MSME certificate enclosed as Annexure A-2 was filed on 06.12.2022. It is seen from the documentary evidence that the 'Corporate Debtor' was not registered as an MSME prior to the initiation of CIRP and the certificate was obtained subsequently by the 'related party' of the 'Corporate Debtor'. It is significant to mention that this was not brought to the notice of the Members during the various CoC Meetings conducted.

5. The Hon'ble Supreme Court in '***Arun Kumar Jagatramka***' Vs. '***Jindal Steel & Power Limited & Anr.***'¹, has held as follows:

“46. The Report of the Insolvency Law Committee dated 3-3-2018 states that the intent behind introducing Section 29-A was to prevent unscrupulous persons from gaining control over the affairs of the company. These persons included those who by their misconduct have contributed to the defaults of the company or are otherwise undesirable. The Committee observed:

“14.1. Section 29-A was added to the Code by the Amendment Act. Owing to this provision, persons, who by their misconduct contributed to the defaults of the corporate debtor or are otherwise undesirable, are prevented from gaining or regaining control of the corporate debtor. This provision

¹ (2021) 7 SCC 674

protects creditors of the company by preventing unscrupulous persons from rewarding themselves at the expense of creditors and undermining the processes laid down in the Code.”

48. The underlying purpose of introducing Section 29-A was adverted to in a judgment of this Court in Chitra Sharma v. Union of India [Chitra Sharma v. Union of India, (2018) 18 SCC 575] (hereinafter referred to as “Chitra Sharma”). One of us (D.Y. Chandrachud, J.) speaking for a Bench of three learned Judges took note of the Statement of Objects and Reasons accompanying the Bill and emphasised the purpose of Section 29-A thus : (SCC p. 601, para 38)

“38. Parliament has introduced Section 29-A into IBC with a specific purpose. The provisions of Section 29-A are intended to ensure that among others, persons responsible for insolvency of the corporate debtor do not participate in the resolution process. The Statement of Objects and Reasons appended to the Insolvency and Bankruptcy Code (Amendment) Bill, 2017, which was ultimately enacted as Act 8 of 2018, states thus:

“2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of a company at the time of liquidation. Concerns have been raised that persons who, with their

misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible.”

Parliament was evidently concerned over the fact that persons whose misconduct has contributed to defaults on the part of debtor companies misuse the absence of a bar on their participation in the resolution process to gain an entry. Parliament was of the view that to allow such persons to participate in the resolution process would undermine the salutary object and purpose of the Act. It was in this background that Section 29-A has now specified a list of persons who are not eligible to be resolution applicants.”

6. The aforementioned Judgement highlights the need to give a positive, purposive comprehensive interpretation of Section 29-A which was observed by the Hon’ble Apex Court in the matter of **‘Arcelormittal India**

Private Limited’ Vs. ‘Satish Kumar Gupta & Ors.’², in which the Hon’ble Supreme Court has noted as hereunder:

“30. A purposive interpretation of Section 29-A, depending both on the text and the context in which the provision was enacted, must, therefore, inform our interpretation of the same. We are concerned in the present matter with clauses (c), (f), (i) and (j) thereof.

31. It will be noticed that the opening lines of Section 29-A contained in the 2017 Ordinance are different from the opening lines of Section 29-A as contained in the Amendment Act, 2017. What is important to note is that the phrase “persons acting in concert” is conspicuous by its absence in the 2017 Ordinance. The concepts of “promoter”, “management” and “control” which were contained in the opening lines of Section 29-A under the Ordinance have now been transferred to clause (c) in the 2017 Amendment Act. It is, therefore, important to note that the 2017 Amendment Act opens with language which is of wider import than that contained in the 2017 Ordinance, evincing an intention to rope in all persons who may be acting in concert with the person submitting a resolution plan.”

7. At this juncture, it is relevant to reproduce Section 240-A, which is detailed as hereunder:

“240-A. Application of this Code to micro, small and medium enterprises. – (1) Notwithstanding anything to the contrary contained in this Code, the provisions of clauses (c) and (h) of section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process 2 [or pre-packaged insolvency resolution process] of any micro, small and medium enterprises.

² (2019) 2 SCC 1

(2) Subject to sub-section (1), the Central Government may, in the public interest, by notification, direct that any of the provisions of this Code shall—

(a) not apply to micro, small and medium enterprises; or

(b) apply to micro, small and medium enterprises, with such modifications as may be specified in the notification.

(3) A draft of every notification proposed to be issued under subsection (2), shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions.”

8. In the instant case, the Resolution Applicant registered as an MSME only after the initiation of CIRP. This Tribunal in the case of ***‘Digamber Anand Rao Pingle’ Vs. ‘Shrikant Madanlal Zawar & Ors.***³, wherein the Promoter of the ‘Corporate Debtor’ had filed an Appeal against the ‘Liquidation Order’ passed by the ‘Adjudicating Authority’ claiming that the ‘Corporate Debtor’ was an MSME and that he could file a Resolution Plan, but this Tribunal observed that as the Application for MSME certificate was made after the commencement of CIRP, such unauthorized Application cannot be considered and cannot tide over ineligibility under Section 29-A. The ratio of this matter is squarely applicable to the facts of this case and the matters of eligibility under

³ Comp. App. (AT) (Ins.) No.43-43A/2021

Section 29-A as observed by the Hon'ble Supreme Court in a catena of Judgements, cannot be undermined.

9. We do not see any grounds to interfere with the well-reasoned 'Order' of the 'Adjudicating Authority' (National Company Law Tribunal, Bengaluru Bench). Hence this Appeal fails and is accordingly 'dismissed'. No costs.

[Justice M. Venugopal]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

02/06/2023
HA / TM