

IA(IBC)64/KOB/2021

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH**

I.A.(IBC) No. 64/KOB/2021

In

IBA No.52/KOB/2019

(Under Section 60(5) of IBC 2016 and Rule 11 of NCLT Rules, 2016)

Date of decision: 20th April, 2021

CORAM

HON'BLE MR. ASHOK KUMAR BORAH, MEMBER (JUDICIAL)

Applicant:

K. SATHEESH BABU RAJESH
NANDANAM, SMRRAM 111 SAW MILL ROAD
KURKANCHERI,
THRISSUR-680007.

Versus

Respondents:

Mr. George Varkey,
Resolution Professional of Propyl Packaging Limited
Residing at Building No.110
Ground floor, Surabhi Nagar,
Kakkanad, Kochi-682030.

Parties/Counsel appeared (through Video Conferencing)

For applicant : Mr. Shivshankar R. Panicker, Advocate
For Respondent : Mr. Vinod PV, Advocate along with RP.

ORDER

This application has been filed under Section 60(5) of Insolvency and Bankruptcy Code, 2016 and Rule 11 of NCLT Rules by M.K.Satheesh Babu

IA(IBC)64/KOB/2021

Rajesh who is a promoter of Corporate Debtor M/s Prlopyl Packaging, seeking following reliefs:

- (a) Direct the respondent 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.*
- (b) Direct the Respondent and Committee of Creditors to relax the eligibility criterion requirement of minimum tangible net worth of Rs. 10 crores for the applicant/promoter of Corporate Debtor.*
- (c) Direct the Respondent to register Corporate Debtor as an MSME in the light of Gazette Notification No. S.O 2119€ dated June 26th 2020 regarding MSME.*

2. The facts in brief are as follows:

This Tribunal admitted an application filed by M/s Prayag Polytech Private Limited (Operational Creditor) vide IBA No. 52/KOB/2019 and directed to initiate Corporate Insolvency Resolution Process against the Corporate Debtor -M/s Propyl Packaging Limited, vide order dated 14.2.2020. The applicant being the Promotor Director of the company was keen in restarting the business operations of the unit and intend to submit a Resolution Plan. However, the eligibility criterion specified in the invitation to submit Expression of Interest prescribed Minimum “Tangible Net Worth of INR 10 Crores” for an individual who submits the Expression of Interest. Hence the expression of interest submitted by the applicant to the respondent Resolution Professional on 17.1.2021 has not been accepted. The applicant states that as pe the Government

IA(IBC)64/KOB/2021

of India Gazette Notification No. SO. 2119-E dated 26th June, 2020 for implementation of the upward revision in the definition and criteria of MSME(s) and that the applicant will come within the purview of micro small or medium enterprises if the investment is upto Rs. 50 crores and turn over is upto Rs.250 crores. It is further stated that the applicant is not a wilful defaulter and is not ineligible under Section 29A of IBC to apply as a Prospective Resolution Applicant of the Corporate Debtor under Section 240A of IBC. In this connection, the applicant has referred to a decision of the Hon'ble NCLAT in *Saravana Global Holdings Ltd. Vs. Bafna Pharmaceuticals Limited and others (CA(AT)(Insolvency) No.,203 of 2019 decided on 4.7.2019)*. In view of the above judgment, if the Corporate Debtor is an MSME, it is not necessary for the promoters to compete with other Resolution Applicants to regain the control of the Corporate Debtor. The applicant is ready and willing to submit a Resolution Plan which will maximise the value of assets of the Corporate Debtor and will ensure that the unit does not go into liquidation. In view of the above, the Resolution Professional should register the Corporate Debtor as an MSME and consider the Resolution Plan submitted by the applicant.

3. The Respondent Resolution Professional filed a counter affidavit stating that after the admission of the matter, the applicant invited Expression of Interest to submit the Resolution Plan on 18.9.2020, 3.1.2021, 24.02.2021 to which in the last EOI respondent received three Expression of Interests (EOI) from the

IA(IBC)64/KOB/2021

prospective resolution applicants which includes the EOI submitted by the promotor/applicant herein. The eligibility criteria for submission of the Resolution Plan approved by the Committee of Creditors in the meeting held on 16.9.2020 are as under:

(a) In case Resolution Applicant is a company or LLP or individual his Tangible Net worth must be Rs. 10 crores as per the latest Financial Statement certified by a Chartered Accountant: and

(b) In case Resolution Applicant is a Financial Institution or Asset Restructuring Company, its Minimum Assets under Management or Committee Fund for deployment must be Rs. 50 crores.

On verification of the EOI submitted by the prospective resolution applicants, it was found that the EOI submitted by the applicant does not meet the eligibility criteria as the applicant has submitted the EOI in the name of Corporate Debtor and he did not submit the net worth certificate to prove his net worth of Rs. 10 crores. In order to rectify this mistake the applicant was intimated vide email dated 15.3.2021, however he has neither corrected the defect nor submitted the net worth certificate meeting the required eligibility criteria. Since the applicant made a request for waiving the eligibility criteria, the same was placed before the Committee of Creditors on 25.1.2021. The Committee did not agree with the request of the applicant and directed to proceed with the eligibility criteria already fixed. Even though the suspended director/applicant was permitted to attend the COC, he did not attend the same meeting. Since the applicant did not

IA(IBC)64/KOB/2021

qualify the eligibility criteria, the respondent published the provisional list of prospective resolution applicants on 15.3.2021. With respect to the prayer to register the Corporate Debtor as an MSME, in the light of Gazette Notification No.2119-E dated 26th June, 2020 regarding MSME, the respondent stated that since the Corporate Debtor meets the statutory requirements and revision in the MSME criteria and it was issued after the commencement of CIRP, the RP shall act according to the direction of this Tribunal.

4. I have heard the learned counsel for the applicant and the respondent Resolution Professional and have meticulously gone through the documents produced on record. The points to be considered are whether (a) The applicant is eligible to submit the Resolution Plan in the name of the Corporate Debtor, and (b) Whether the applicant is eligible to submit the Resolution Plan in view of the Govt. of India Gazette Notification dated 26th June, 2020?

5. As rightly pointed out by the learned counsel for the Resolution Professional, as per the IBBI Regulations, the Corporate Debtor cannot submit a Resolution Plan in the CIR Process. When this issue was argued, the learned counsel for the applicant stated that the applicant is ready to submit the Resolution Plan in the name of the applicant in his individual capacity.

6. Regarding the second issue, it is relevant to quote the Notification SO. 2119-E issued by the Ministry of Micro Small and Medium Enterprises, in which

IA(IBC)64/KOB/2021

the classification of enterprises and how to become a micro, small and medium enterprise are given as under:

Classification of enterprises. - An enterprise shall be classified as a micro, small or medium enterprise on the basis of the following criteria, namely:--

- (i) a micro enterprise, where the investment in plant and machinery or equipment does not exceed one crore rupees and turnover does not exceed five crore rupees;
- (ii) (ii) a small enterprise, where the investment in plant and machinery or equipment does not exceed ten crore rupees and turnover does not exceed fifty crore rupees; and
- (iii) (iii) a medium enterprise, where the investment in plant and machinery or equipment does not exceed fifty crore rupees and turnover does not exceed two hundred and fifty crore rupees.

Becoming a micro, small or medium enterprise. -- (1) Any person who intends to establish a micro, small or medium enterprise may file Udyam Registration online in the Udyam Registration portal, based on self-declaration with no requirement to upload documents, papers, certificates or proof. (2) On registration, an enterprise (referred to as —Udyam in the Udyam Registration portal) will be assigned a permanent identity number to be known as —Udyam Registration Number. (3) An e-certificate, namely, —Udyam Registration Certificate shall be issued on completion of the registration process.

7. The Resolution Professional stated that considering the revised criteria laid down by the MSME as per Notification dated 26.6.2020, the Corporate Debtor qualified as a MSME under the revised norms. However, the notification was issued after admission of the application for initiation of CIRP considering the covid 19 pandemic in the country. The Resolution Professional further states that the Corporate Debtor meets the statutory requirements and revision in the MSME criteria and the Resolution Professional is ready to accept

IA(IBC)64/KOB/2021

the Resolution Plan from the applicant, if a direction to that effect is granted by this Tribunal.

8. At this juncture, it is relevant to mention the decision of the Hon'ble NCLAT in the matter *Saravana Global Holdings (supra)* the relevant portion of the order reads thus:

20. The 'Committee of Creditors' is to consider the feasibility, viability and such other requirements as has been specified by the Board. If it proposes maximisation of the assets and is found to be feasible, viable and fulfil all other requirements as specified by the Board, the company being MSME, it is not necessary for the 'Committee of Creditors' to follow all the procedures under the 'Corporate Insolvency Resolution Process'. For example, if case is settled before the constitution of the 'Committee of Creditors' or in terms of Section 12A on the basis of offer given by Promoter, in such case, all other procedure for calling of application of 'Resolution Applicant' etc. are not followed. If the Promoter satisfy all the creditors and is in a position to keep the 'Corporate Debtor' as a going 10 Company Appeal (AT) (Insol.) No. 203 of 2019 concern, it is always open to 'Committee of Creditors' to accept the terms of settlement and approve it by 90% of the voting shares. The same principle can be followed in the case of MSME.

21. The Parliament with specific intention amended the provisions of the 'I&B Code' by allowing the Promoters of 'MSME' to file 'Resolution Plan'. The intention of the legislature shows that the Promoters of 'MSME' should be encouraged to pay back the amount with the satisfaction of the 'Committee of Creditors' to regain the control of the 'Corporate Debtor' and entrepreneurship by filing 'Resolution Plan' which is viable, feasible and fulfils other criteria as laid down by the 'Insolvency and Bankruptcy Board of India'.

22. Therefore, we hold that in exceptional circumstances, if the 'Corporate Debtor' is MSME, it is not necessary for the Promoters to compete with other 'Resolution Applicants' to regain the control of the 'Corporate Debtor'.

9. In *Swiss Ribbons Pvt.Ld. and Another Vs. Union of India and others -2019 SCC Online SC 73*, the Hon'ble Apex Court made it clear that I&B Code

IA(IBC)64/KOB/2021

envisages maximisation of value of Assets of the Corporate Debtor so that they are efficiently runs as going concerns and in turn will promote entrepreneurship.

The liquidation can be ordered as a last resort if there is no Resolution Plan and the Resolution Plans submitted are not fulfilling the criteria laid down therein.

10. In view of the above, considering the facts situation and since the Corporate Debtor qualifies as a MSME under the revised norms, this **application is disposed of** with the following order:

- (i) The applicant shall submit the Expression of Interest/Resolution Plan in his individual capacity within two weeks from today.
- (ii) If the applicant submits the EOI/RP in his individual capacity, the Resolution Professional shall register the Corporate Debtor as an MSME, provided he produces the certificate of Registration as an MSME under the “Udhayam Registration” of the Ministry of Micro Small and Medium Enterprises. After considering the Expression of Interest of the applicant, the Respondents shall publish the list of Prospective Resolution Applicants, without further delay.

Dated the 20th day of April, 2021

Sd/-
(Ashok Kumar Borah)
Member (Judicial)