

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1672-1673 of 2023

[Arising out of order dated 08.12.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, Court-III in IA No. 317/2022 in CP (IB) No. 126/MB/C-III/2019 and order dated 08.12.2023 in IA No. 2895/2021 in CP (IB) No. 126/MB/C-III/2019]

IN THE MATTER OF:

Ramesh Shah

In consortium with Masitia Capital Services Pvt. Ltd.

Having office at:

S-13 & S-14, 2nd Floor,

Pinnacle Business Park,

Shanti Nagar, MIDC,

Mahakali Caves Road,

Andheri (E), Mumbai-400093

...Appellant

Versus

- 1. Central Bank of India,
Having its registered office at
Stressed Asset Management Branch-II
346, Standard Building, 3rd Floor,
Dr. D.N. Road, Fort, Mumbai-23.**
- 2. Nandkishore Despande
(Resolution Professional/Liquidator
of ETCO Denim Pvt. Ltd.)
Having office at:
708, Raheja Centre,
Nariman Point, Mumbai-400021.**
- 3. Committee of Creditors,
Through Union Bank of India**

(e-Corporation Bank)

SAMV Branch, Mumbai Samachar Marg,

Fort, Mumbai-400001.

...Respondents

Present:

**Appellant: Mr. Arvind Kr. Gupta and Ms. Henna George,
Advocates.**

**For Respondents: Mr. Ravi Raghunath, Mrs. Rathina
Maravarman, Mr. Utkarsh Kumar, Advocates
for R-1.
Mr. Mukesh Jain, Mr. Ayush J. Rajani,
Advocates.**

WITH

**Company Appeal (AT) (Insolvency) No. 163-164 of 2024
& I.A. No. 526, 527 of 2024**

**[Arising out of order dated 08.12.2023 passed by the Adjudicating
Authority, National Company Law Tribunal, Mumbai Bench, Court-
III in IA No. 2895/2021 & 317/2022 Company Petition No.
126/IBC/MB/2019]**

IN THE MATTER OF:

Nandkishore Despande

Resolution Professional of Etco Denim Pvt. Ltd.

Having office at:

708, 7th Floor, Raheja Centre,

Nariman Point, Mumbai-400021.

...Appellant

Versus

1. Central Bank of India,

Having its Registered office at

Stressed Asset Management Branch-II

346, Standard Building, 3rd Floor,

Dr. D.N. Road, Fort, Mumbai-400023.

**2. Committee of Creditors,
Through Union Bank of India
(e-Corporation Bank)
SAMV Branch, Mumbai Samachar Marg,
Fort, Mumbai-400001.**

...Respondents

Present:

Appellant: Mr. Mukesh Jain, Mr. Ayush J. Rajani, Mr. Anuj Tiwari, Advocates.

**For Respondents: Mr. Ravi Raghunath, Mrs. Rathina Maravarman, Mr. Utkarsh Kumar, Advocates for R-1.
Mr. Arvind Kr. Gupta and Ms. Henna George, Advocates for SRA.**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

Present is a set of two appeals filed under Section 61 of Insolvency and Bankruptcy Code, 2016 (“**IBC**” in short) arising out of two separate orders dated 08.12.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court- III) in IA No. 2895/2021 & 317/2022 in Company Petition No. 126/MB/C-III/2019. By the **first impugned order** passed by the Adjudicating Authority in I.A. No. 317/2022 filed by the Central Bank of India, it has been held that the ex-promoter/Corporate Debtor is not eligible under Section 29A read with Section 240A of the IBC to submit a resolution plan claiming the benefits of MSME. By the **second impugned order**, the Adjudicating Authority has rejected I.A. No. 2895/2021 filed by the Resolution

Professional seeking the approval of the resolution plan submitted by the successful resolution applicant - ex-promoter/Corporate Debtor. Aggrieved by the said impugned orders, the present appeals have been preferred by the Appellants. While one appeal vide Company Appeal (AT) (Ins) No. 1672-1673 of 2023 has been preferred by the successful resolution applicant, the other appeal has been filed vide Company Appeal (AT) (Ins) No. 163-164 of 2024 by the Resolution Professional.

2. Coming to the factual matrix, which is common to both the appeals, we notice that on a Section 9 petition having been admitted, the Corporate Debtor-ETCO Denim Private Ltd was admitted into CIRP. The Resolution Professional ("**RP**" in short) constituted the Committee of Creditors ("**CoC**" in short) comprising of Union Bank of India (66.91%), Corporation Bank (36.42%), Central Bank of India (22.44%) and Andhra Bank (10.89%). Form-G was published on 10.08.2020 inviting EoIs and the last date for submission of resolution plan was 30.10.2020. The second round of Form-G was published on 05.05.2021 with last date of submission of plan being 22.06.2021. During the period when the CIRP process was going on, the Government of India had issued a Notification dated 01.06.2020 by which MSMEs were reclassified. In terms of the amended criteria brought in by this Notification, the eligibility condition for any entity to qualify as MSME, the valuation of assets was enhanced to Rs. 50 Crore and that of turnover to Rs. 250 Crore. Based on this Notification, the Corporate Debtor received MSME certificate on 23.10.2020 on an online application filed by one of its employees. On the strength of this MSME

certificate, the Ex-promotor of the Corporate Debtor, Mr. Ramesh Shah in consortium with Masitia Capital Services Pvt Ltd submitted a resolution plan which was approved by the CoC in the 26th meeting with 77.56% vote share. The RP filed I.A. No. 2895/2021 for approval of the said resolution plan which was dismissed by the Adjudicating Authority and the proposal for approval of the resolution plan rejected. The Central Bank of India, as a dissenting financial creditor, had filed I.A. No. 317/2022 seeking stay of the approval of the resolution plan before the Adjudicating Authority and challenged the eligibility of the ex-promotor as a Successful Resolution Applicant (“**SRA**” in short). The Adjudicating Authority on 08.12.2023 allowed the I.A. No. 317/2022 and held the SRA to be ineligible under Section 29A read with Section 240A of the IBC to submit a resolution plan. Aggrieved by these two orders, the present appeals have been preferred.

3. Since the facts in both the appeals are inter-connected, and the issues raised by the Learned Counsels for both the Appellants in their respective appeals are found to largely overlap, therefore, for reasons of convenience, we would like to take note of their submissions conjointly.

4. The Learned Counsel for the Appellants making their submissions stated that the Corporate Debtor had been issued MSME certificate by the competent authority on the basis of an online application filed by an employee of the Corporate Debtor on the instructions of the RP. Since this MSME Registration Certificate was obtained on 23.10.2020 which date was before the date of submission of the resolution plan, the SRA was eligible to file a resolution plan and seek the benefits of Section

240A of the IBC. It was pointed out that the impugned order had been passed on the wrong premise that since the status of the Corporate Debtor had changed to MSME after the insolvency commencement date it was ineligible to file the resolution plan. It was asserted that in terms of the recent judgment of the Hon'ble Supreme Court in the matter of ***Hari Babu Thota in CA No. 4422 of 2023*** wherein it has been held that even if MSME registration is made after the initiation of CIRP but before the date of submission of resolution plan, the ex-promoter of the MSME is eligible to file a resolution plan.

5. It was also contended that the CoC was fully aware of the MSME status of the SRA while considering their resolution plan. It was submitted that the MSME status of the Corporate Debtor and their eligibility to file a resolution plan had been discussed in the various CoC meetings which clearly shows that CoC was aware of the MSME status of the SRA. Further submission was pressed that the Adjudicating Authority has wrongly noted that information of MSME status of the Corporate Debtor was given only in the 13th COC meeting.

6. It has been also pointed out that in terms of the certificate issued by Chartered Engineer on 01.08.2021 and 31.08.2021, the Written Down Value (WDV) of the plant and machinery of the Corporate Debtor was Rs. 29.27 Crore and Rs. 24.88 Crore respectively which qualified for the MSME status. This valuation was also discussed by the CoC meetings and held that the Corporate Debtor had been correctly classified as MSME. The CoC had never made any adverse findings on the valuations undertaken by the valuers appointed during the CIRP.

Furthermore, on the directions of the Adjudicating Authority dated 25.10.2023, another valuation was undertaken by a Chartered Accountant which also certified the same to be Rs. 37.57 Crore.

7. It is also the contention of the SRA that when computation of the valuation of the assets of the Corporate Debtor has been accepted by the competent authority basis which MSME registration certificate was issued by them, the Adjudicating Authority did not enjoy the jurisdiction to examine and review the computation at its own level and unilaterally revoke the certificate. Echoing the same argument, the Learned Counsel for the RP submitted that a similar view has been taken by this Tribunal in the matter of ***Amit Gupta versus Yogesh Gupta in CA(AT)(Ins)No93 of 2019*** vide which it was held that in the summary procedure under the IBC, the RP and Adjudicating Authority are not expected to go into accounts, investigations, enquiries and findings on whether or not a Corporate Debtor falls under the classification of MSME under Section 7 of MSME Act and related notifications issued thereunder.

8. It was contended that during the deliberations in the CoC, the Central Bank of India did not raise any objections on the MSME status of the SRA. However, only when the voting was undertaken on the resolution plan in the 26th CoC meeting that the Central Bank of India did not vote in favour of the plan of the SRA. The objection raised by the Central Bank of India at a belated stage is only an attempt to thwart the revival process of the Corporate Debtor.

9. It has been contended by the Learned Counsel for the RP that the Adjudicating Authority has ignored the fact that the Union Bank of India which had an overwhelming majority in the CoC had expressed its complete satisfaction with the registration of the Corporate Debtor as an MSME and had actively engaged in prolonged negotiation with them for stitching up the best possible resolution plan. The Central Bank of India which held only 22.44% vote share and therefore as a dissenting financial creditor it has to fall in line with the other creditors who have approved the resolution plan with majority voting. In support of their contention, it is submitted that the Hon'ble Supreme Court in ***Committee of Creditors of Essar Steel India Ltd versus Satish Kumar Gupta and others (2020) 8 SCC 531*** has held that it is the commercial wisdom of the CoC which operates to approve what is deemed by majority of such creditors to be the best resolution plan, which is finally accepted after negotiation of its terms by such COC with prospective resolution applicants. Therefore, the rejection by the Adjudicating Authority of the resolution plan of the SRA which had been recommended by the CoC in the exercise of its collective wisdom with 77.56% militates against the well settled law that the minority has to fall in line with the majority decision in the CoC.

10. Refuting the contentions made by the Appellants, the Learned Counsel for the Respondent/Central Bank of India submitted that it was important to correctly determine the MSME status of the SRA as it had significant implications in the context of Section 29A and 240A of IBC. It was submitted that the RP and the Chartered Engineer had wrongly

relied upon notification dated 05.10.2006 to exclude certain items and amounts while calculating the WDV of plant and machinery in ascertaining the MSME eligibility of the SRA. Under such circumstances, it was contended that the Adjudicating Authority was justified to make the proper calculations in terms of the new notification dated 01.06.2020 and arrive at the conclusion that the MSME registration certificate was obtained on the basis of calculation which took into account illegal and impermissible exclusions. Based on the calculations made by the Adjudicating Authority, the WDV of the plant and machinery of the Corporate Debtor worked out to be more than Rs. 50 crores and therefore the Corporate Debtor was ineligible to seek classification as MSME. Thus, the MSME status claimed by the SRA was rightly disregarded by the Adjudicating Authority.

11. It was also contended by Learned Counsel for the Respondent that the MSME registration was unauthorised since the RP neither informed nor sought prior approval of the CoC before obtaining the MSME registration which it was required to do under the provisions of IBC. No explanation has also been provided as to why an employee of the Corporate Debtor was made to apply for the MSME registration. It was also stressed that the CoC had repeatedly entertained doubts regarding the propriety of MSME registration as is seen from the proceedings of the 21st and 22nd CoC meetings. Moreover, as the Corporate Debtor was under shutdown with no cashflow and therefore not a going concern, the MSME certificate was obtained by SRA purely for own benefit to take-over the assets of the Corporate Debtor with a haircut of 71.90%

of the claims of the financial creditors and that this step did not pave way for maximisation of the value of assets. It was therefore contended that the Adjudicating Authority had rightly rejected the resolution plan of the SRA.

12. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

13. The first issue for consideration before us is the eligibility of the Corporate Debtor to submit a resolution plan in the present facts of the case when it has acquired a change in its status to that of an MSME after initiation of the CIRP proceedings.

14. Before we dwell into this issue, we may notice how the Adjudicating Authority has dealt with this issue and the relevant findings in the first impugned order are as extracted below:

*“29..... In this regard, this Tribunal draws attention towards certain observations made by Hon’ble NCLAT, Chennai Bench in its order dated 02.06.2023 in **Re Hari Babu Thota [Company Appeal (AT) (Ins) No. 110 of 2023:***

“2... ‘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’

***4.** 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.*

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. ‘Srikant Madanlal Zawar & Ors.’³, Wherein the Promoter of the ‘Corporate Debtor’ has 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 section 29A as observed by the Hon’ble Supreme Court, in a catena of Judgements, cannot be undermined”*

30. *In view of above, it is clear that obtainment of MSME Certificate by the Resolution Professional post the initiation of CIRP process, as was the case in the present matter, is unauthorised and therefore invalid.*

32. *Therefore, in view of the aforesaid Judgements and the observations of Hon’ble NCLAT in **Re Hari Babu Thota** (supra) in particular, the Tribunal holds that the Ex-Promoter/Director/Management of the Corporate Debtor cannot take advantage under the section 240A of the Insolvency & Bankruptcy Code, 2016 when the Corporate Debtor gets registered as MSME post the initiation of CIRP in conformity with the Notification No. SO 1702(E) dated 01.06.2020. This Tribunal is of the view that when a Company, not being a MSME, enters into CIRP process prior to 01.07.2020 i.e. the effective date as mentioned in the said notification, as is the case in the present matter, it cannot later on seek to claim the benefit under section 240A of the I&B Code by reason of subsequent status.”*

15. It has been contended by the Appellants that the above findings of the Adjudicating Authority do not stand the test of law anymore since it relied on the judgement of this Tribunal in **Hari Babu Thota** in **Company Appeal (AT) (Ins) No. 110 of 2023** which has since been

overruled by the Hon'ble Supreme Court in the matter of **Hari Babu Thota** in **Civil Appeal No. 4422 of 2023 (2024) 242 Comp Cas 1**

wherein it has held:

“20. *The submission is that while for some other aspects the initiation of the corporate insolvency proceedings would be the cut off date, the same would not apply in the case of Section 240A, in view of the statement of the Minister themselves while introducing the amendment Bill.*

21. *We are inclined to accept the aforesaid plea as it is quite obvious that while seeking to protect this category of industries, the disqualification is not to be incurred, especially in view of the “notwithstanding clause”.*

22. *We certainly can look to the statement of the Minister for purposes of a cut off date that “there is no other specific provision providing for cut off date” which submits that it should be the date of application of making a bid. Thus, to opine that it is the initiation of the corporate insolvency resolution process 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 Anandrao Pingle v. Shrikant Madanlal Zawar case by the Tribunal is not the correct position in law and the cut off date will be the date of submission of the resolution plan.”*

16. The law declared by the Hon'ble Supreme Court in above judgment is crystal clear in that not having MSME status at the time of commencement of the CIRP proceedings does not disqualify the Corporate Debtor from being a resolution applicant under Section 29A of the IBC as long as this status is attained well before the submission of the resolution plan. Applying the same yardstick to the present facts of the case, the MSME registration was obtained by the Corporate Debtor on 23.10.2020 which date preceded the date of resolution plan submission by SRA which was on 30.10.2020. Hence in terms of the **Hari Babu judgment**, the SRA was squarely entitled to submit the resolution plan by claiming MSME status and take advantage of Section

240A of IBC. The findings of the Adjudicating Authority being contrary to the settled law as contained in the aforesaid judgment of the Hon'ble Apex Court, we hold that it suffers from legal infirmities from this perspective.

17. The applicability of *Hari Babu* ratio in the present case has however been questioned by Learned Counsel for the Respondent on the ground that the facts are distinguishable, as unlike in the present facts of the case, there was no dispute regarding the calculation basis which MSME registration was obtained.

18. It is the case of Respondent that in terms of the new notification dated 26.06.2020 issued by the Ministry of MSME which expressly superseded the earlier notification of 05.10.2006, a new methodology for calculating the investment in plant and machinery had come into effect. Under the new notification, the definition of plant and machinery was given the same meaning as under the Income Tax Rules, 1962 and the calculation linked to Income Tax returns. Moreover, the number of items to be excluded for calculating the WDV under both notifications were different but this aspect had been misconstrued by the RP and SRA in calculating the investment in plant and machinery. It is also their case that the certificate issued by the Chartered Engineer is bereft of details on how the WDV figures were arrived at therein. It is contended that the exercise carried out by the Chartered Engineer is not substantiated by purchase orders/invoices etc and is based on random data which led to drastic reduction in valuation of plant and machinery.

Further as the subsequent Chartered Accountant's certificate also was not based on any independent valuation or investigation but premised on the faulty certificate of the Chartered Engineer and hence cannot be relied upon.

19. We notice that the Adjudicating Authority in the first impugned order has felt the necessity to look into the records relied upon by the RP and SRA to claim MSME status for the Corporate Debtor which is to the effect:

“15. The main issue arising out of the present case is whether the Corporate Debtor is an MSME in accordance with the Notification No. SO 1702(E) dated 01.06.2020. In this light, the Tribunal has to accentuate whether the records relied upon by the Respondents that enabled the Corporate Debtor to get itself registered as a MSME is tenable or not.”

20. The next question before us for our consideration is whether the Adjudicating Authority could have raised concern over the plausibility of the reports of the Chartered Engineer and other the valuation reports which had validated the MSME entitlement of the Corporate Debtor by going under the skin of the computation exercise conducted by them in rejecting the MSME status of the Corporate Debtor.

21. To answer the above question, it may be useful to have a cursory look on the broad working of the MSME registration process and whether there has been due compliance thereto given the facts of this case. That MSME registration is granted in terms of MSME Act is an undisputed fact. This Act provides for laying down of rules and regulations which determines the procedure to be followed for grant of

registration and revocation thereof. Registration under the MSME Act is done through an online portal where after the application is filed online with self -declaration of facts and figures, the competent authority examines the previous ITR and GST returns of the concerned entity to consider the eligibility and allow MSME registration. It is for the competent authority under MSME Act to examine and satisfy itself before granting registration.

22. The modality of MSME registration also provides the procedure for grievance redressal in case of any discrepancy as laid down in Clause 9(4) of the said revised notification which is to the effect:

“9. Facilitation and grievance redressal of enterprises.-

(4) In case of any discrepancy or complaint, the General manager of the District Industries Centre of the concerned District shall undertake an enquiry for verification of the details of Udyam Registration submitted by the enterprise and thereafter forward the matter with necessary remarks to the Director or Commissioner or Industry Secretary concerned of the State Government who after issuing a notice to the enterprise and after giving an opportunity to present its case and based on the findings, may amend the details or recommend to the Ministry of Micro, Small or Medium Enterprises, Government of India, for cancellation of the Udyam Registration Certificate.”

(Emphasis Supplied)

23. In the instant case, we notice that the MSME registration was done by the competent authority under MSME Act on 23.10.2020 which was subsequent to the date of MSME Notification of 26.06.2020. Hence the certificate prima-facie was issued on the basis of the new Notification. Also in the present case, admittedly, the application has been filed online and the registration was done online on the basis of

ITRs and hence there lies no case of any patent procedural violation or deviation from the normal practice. Any infirmity or defect in the MSME registration certificate could have therefore been corrected only by the competent authority or any other designated authority as specified in the notification.

24. The MSME Act as it stands clearly does not provide any supervisory role on the Adjudicating Authority to revise/modify/revoke/interfere with MSME registration at its level. Clearly the notification framed thereunder also does not bestow upon the Adjudicating Authority with any such authority to hold an MSME registration certificate to be null and void on its own. Even if Adjudicating Authority was suo motu convinced or persuaded to believe that there were errors in the calculation of the WDV in the grant of MSME status, to our minds, before embarking on any exercise of unilaterally undertaking calculation of the WDV at its own level, the Adjudicating Authority ought to have asked itself the question as whether the Parliament while framing the MSME Act intended to bestow any such authority on it. In the exercise of summary jurisdiction by the Adjudicating Authority under IBC, the Adjudicating Authority is not expected to go into details of accounts and examination of certificates issued by the competent authority under MSME Act and notification issued thereunder. The MSME registration can only be revoked by the competent authority and the Adjudicating Authority cannot arrogate this jurisdiction upon itself to modify/revise/revoke or interfere in any manner with the MSME registration granted by the competent

authority. We are of the considered opinion that the MSME status of the Corporate Debtor as granted by the competent authority continues to subsist and could not have been disregarded by the Adjudicating Authority unilaterally.

25. This brings us to the other principal finding of the Adjudicating Authority that CoC was not consulted before MSME registration of the Corporate Debtor which has been hotly contested. We notice that the Adjudicating Authority has also questioned the power of the RP under Section 25 of IBC to make any application for MSME registration. These concerns of the Adjudicating Authority have been articulated in para 29 of the first impugned order which is as reproduced below:

“29. Thus, it is clear that the role of Resolution Professional is limited to that stated in the code and that s/he has no authority to obtain MSME Certificate thereby changing the character of the Company and facilitating the Ex- promoter to gain backdoor entry in the insolvency proceedings. In this context, it is also pertinent to note here that in the present case, the committee of Creditors (CoC) was also not consulted before obtaining such certificate. The CoC was informed about the change in the status only after its effectivity. Upon perusal of the documents on record, it is observed that the CoC members were elaborated on the revised MSME criteria, that allowed the Ex-Promoter to participate in the CIRP process, only in the 13th CoC meeting dated 08.04.2021 whereas the certificate was obtained on 23.10.2020. Thus, it is evident that there was no approval given by the CoC as regards application for MSME certificate.....”

26. For better appreciation of this issue it may be constructive to note the minutes of the various CoC meetings wherein the MSME status of the Corporate Debtor was discussed to find out if the CoC was actually

unaware of the MSME registration aspect. The relevant minutes are as culled out below:

4th Meeting of the CoC held on 27.07.2020

Item No.: 5 – To discuss on the possibilities of utilization of assets of CD for generating cashflows-

“.....Suspended Director asserted that the CD is eligible to get registered under as a MSME, in line with the amended definition. RP stated that as a prerequisite, the CD has to complete the filing of FY2020 audited statements subsequent ITR filings to qualify for the MSME registration under amended definitions and guidelines.”

5th Meeting of the CoC held on 03.11.2020

Item No. 5: To take of the relevant updates on the Corporate Debtor

“RP apprised that the CD has received registration certificate under the provisions of MSME with UDYAM-MH-18-0020176 dated 23rd October 2020. CoC took note of the same.”

11th Meeting of the CoC held on 02.03.2021

List of matters discussed/noted.

“..... Hence, in the present case, Mr Ramesh Shah has submitted the EOI on time. If he is otherwise eligible then the point of time to determine his eligibility for the purpose of section 29A is the date of submission of the resolution plan. Since he has submitted the resolution plan on 30th October 2020, the Resolution Professional needs to determine his eligibility under section 29A as on 30th October 2020, the CD is a MSME. Thus, the provisions of clauses (c) and (h) of section 29A of IBC shall not apply to Mr. Ramesh Shah as on 30th October 2020 in respect of corporate insolvency resolution process of CD. The copy of the said legal opinion as shared with CoC.”

20th Meeting of the CoC held on 03.082021

Item No. 5 – To discuss on the Resolution Plans –

“.....Thereafter, regarding to the Resolution Plan of Mr. Ramesh Shah, ‘Resolution Professional’ stated that no

demonstrable source of fund is provided as per the provisions of RFRP, apart from this, the Resolution Plan is compliant with IBC. CoC took note of the same.

CoC requested Mr. Ramesh Shah to provide under affidavit the source of funding towards the Resolution Plan. CoC raised that the current Resolution Plan is lower in value as compared with his last Resolution Plan, which was not accepted by the CoC. CoC further asserted that Mr. Ramesh Shah should utilise this second opportunity and provide a serious plan with higher amounts and a 90 days payment schedule rather than 2 years, proposed in the plan. Accordingly, requested Mr. Ramesh Shah to submit his final resolution plan by 10th August 2021. Mr. Ramesh Shah took note of the same.”

21st Meeting of the CoC held on 18.08.2021

Item No. 5 – To discuss on the Revised Resolution Plans –

“.....Therefore, the CoC considered the revised resolution plan submitted by Mr. Ramesh Shah. Rep. of Union Bank of India (UBI) informed that their head office has to understand about the obtainment of MSME status for the CD during the CIRP period by ‘Resolution Professional’. ‘Resolution Professional’ pointed out the discussions which took place in the earlier CoC meetings, especially in the 11th & 13th CoC meeting, wherein the various legal pronouncements allowing the CD to get MSME registration during CIRP were discussed and the entire process & steps taken by RP for obtaining the MSME has also been laid down in line with latest rules & regulations. RP further stated that in the 16th CoC meeting held on 24th May 2021, the Rep. of UBI had confirmed that they have no objections regarding the eligibility of Mr. Ramesh Shah. CoC took note of the same.

Subsequently, the CoC observed that Mr. Ramesh Shah (RA) has increased the amount to Rs. 66.60 crores and reduced the payment period to 2 years. However, the CoC felt that the amount should be increased further, and the payment period should be reduced. Rep. of UBI stated that they are expecting a much higher amount in the Resolution Plan, since the RA, being the promoter of CD, is in a better position to turnaround the CD. Mr. Ramesh Shah stated that he needs to speak with his investor for committing any changes in the payment amount and period therein.”

22nd Meeting of CoC held on 26.08.2021

Item No. 5- To conclude the discussions and commence voting on the Final Resolution Plans

“.....After due deliberation, the COC requested Mr. Ramesh Shah to submit his Final Resolution Plan by Tuesday 31st August 2021. Rep. of UBI was also of the view that Mr. Ramesh Shah should not mix the issue of resolution plan of the CD and his personal guarantee. Mr. Ramesh Shah took the note of the same.”

Adjourned 22nd Meeting of CoC held on 08.09.2021

Item No. 5- Discussions on the Final Resolution Plans (Continued)-

“RP further stated that the MSME Certificate has been taken to allow the prospective resolution applicant (PRAs) to receive the inherent benefits made available by the government to such units which would only promote asset value maximization, Attractiveness towards CD, competition among PRAs and other benefits CD/ PRA might receive which would be beneficial to kick start the business operations of CD effectively and in shortest possible time. Under the provisions of IBC, it is the duty of RP to increase the value of assets of the CD and accordingly the same has been accomplished by registering the CD as MSME. However, the promoters becoming eligible to submit a resolution plan should not be seen in isolation. Just because the promoter would become eligible to submit a Resolution Plan, the RP cannot neglect his duty of value maximisation entrusted upon him under the code. Furthermore, the COC in its wisdom, can take appropriate decision on all the resolution plans.”

27. From a perusal of the above minutes recorded above, it is clear that the MSME issue was discussed in various CoC meetings including the 4th, 5th, 11th, 20th, 21st, and 22nd meetings. In the 4th CoC meeting, the CoC was duly informed that the Corporate Debtor had to complete filing of audited statements of accounts to qualify for MSME registration following which an employee made an online application and a certificate was granted on the same day. In the 5th COC meeting, the

COC had noted that Corporate Debtor had received registration certification and the resolution plan received from the Corporate Debtor was also discussed along with others. No objection was raised by any CoC member including the Central Bank of India. In the 11th CoC meeting also there were no discussions on the eligibility of Corporate Debtor for filing a resolution plan. In the 20th, 21st and 22nd CoC meetings, the eligibility of the Corporate Debtor with reference to Section 29 A of IBC was also discussed and it was agreed that they may submit their resolution plan for consideration of CoC. The contention of the Respondent that the RP was required to seek permission of the CoC under Section 28(h) of IBC does not carry much force since the CoC was all along kept apprised by the RP in this regard. More specifically the MSME valuation of the Corporate Debtor was discussed by the CoC in the 22nd and 23rd meetings and held that the Corporate Debtor had been correctly classified as MSME. The CoC had therefore clearly found the SRA to be eligible for MSME status and to submit a resolution plan. It is an undisputed fact that the application for MSME registration was made at the instance of RP. RP who is running the business of the Corporate Debtor is the best suited to take such a decision. We feel that the RP is entitled to make such applications as long as it is not inimical to the continued business operations of the Corporate Debtor.

28. In the present case, the CoC never passed any resolution questioning the registration of the Corporate Debtor as an MSME. During these deliberations in the CoC, we also find that the Central Bank of India did not raise any objections. Only when the voting was

undertaken in the 26th CoC meeting that the Central Bank of India did not vote in favour of the resolution plan of the SRA. We notice that in the 26th meeting of the COC, 77.56% vote was cast in favour of the resolution plan by the Union Bank of India, Omkara ARC, SREI and Ramuka. The only COC member which had voted against the resolution plan was the Central Bank of India with 22.4% vote share.

29. As regards the process of consideration and approval of resolution plan is concerned, the matter is essentially that of the commercial wisdom of the CoC and the scope of judicial review is strictly circumscribed within the boundaries of Section 30(2) of the IBC for the Adjudicating Authority. This discipline has been emphasised by the Hon'ble Supreme Court in several judgments and laid down that the powers of the Adjudicating Authority dealing with the resolution plan does not extend to examining the correctness or otherwise of the commercial wisdom exercised by the CoC and every dissatisfaction does not partake the character of a legal grievance and cannot become a ground of appeal.

30. It is a well settled proposition of law that the Adjudicating Authority cannot enter upon adjudicating into the merits of a business decision which has been taken by the CoC with requisite majority in its commercial wisdom as it has only been bestowed with limited jurisdiction in terms of the statutory framework of the IBC. The Hon'ble Apex Court has reiterated the primacy of the CoC's commercial wisdom on several occasions and restrained the Adjudicating Authority and the Appellate Tribunal from interfering with the resolution plan on merit.

31. The Hon'ble Supreme Court in the matter of **Kalparaj Dharamshi & Anr. v. Kotak Investment Advisors Ltd. & Anr. 2021**

10 SCC 401 has held as follows:

“164. It will be further relevant to refer to the following observations of this Court in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] : (SCC pp. 186-87, para 57)

57. ... Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. The provisions investing jurisdiction and authority in NCLT or Nclat as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order “approving a resolution plan” under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers “by the resolution professional” during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board. Significantly, the matters or grounds—be it under Section 30(2) or under Section 61(3) of the I&B Code—are regarding testing the validity of the “approved” resolution plan by CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by CoC in exercise of its business decision.”

165. *It will therefore be clear, that this Court, in unequivocal terms, held, that the appeal is a creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the*

commercial decision exercised by CoC of approving the resolution plan or rejecting the same.

166. *The position is clarified by the following observations in para 59 of the judgment in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222], which reads thus : (SCC p. 187)*

“59. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (Nclat) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors.”

167. *This Court in Essar Steel India Ltd. Committee of Creditors [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] after reproducing certain paragraphs in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] observed thus : (Essar Steel India case [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443], SCC p. 589, para 67)*

“67. ... Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the adjudicating authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222].”

168. *It can thus be seen, that this Court has clarified, that the limited judicial review, which is available, can in no circumstance trespass upon a business decision arrived at by the majority of CoC.”*

32. The Hon’ble Supreme Court in the judgement of **Ngaitlang Dhar vs Panna Pragati Infrastructure Pvt ltd in C.A. Nos 3665-3666 of**

2020 has also reiterated the paramountcy of the commercial wisdom of the CoC and in para 31, the following has been held:-

“31. It is trite law that ‘commercial wisdom’ of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the processes within the timelines prescribed by the IBC. It has been consistently held that it is not open to the Adjudicating Authority (the NCLT) or the Appellate Authority (the NCLAT) to take into consideration any other factor other than the one specified in Section 30(2) or Section 61(3) of the IBC.

It has been held that the opinion expressed by the CoC after due deliberations in the meetings through voting, as per voting shares, is the collective business decision and that the decision of the CoC’s ‘commercial wisdom’ is non justiciable, except on limited grounds as are available for challenge under Section 30(2) or Section 61(3) of the IBC. This position of law has been consistently reiterated in a catena of judgments of this Court, including:

- (i) K. Sashidhar v. Indian Overseas Bank and Others*
- (ii) Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta and Others,*
- (iii) Maharashtra Seamless Limited v. Padmanabhan Venkatesh and others,*
- (iv) Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another.*
- (v) Ghanashyam Mishra and Sons Private Limited Through the Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited Through the Director & Ors.”*

33. Collective action along with ‘timely resolution’ and ‘value maximisation’ is fundamental to the operational aspects of an insolvency regime. It is also well settled that the IBC places the CoC in control of the insolvency process and the CoC exercises its power of

decision making through the process of voting. Voting mechanism which is the instrument of decision making for the CoC has been coupled with specific threshold levels of voting share required for taking such decisions. The IBC prescribes a threshold of 66% for a decision in respect of approval of a resolution plan which has clearly been obtained in this case. CoC's decision with requisite voting share in relation to the resolution plan is sacrosanct and is binding on all stakeholders including the dissenting financial creditors. Finality and binding force of the resolution plan in accordance with the majority decision is well settled. That being the case we are not in a position to subscribe to the findings of the Adjudicating Authority in rejecting the resolution plan which has been recommended by the CoC with requisite majority.

34. In view of the foregoing discussions, we are of the view that the Adjudicating Authority committed gross error in rejecting the application for approval of the resolution plan of the SRA on the ground that the MSME registration was obtained after commencement of the insolvency proceedings and that the registration was wrongly obtained. Thus, we are of the considered view that both the impugned orders of the Adjudicating Authority are unsustainable. In result, we allow both the appeals and set aside the impugned orders passed by the Adjudicating Authority. We hold the SRA to be eligible to submit a resolution plan as an MSME. The Adjudicating Authority shall proceed to pass a fresh order in I.A. No. 2895/2021 filed by the RP praying for approval of the resolution plan along with necessary directions.

Adjudicating Authority shall endeavour to pass a fresh order within a period of three months from the date when copy of this order is produced before it. The Appeals are allowed accordingly. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

Place: New Delhi

Date: 29.02.2024

Ram N.