

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

IA-3846/ND/2023 & IA-1175/ND/2022
IN
Company Petition No. (IB)-2240(ND)/2019

IN THE MATTER OF:

M/s Hi-Tech Resource Management Limited

... Applicant/Financial Creditor

Versus

M/s Overnite Express Limited

... Respondent

AND IN THE MATTER OF IA. NO. 3846/ND/2023:

Deutsche Bank A.G

Ground & 14th Floor,
Hindustan Times House,
18-20 K.G. Marg
New Delhi - 110001

... Applicant

Versus

Mr. Devendra Umrao

Resolution Professional of
Overnite Express Limited
Ground Floor-14, Tower-A
The Corenthum, Sector 62,
Noida, Uttar Pradesh - 201301

... Respondent

SECTION: 60(5) of IBC, 2016

AND IN THE MATTER OF IA. NO. 1175/ND/2022:

Mr. Devendra Umrao

Resolution Professional of
Overnite Express Limited
Ground Floor-14, Tower-A
The Corenthum, Sector 62,
Noida, Uttar Pradesh - 201301

... Applicant

SECTION: 30(6) of IBC, 2016

Order Delivered on: 18.09.2023

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Rahul Tyagi in IA. No. 3846/2023

For the RP : Adv. Sumant Batra, Adv. Ruchi Goyal, and Mr.
Devendra Umrao, RP in IA. No. 1175/2022;
Adv. Aishwarya in IA-3846/2023

ORDER

PER: SH. L. N. GUPTA, MEMBER (T)

The present IA No. 3846 of 2023 has been filed by Deutsche Bank A.G (hereinafter referred to as, the '**Applicant**') under Section 60(5) of IBC, 2016, seeking the following reliefs:

- a) *Allow the present Application/Objections of the Applicant Bank.*
- b) *Reject the Resolution Plan of the Resolution Applicant in terms of the provisions of the Insolvency and Bankruptcy Code and Rules made there under;*
- c) *Direct the liquidation of the Corporate Debtor be initiated as per the provisions of the Insolvency and Bankruptcy Code and Rules made thereunder; and in that behalf*
- d) *Pass any other Order that this Hon'ble Tribunal deems it necessary in the interest of justice."*

2. To put the facts concisely, the underlying main Petition CP (IB)-2240/ND/2019 was filed by M/s Hi-Tech Resource Management Limited

against the Corporate Debtor namely, M/s Overnite Express Limited under IA. No. 3846/ND/2023 & IA. No. 1175/ND/2022 in (IB)-2240/(ND)/2019
Hi-Tech Resource Management Ltd. Vs. Overnite Express Ltd.

Section 7 of IBC, 2016, which was admitted vide Order dated 02.03.2020 of this Adjudicating Authority and the Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor (CD) was initiated. The Corporate Debtor is at present represented through its Resolution Professional Mr. Devendra Umrao (hereinafter referred to as, the “**Respondent/RP**”).

3. The present Application has been preferred by the Applicant/Deutsche Bank A.G., as an objection to the Resolution Plan submitted by the RP in IA-1175/ND/2022.

4. It is stated by the Applicant Bank that it is a Secured Financial Creditor of the Corporate Debtor. The Applicant has put forth the following submissions while objecting to the Resolution Plan:

4.1 The total admitted claims of the Secured Financial Creditors are to the tune of Rs.10,82,08,485/- against which they are offered a meagre amount of Rs.3,24,62,545/-, which is approximately 30% of the admitted claims. It is a matter of fact that since the Applicant's claim is Rs.6,00,26,716.30/-, it will be offered a mere 30% of the admitted Claim. The said offer is without considering the valuation of the security held by the Applicant, which is valued at more than Rs.12 Crores as of date.

4.2 In support of its contention, the Applicant has relied upon the following Judgements:

(i) The Hon'ble NCLAT in “**Jet Aircraft Maintenance Engineers Welfare Assn. vs. Jet Airways (India) Ltd.**”, 2022 SCC OnLine NCLAT 418, has held that the Secured Financial Creditor is entitled to the amount owed to them as per the value of the Security interest.

(ii) The Applicant is entitled to the value of its security/ Mortgage Property as held by the Hon'ble Apex Court in **Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd., (2022) 1 SCC 401**, and which was affirmed in **India Resurgence ARC Private Limited v. Amit Metaliks Limited, 2021 SCC OnLine SC 409**.

4.3 The present Resolution Plan is submitted on behalf of Mr. Om Prakash Raj Ghoria, who is a member of the Suspended Board of the Corporate Debtor, claiming that the CD falls under the MSME Category in terms of the Central Government's notification dated 01.06.2020.

4.4 The Corporate Debtor is fraudulently trying to take advantage available to MSME under Section 240A of the Code of 2016.

4.5 In the case of Hari Babu Thinota, CP (IB) No. 196 of 2020 dated 28.02.2023" NCLT Bengaluru and Hon'ble NCLAT in "*Harkirat Singh Bedi vs the Oriental Bank of Commerce & Anr. in Company Appeal (AT)(Ins.) No.40 of 2020*" held that the erstwhile promoter being the Applicant was ineligible to take the benefit of Section 240A and therefore, was not qualified under Section 29A of the Code.

4.6 The Respondent is in hand in glove with the Suspended Board of Directors, who is the Successful Resolution Applicant herein. To buttress the plea, it has stated that RP has not included the claims of the Applicant even after admitting the claim for an amount of Rs.6,00,26,716.30/- before this Tribunal. The Respondent RP has not re-constituted the CoC in order to accommodate the Applicant, being a secured financial creditor of the Corporate Debtor with a voting share of approximately 35%.

4.7 The Respondent/RP has not conducted any forensic or transactional audit of the Corporate Debtor in order to find whether any defrauding of the assets of the Corporate Debtor has been carried out by the Suspended Board of Directors or by any third party.

4.8 The Respondent has not supplied documents related to CIRP and the complete set of the Resolution plan to the Applicant.

5. In response the RP, during the course of the hearing as well as through its Written Submissions filed, has stated mainly the following:

5.1 The RP informed the members of the 5TH CoC meeting held on 01.11.2021 that the legal opinion has been received regarding the registration of CD as MSME during CIRP, which emphasises that CD can be registered as MSME and the RP can register the same during CIRP. The relevant extracts of the minutes of CoC read thus:

Item No. 11

To take note of the draft :Legal opinion received in the matter of registration of the Corporate Debtor as a MSME unit.

The Resolution Professional apprised the Members of the CoC that as per the discussion held with COC Members during the 4th COC Meeting, a legal opinion was sought from Madaan Law Offices seeking their view on the following:

"Whether a company undergoing Corporate Insolvency Resolution Process under the provisions of Insolvency and Bankruptcy Code, 2016 and the regulations made thereunder, pursuant to admission of petition filed against it under Section 7 of the Code by the Hon'ble Adjudicating Authority, be registered as a MSME by the Resolution Professional?"

Assumption: The CD fulfills the extant criteria for being categorized a MSME as promulgated. by the Ministry of Micro, Small and Medium Enterprises, Govt. of India."

The Resolution Professional mentioned that a Draft opinion has been received and according to it the Corporate Debtor in the present case, can be registered as MSME and the Resolution Professional can register (as MSME) the CD which is undergoing CIRP.

The COC took note of the same and expressed that in case the ex-promoters are interested, this would enable them to submit their expression of interest as well which may be beneficial for the Corporate Debtor.

Further, CoC Members requested the RP to share the Legal opinion received from the Madaan Law Offices for their reference.

5.2 The RP relied upon the Judgement of the Hon'ble NCLAT passed in the matter of "**Govind Prasad Todi v. Satyanarayana Gudetti and Ors.**" **having Comp. App. 1125 of 2022 dated 14.02.2023**, wherein the Appellants/Promoters, who obtained the MSME certificate much after the initiation of CIRP i.e., 30.08.2020 (while the CIRP was initiated on 04.02.2020), submitted the resolution plan.

5.3 It is further stated by the RP that the Dissenting Financial Creditor(s), who did not vote in favour of the Resolution Plan, shall be paid the liquidation value due to them in accordance with the provision under Section 30(2) read with Section 53 of the IBC 2016.

6. During the course of the hearing on 13.04.2022, Ld. Counsel appearing for the RP submitted that the Resolution Plan is submitted by one of the suspended Directors under Section 240A of IBC 2016, the Corporate Debtor being the MSME. However, as submitted by him, he did not enclose, the Certificate of the Corporate Debtor being MSME on the date of submission of the Resolution Plan, along with the application.

7. Accordingly, this Adjudicating directed the RP to place the Certificate of the Corporate Debtor being an MSME, a Chronology of events, and a brief synopsis of the Resolution Plan along with the Form-H within 07 days. The RP, in compliance with the aforesaid directions, filed the MSME Certificate dated 12.11.2021 vide Affidavit dated 09.05.2022, the contents of which reads thus:



भारत सरकार
Government of India
सूक्ष्म, लघु एवं मध्यम उद्यम मंत्रालय
Ministry of Micro, Small and Medium Enterprises



Udyam Registration Number : UDYAM-DL-01-0012158

Type of Enterprise	MICRO	Major Activity	Services
Type of Organisation	Public Limited Company	Name of Enterprise	M/S OVERNITE EXPRESS LIMITED
Owner Name	M/S OVERNITE EXPRESS LIMITED	PAN	AAACO3758L
Do you have GSTIN	Yes	Mobile No.	9810045874
Email Id	cirp.overnite@gmail.com	Social Category	General
Gender	Male	Specially Abled(DIVYANG)	No
Date of Incorporation	27/11/1986	Date of Commencement of Production/Business	27/11/1986

Bank Details

Bank Name	IFS Code	Bank Account Number
KOTAK MAHINDRA BANK	KKBK0000191	7111341480

Employment Details

Male	Female	Other	Total
1	0	0	1

Investment in Plant and Machinery OR Equipment (in Rs.)

SNo.	Financial Year	Enterprise Type	Written Down Value (WDV)	Exclusion of cost of Pollution Control, Research & Development and Industrial Safety Devices	Net Investment in Plant and Machinery OR Equipment[(A)-(B)]	Total Turnover (A)	Export Turnover (B)	Net Turnover [(A)-(B)]	Is ITR Filled?	ITR Type
1	2019-20	Micro	0.00	0.00	0.00	0.00	0.00	0.00	No	NA

Unit(s) Details

SN	Unit Name	Flat	Building	Village/Town	Block	Road	City	Pin	State	District
1	OVERNITE EXPRESS LIMITED	11099-C	OVERNITE HOUSE	KAROL BAGH	KAROL BAGH	EAST PARK ROAD, KAROL BAGH	NEW DELHI	110005	DELHI	CENTRAL

11/20/21, 5:14 PM

Udyam Print Application

Flat/Door/Block No.	11099-C	Name of Premises/ Building	OVERNITE HOUSE
Village/Town	KAROL BAGH	Block	KAROL BAGH
Road/Street/Lane	EAST PARK ROAD, KAROL BAGH	City	NEW DELHI
State	DELHI	District	CENTRAL , Pin : 110005
Mobile	9810045874	Email:	cirp.overnite@gmail.com

National Industry Classification Code(S)

SNo.	Nic 2 Digit	Nic 4 Digit	Nic 5 Digit	Activity
1	53 - Postal and courier activities	5320 - Courier activities	53200 - Courier activities	Services

Are you interested to get registered on Government e-Market (GeM) Portal	Yes
Are you interested to get registered on TReDS Portals(one or more)	Yes
DIC	DELHI
MSME-DI	DELHI
Date of Udyam Registration	12/11/2021

8. The chronology of events as filed by the RP through its Affidavit dated 09.05.2022 reads thus:

Dates and Events:

S. No.	Date	Events
1.	<u>2nd March, 2020</u>	Order passed by the Hon'ble NCLT for initiation for CIRP and appointment of IRP
2.	<u>8th March, 2020</u>	Public Announcement made in Form A
3.	<u>12th March, 2020</u>	Stay imposed on Constitution of CoC by the Hon'ble NCLAT
4.	<u>4th February, 2021</u>	Stay vacated on Constitution of CoC by the Hon'ble NCLAT
5.	<u>1st March, 2021</u>	Appeal withdrawn from the Hon'ble NCLAT
	<u>10th March, 2021</u>	Order passed by the Hon'ble Bench for exclusion of 330 Days on account of stay imposed by the Hon'ble NCLAT
	<u>11th March, 2021</u>	First Meeting of CoC was conducted
	<u>17th May, 2021</u>	Second Meeting of CoC was conducted
9.	<u>23rd May, 2021</u>	Circulation of E-voting Report of the 2 nd CoC Meeting wherein Appointment of Mr. Devendra Umrao as the Resolution Professional was approved by CoC
10.	<u>1st July, 2021</u>	Order passed by the Hon'ble Bench for confirmation of appointment of Mr. Devendra Umrao as the Resolution Professional
11.	<u>30th July, 2021</u>	Third Meeting of CoC was conducted
12.	<u>9th August, 2021</u>	Order passed by the Hon'ble Bench for exclusion of 48 Days for the period 20 th April, 2021 to 6 th June, 2021
13.	<u>1st September, 2021</u>	Fourth Meeting of CoC was conducted
14.	<u>17th September, 2021</u>	Order passed by the Hon'ble Bench extending the time period of CIRP further by 90 Days beyond 180 Days from 11 th September, 2021
15.	<u>1st November, 2021</u>	Fifth Meeting of CoC was conducted
16.	<u>9th November, 2021</u>	Publication of Form G
17.	<u>12th November, 2021</u>	MSME Status granted to Corporate Debtor vide Udyam Registration Certificate bearing Reg. No. UDYAM-DL-01-0012158
18.	<u>24th November, 2021</u>	Last Date of submission of EOI
19.	<u>24th November, 2021</u>	Date of submission of EOI by Mr. O.P Rajgrahia
20.	<u>24th November, 2021</u>	Date of submission of EOI by Tower Leasing and Finance Limited
21.	<u>24th November, 2021</u>	Date of submission of EOI by Mr. Neeraj Gupta
22.	<u>24th November, 2021</u>	Date of submission of EOI by Mr. Nikhil Jain
23.	<u>29th November, 2021 and 8th December, 2021</u>	Circulation of provisional List of PRAs and Circulation of Final List of PRAs respectively.
24.	<u>6th December, 2021</u>	Sixth Meeting of CoC was conducted
25.	<u>20th December, 2021</u>	Order passed by the Hon'ble Bench extending the time period of CIRP further by 60 Days beyond 270 Days from 11 th December, 2021
26.	<u>31st December, 2021</u>	Seventh Meeting of CoC was conducted
27.	<u>7th January, 2022</u>	Submission of Resolution Plan by PRA Mr. Om Prakash Rajgarhia
28.	<u>8th January, 2022</u>	Last Date for submission of Resolution Plan by PRAs and Submission of Resolution Plan by Tower Leasing & Finance Ltd.
	<u>17th January, 2022</u>	Eighth Meeting of CoC was conducted
	(i) <u>24th January, 2022</u>	(i) Ninth Meeting of CoC was convened and Adjourned
	(ii) <u>4th February, 2022</u>	(ii) Adjourned Ninth Meeting of CoC was conducted
	<u>14th February, 2022</u>	E-voting on approval of resolution plan was commenced
32.	<u>21st February, 2022</u>	Order passed by the Hon'ble Bench extending the time period of CIRP further by 30 Days beyond 330 Days from 9 th February, 2022
33.	<u>22nd February, 2022</u>	E-voting was concluded on Approval of Resolution

		Plan submitted by Mr. O.P. Rajgarhia by CoC
34.	<u>25th February, 2022</u>	LOI issued by the Resolution Professional
35.	<u>3rd March, 2022</u>	LOI issued by the RP was accepted by the Prospective Resolution Applicant unconditionally
36.	<u>4th March, 2022</u>	Submission of Performance Guarantee
37.	<u>10th March, 2022</u>	Application for Approval of Resolution Plan filed before this Hon'ble Bench
38.	<u>13th April, 2022</u>	Directions issued by this Hon'ble Bench to file Additional affidavit

9. We heard the submissions of both parties and perused the pleadings placed on record. The Applicant has sought rejection of the Resolution Plan on the ground that the Corporate Debtor is fraudulently trying to take advantage available to an MSME under Section 240A of the IBC 2016. Further, the Applicant has also raised another objection towards the meagre amount provided to it in the Resolution Plan. Before dealing with the lawful entitlement amount to the Applicant Bank, we would like to examine the issue relating to the eligibility of the SRA to submit the Resolution Plan. As per the pleadings and chronology of the events filed by the RP/ Respondent, it is an admitted fact that the MSME Certificate in the instant case was obtained after the commencement of the CIR Process of the Corporate Debtor. Whereas the CIR Process of the CD commenced on 02.03.2020, the MSME Certificate for the CD was obtained on 12.11.2021. Hence, the question that emerges for our adjudication is **“Whether the MSME Certificate obtained after the commencement of CIRP is valid for making a Defaulter Promoter eligible to submit a Resolution Plan under Section 240A of IBC, 2016.”**

10. Since, in the instant case, the MSME Certificate has been obtained post-commencement of CIRP, it would be appropriate to find out who would be interested in obtaining the MSME Certificate of the Corporate Debtor after commencement of CIRP -

- i) It could be a Promoter(s) or Member(s) of the Suspended Board of Directors, who intends to be a Prospective Resolution Applicant (PRA) and who is otherwise barred under Section 29A (c) &/or (h) of IBC 2016 to submit the Resolution Plan; or
- ii) It could be RP/CoC to avail the business advantages available under the MSME Act such as to avail preference in the marketing of its product, price preference, or benefit in the payment terms.

11. Hence, we would like to examine the validity of an MSME Certificate obtained by both the category of persons (ibid) post-commencement of CIRP. In case an MSME Certificate is obtained by a Promoter/ Suspended Director of a Corporate Debtor after the commencement of CIRP, the same shall be in violation of Section 17(1)(b) of IBC 2016, since on commencement of the CIRP of a Corporate Debtor, the powers of its Board of Directors or in case of an LLP, the powers of Partners of the corporate debtor shall stand suspended and can be exercised by the Interim Resolution Professional (IRP)/RP only. Section 17(1)(a) and (b) reads thus:

“17. Management of affairs of corporate debtor by interim resolution professional. –

(1) From the date of appointment of the interim resolution professional, -

(a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;

(b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;

.....

(Emphasis placed)

Thus, in respect of a Corporate Debtor that is undergoing the Insolvency Resolution Process, if such a certificate is obtained by a Promoter/ Suspended Director of a Corporate Debtor, the same will be an *Ultra Vires* act.

12. Further, the Hon'ble NCLAT vide its Judgement dated 12.01.2021 passed in the matter of "**Harkirat Singh Bedi Vs. The Oriental Bank of Commerce & Anr.**" has held the following:

*"39. The appellant in its EOI claimed the advantage of section 240A of the code claiming exemptions from applicability of section 29A(c) and 29A(h) in terms of eligibility to be a resolution applicant as a medium level enterprise under MSME Development Act, 2006. On reading the provisions under section 29A along with section 240A of I&B Code. It can be concluded that the exemption is only in respect of clause (c) and(h) of Section 29A of the I&B Code. However, in this case the Appellant is declared ineligible under clause (b) of Section 29A where no exemption has been given to MSME. **Also, the date of registration of the Corporate Debtor as MSME as on record was 5th June, 2019, i.e after CIRP admission order dated 29th March, 2019. The application for registration of MSME by the Appellant was without authorization, being subsequent to initiation of CIRP and hence was invalid. Therefore, the Appellant is ineligible to take the benefits of section 240A under I&B Code.**"*

(Emphasis added)

13. Hence, in the light of the provision under Section 17(1) (a) and (b) of IBC 2016, and Judgement of the Hon'ble NCLAT (ibid), **we find that an MSME Certificate obtained by Promoter(s)/Ex-Director(s) post-commencement of the CIRP is invalid and it will not make them eligible to submit an EOI or the Resolution Plan by taking benefit of Section 240A of IBC 2016.**

14. Now, we would like to examine whether the RP/CoC members can obtain an MSME Certificate. The answer could be Yes; if it is for the purpose of availing the business advantages available under the MSME Act, 2006 such as - to avail preference in the marketing of its product, price preference, or benefit in the payment terms, which are in the overall interest of maximizing the value of assets of the Corporate Debtor under CIRP, which is a going concern. Hence, we would like to find out whether in the instant case, the intent behind RP/CoC obtaining the MSME Certificate of the Corporate Debtor was a business decision for availing any product/price/payment advantage with an aim to maximize the value of assets of the CD.

15. In this context, when we peruse the Master Data of the Corporate Debtor available on the MCA website in the public domain, we observe that the Corporate Debtor M/s Overnite Express Limited was incorporated on 27.11.1996. As noted in paragraph No.2, the CIRP of the CD was initiated on 02.03.2020, which indicates that for a period of around 24 years since the incorporation, the promoters *per se* never felt a need to obtain an MSME Certificate of the Corporate Debtor Company for carrying out its operations. Further, on the perusal of the Chronology of dates and events placed on record by the Respondent/RP, it is seen that “Form G” was published on 09.11.2021, as per which the last date for submission of EOI was 24.11.2021, while it is clear that the MSME Certificate by the RP in the instant case was obtained on 12.11.2021. The abovementioned chronology clearly reflects that the MSME Certificate, which was not obtained by the Corporate Debtor or its promoters for around “24 years” for the purpose of carrying out business as per the objects of its MoA, was obtained on 12.11.2021 i.e., within “03 days” from the

date of publication of Form-G on 09.11.2021. Evidently, the SRA herein, being a Defaulter Ex-Director of the Corporate Debtor, given the pre-MSME certificate status of CD being of a non-MSME, was ineligible to submit an EOI/Resolution Plan. **Thus, the RP/CoC by obtaining an MSME Certificate on their initiative, opened the doors, that were otherwise shut, to the Defaulter Promoter(s)/ Suspended Board of Director(s)/ Ex-Management just to enable them to submit EOI/Resolution Plan to regain entry and control/management over the Corporate Debtor through the backdoor.** In this context, it is important to note that the relevant minutes of the 5th CoC meeting dated 01.11.2021 reproduced in Para 5.1 above, clearly reflect that the MSME Certificate would *enable them* (the Ex-Promoters) to submit their expression of interest/Resolution Plan. However, **we find (a) No recording in the minutes of the said CoC meeting that the MSME Certificate was obtained to get a business advantage by the Corporate Debtor; and (b) No formal resolution passed by the CoC authorizing the RP to obtain the MSME Certificate. Hence, it won't be wrong to say that there was "No Resolution" passed by the CoC authorizing the RP to obtain the MSME Certificate.**

16. Nonetheless, Ld. Counsel for the RP contended that the RP/CoC was well within its rights to obtain the MSME Certificate post-commencement of CIRP. In this regard, he relied upon the Judgment dated 14.02.2023 of Hon'ble NCLAT passed in the matter of "**Govind Prasad Todi v. Satyanarayana Gudetti and Ors.**" Comp. App. 1125 of 2022, wherein the Appellants (Promoters) submitted the resolution plan after obtaining the MSME certificate on 30.08.2020 i.e., much after the initiation of CIRP on 04.02.2020.

Accordingly, we refer to the relevant paragraphs of the Judgement (ibid), which reads thus -

*“2. Adjudicating Authority in the impugned order has held **that Appellants were not eligible to submit the Resolution Plan under Section 29A read with Section 240A since the date when application for submitting EOI was issued, the Appellants were not eligible. It is further observed that registration of the Corporate Debtor cannot operate retrospectively making them eligible.** It is further held by the Adjudicating Authority that although Adjudicating Authority vide its order dated 28.09.2021 directed for deliberation as to whether Resolution Applicants may be invited but the CoC did not invite other Resolution Applicants which has denied level playing field to other Resolution Applicants. After coming to the aforesaid conclusion, the Adjudicating Authority held that the Appellants’ Resolution Plan is not in compliance with the Code and CIRP Regulations. After coming to the said conclusion, the approval of Resolution Plan was set aside and order of liquidation was passed.*

.....

*4. Learned counsel for the Appellant challenging the order impugned contends that the Adjudicating Authority having directed on 28.09.2021 to consider **the Resolution Plan submitted by the Appellant which was duly considered by the CoC and approved, the said approval cannot have been set aside by the Adjudicating Authority. After registration of the Corporate Debtor as MSME on 30.08.2021 by virtue of Section 240A the Appellant has become eligible to submit a Resolution Plan. It is submitted that the Adjudicating Authority having directed to submit Resolution Plan on 28.09.2021, cannot take contrary view in the impugned order.** It is submitted that there was no objection filed to the approval of the Resolution Plan by any of the parties. There being no objection to the Resolution Plan, the Resolution Plan could not have been rejected. In the CIRP process when no Resolution Plan was approved and the Promoter wanted to revive the Corporate Debtor by submitting a Resolution Plan,*

the Adjudicating Authority ought to have approved the decision of the CoC. The decision of the CoC approving the Resolution Plan was a decision taken in the commercial wisdom of the CoC which ought not to have been interfered with.

.....

10. The Adjudicating Authority has rightly taken the view that the order dated 28.09.2021 of the Adjudicating Authority directing consideration of Resolution Plan of the Appellants was required but the CoC has to consider other Resolution Applicants also. We have already noticed that registration of MSME of Corporate Debtor obtained on 30.08.2020 that is much after issuance of Form G. We are of the view that the Adjudicating Authority vide order dated 28.09.2021 gave opportunity to the Resolution Professional and the CoC to take steps to revive the Corporate Debtor. The Adjudicating Authority is right in its observation that the CoC ought to have taken steps in accordance with provisions of CIRP Regulations. In Para 42 of the impugned order, the Adjudicating Authority made following observations

“42. On perusal of Resolution Plan submitted by the Successful Resolution Applicant specifically clause 4.2 of the plan, we observe that with regard to the Compliance of Section 29A of Code, 2016, it was mentioned that the Resolution Plan has been considered under specific directions passed by the Hon'ble NCLT, New Delhi Bench vide order dated 28.09.2021. At the cost of repetition, we reiterate that this Tribunal vide order dated 28.09.2021 had directed the COC to consider whether more Resolution Applicants may be invited and no specific direction to consider the Resolution Plan proposed by the Suspended Directors was given. Therefore, the RP, COC as well as the promoters were duty bound to follow the procedure as laid down by the IBBI in the Code and CIRP Regulations.”

.....

12. After considering the submissions of learned counsel for the parties and facts on record, we are of the view that the decision of the Adjudicating Authority not approving the resolution of the

CoC dated 30.12.2021 approving the Resolution Plan cannot be faulted. We, thus, affirm the order of the Adjudicating Authority insofar as it disapproves the CoC decision dated 30.12.2021 and reject I.A. No. 1528/2022 seeking approval of the Resolution Plan. We, however, in the facts of the present case are of the view that one more opportunity be given for revival of the Corporate Debtor, for which Resolution Professional may issue a fresh Form G and take steps for considering willing Resolution Applicants including the Appellants before us, who has filed the Resolution Plan on the strength of registration of the Corporate Debtor as MSME dated 30.08.2021. Opportunity to the Resolution Professional and the CoC has to be time bound opportunity to make one more effort to revive the Corporate Debtor, the liquidation being the last resort. We, thus, are inclined to keep the order of the Adjudicating Authority directing for liquidation of the Corporate Debtor in abeyance to make one effort for revival, failing which liquidation order shall stand revived.”

(Emphasis placed)

17. After going through the Judgement (ibid), it is observed that the facts of the present case are distinguishable from those referred to in the “**Govind Prasad Todi**” inasmuch as that, in that case, vide order dated 28.09.2021, the Adjudicating Authority had directed the Suspended Director to submit Resolution Plan. However, in the instant case, neither any application was preferred by the Ex-Director (who is SRA) before this Adjudicating Authority seeking permission to file a Resolution Plan nor any direction was passed by this Adjudicating Authority to the CoC to consider such a plan. Moreover, the Resolution Plan submitted by the Ex-Director in “**Govind Prasad Todi**” was eventually rejected by the NCLT, which order was upheld by the Hon’ble NCLAT. However, in the facts of that particular case, directions were issued by the Hon’ble NCLAT to publish fresh Form G where Appellants were allowed

to participate. Since the factual position of the instant case is different and the Resolution Plan in “**Govind Prasad Todi**” was finally rejected, the same cannot be relied upon as a precedent applicable to the present case and therefore, the aforesaid Judgement does not help the RP to demonstrate that either he or CoC were empowered to obtain the MSME Certificate post-commencement of CIRP to enable the Defaulter Ex-Director to submit the Expression of Interest/ Resolution Plan to regain the control and management over the Corporate Debtor.

18. Nevertheless, in the interest of justice, we would like to examine the legal position in this regard. Accordingly, we refer to the “Duties of a Resolution Professional” prescribed under Section 25 of IBC 2016, which reads thus:

25. Duties of resolution professional. -

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;

(c) raise interim finances subject to the approval of the committee of creditors under section 28;

(d) appoint accountants, legal or other professionals in the manner as specified by Board;

(e) maintain an updated list of claims;

(f) convene and attend all meetings of the committee of creditors;

(g) prepare the information memorandum in accordance with section 29;

[(h) 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.]

(i) present all resolution plans at the meetings of the committee of creditors;

(j) file application for avoidance of transactions in accordance with Chapter III, if any; and

(k) such other actions as may be specified by the Board.

19. On the perusal of Section 25(h), it is seen that the RP is duty-bound to invite prospective resolution applicants, who fulfill such criteria as may be laid down by him with the approval of the Committee of Creditors, to submit Resolution Plan(s). In our considered view, such criteria have to be consistent with the Code and cannot be laid down by ignoring Section 29A of IBC 2016. The provisions under Section 25 of IBC 2016 nowhere authorize an RP to obtain an MSME Certificate of the CD for the purpose of opening back door entry to a defaulting Ex-Director(s)/Promoter(s)/Suspended Management.

20. The intent of Section 29A of IBC 2016 has been well examined by the Hon'ble Supreme Court in the matter of "**Arun Kumar Jagatramka Vs Jindal Steel and Power Ltd. & Anr.**", **Civil Appeal No. 9664 of 2019**, dated 15.03.2021. The relevant extracts are reproduced below -

"45. The Report of the Insolvency Law Committee dated 3 March 2018 states that the intent behind introducing Section 29A 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 29A 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 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 Court held that "Section 29A has been enacted in the larger public interest and to facilitate effective corporate governance". **The Court further observed that "Parliament rectified a loophole in the Act which allowed backdoor entry to erstwhile managements in the CIRP."***

(Emphasis placed)

Thus, we find that neither there is any explicit provision under Section 25 of IBC 2016 enabling an RP to obtain an MSME Certificate nor such is the intention behind the insertion of Section 29A in the Code as observed by the Hon'ble Supreme Court in the Judgement (ibid). **Further, under the garb of fixing the criteria for the intending Prospective Resolution Applicants, the RP cannot assume the role of a "Facilitator" to enable the Defaulter Promoter(s)/ Suspended Board of Director(s)/ Ex-Management to submit the EOI/Resolution Plan by abusing the provisions contained under Section 240A of IBC 2016.**

21. Even under Section 28 of IBC 2016, we see no explicit provision, where approval of CoC can be taken by RP to obtain an MSME Certificate. The Section 28 of IBC 2016 reads thus:

28. Approval of committee of creditors for certain actions. -

(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely: -

- (a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;
- (b) create any security interest over the assets of the corporate debtor;
- (c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;
- (d) record any change in the ownership interest of the corporate debtor;
- (e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;
- (f) undertake any related party transaction;
- (g) amend any constitutional documents of the corporate debtor;
- (h) delegate its authority to any other person;
- (i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;
- (j) make any change in the management of the corporate debtor or its subsidiary;
- (k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

(l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or

(m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

(3) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of ¹[sixty-six] per cent. of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code.

Hence, we conclude that neither Section 25 nor Section 28 of IBC 2016 empowers the RP or the CoC to obtain an MSME Certificate to enable the back door entry of the defaulting promoter(s) into the Corporate Debtor.

22. In our view, the benefit of Section 240A of IBC 2016 can only be availed by a genuine MSME Enterprise, whose registration or MSME Certification is done prior to the commencement of CIRP of a Corporate Debtor.

23. In the sequel to the abovementioned discussion and findings, in a nutshell, **we conclude that neither the Promoters/Ex-Directors nor the RP/COC are empowered under the IBC 2016 to obtain an MSME Certificate post-commencement of CIRP with the sole purpose of opening or enabling a back door entry to the defaulting promoters, who are otherwise barred under Section 29A of IBC, 2016 to submit the EOI/Resolution Plan.**

24. Hence, we have no other option but to allow the prayer (b) of the IA-3846/ND/2023 filed by the Applicant Bank. **Accordingly, the prayer (b) of the IA-3846/ND/2023 is allowed and the Resolution Plan filed vide IA-1175/ND/2022 is rejected.**

25. Since a period far more than 330 days of the CIRP has already elapsed, we, in terms of prayer (c) of the IA-3846/2023, order the Liquidation of the Corporate Debtor with immediate effect and in terms of Section 34(4) of IBC, 2016, appoint Mr. Tarun Jain registration no. IBBI/IPA-002/IP-N00187/2017-18/10504 (Email ID: info@jainandpartners.com) Mobile No. 9810265565, as Liquidator of the Corporate Debtor to carry on the liquidation process as per the relevant provision of the IBC 2016.

26. **In view of the above, the IA-3846/2023 is allowed and IA-1175/2022 is rejected.**

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)