IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT – II

Item No. 1
(IB)-1048(ND)/2019
IA-2757/2021

IN THE MATTER OF:

Worldwide Metals Pvt. Ltd. ... Applicant/Petitioner

Versus

J.P. Engineers Pvt Ltd. ... Respondent

Under Section: 9 of IBC, 2016

Order delivered on 27.09.2021

CORAM:
SHRI. ABNI RANJAN KUMAR SINHA
HON'BLE MEMBER (J)

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

PRESENT:

ORDER

Order is pronounced in an open Court today.

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

Sd/-
(ABNI RANJAN KUMAR SINHA)
MEMBER (J)

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NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-II

IA. 2757/ND/2021
IN
Company Petition No. (IB)-1048(ND)/2019

IN THE MATTER OF:

World Wide Metals Pvt. Ltd. ...Operational Creditor

Versus

M/s J.P. Engineering Pvt. Ltd. ...Corporate Debtor

AND IN THE MATTER OF:

1. **Mr. Adiish Jaiin,**
   K-4/20, Model Town-II
   New Delhi-110009 ...Applicant No.1
2. **Mr. Mohinder Jaiin,**
   K-4/20, Model Town-II
   New Delhi-110009 ...Applicant No.2
3. **Mr. Anuj Goyal,**
   A-4/4, Paschim Vihar
   New Delhi-110009 ...Applicant No.3

Versus

1. **Mr. Vivek Raheja**
   Resolution Professional, J.P Engineering Pvt. Ltd.
   At: Ostrik Resolution Pvt. Ltd.
   908, 9th Floor, D Mall, Netaji Subhash Place,
   Pitampura, New Delhi-110034 ...Respondent No.1
2. **Committee of Creditors of J.P Engineering Pvt. Ltd.**
   Represented through Union Bank of India
   (Majority Stakeholder in the CoC)
   Through Sh. Rupesh Agarwal, Assistant Manager
   At: Stressed Asset Management Vertical
   M-93, Connaught Place,
   New Delhi-110034 ...Respondent No.2

Order Delivered on : 27.09.2021

SECTION: 60(5) of IBC 2016 Read with Rule 11 of NCLT Rules 2016

CORAM:

SH. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (J)

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

PRESENTS:

For the Applicant	:	Mr. Mohit Chaudhary, Advocate Ms. Garima Sharma, Advocate
For the Respondents	:	Mr. P.B.A. Srinivasan, Ms. P.S. Chandralekha. Advs. for UBI
For the RP	:	Mr. K.D. Sharma

ORDER

PER SHRI L. N. GUPTA, MEMBER (T)

The present I.A. No. 2757 of 2021 is preferred jointly by Mr. Adiish Jain, Mr. Mohinder Jain and Mr. Anuj Goyal (hereinafter referred to as **"Applicants"**) against Mr. Vivek Raheja, who is the RP of the Corporate Debtor namely, J.P Engineering Pvt. (**hereinafter referred to as RP/Respondent No.1)** under Section 60(5) of IBC, 2016 read with Rule 11 of NCLT Rules 2016**.**

2. That the Applicants have made the following prayers in the application under consideration :

"i*)* *That this Hon'ble Tribunal be pleased to direct the Resolution Professional and the CoC to accept the EOI of the Applicant(s) as Prospective Resolution Applicant under Section 240A IBC and include the Applicants in the Final List of Prospective Resolution Applicants; and/or*

ii*)* *That this Hon'ble Tribunal be pleased to direct the Resolution Professional and the CoC to consider the request for waiver/relaxation of Eligibility Criterion requirements of minimum Turnover of 25 Cr. for the Applicants; and/or*

iii) *That this Hon'ble Tribunal be pleased to direct the Resolution Professional and the CoC to otherwise permit the Applicant(s) to participate in the Resolution Process of J.P. Engineering Pvt. Ltd. So as to maximize the asset value of the Corporate Debtor; and/or*

iv) *pass any other directions upon the Respondents as deemed necessary in the interest of justice."*

3. To put succinctly, the facts of the case are that the Operational Creditor, M/s World Wide Metals Pvt. Ltd. had filed an application bearing no IB-1048(ND)/2019 under Section 9 of IBC 2016 for initiation of CIR Process against the Corporate Debtor M/s. J.P. Engineering Pvt. Ltd. That vide Order dated 26.02.2020, this Adjudicating Authority had initiated the CIR Process against the Corporate Debtor.

4. That the main grievance of the Applicants is that the IRP has rejected their EOI and has held the Applicants to be ineligible vide Provisional List of Prospective Resolution Applicants dated 10.06.2021 and thereafter, confirmed their exclusion in the Final List of Prospective Resolution Applicants vide email dated 24.06.2021 after rejecting the objections of the Applicants dated 15.06.2021. The Applicants are also seeking relaxation in the eligibility criteria of having a minimum turnover of Rs. 25 Crore for the Prospective Resolution Applicants.

5. That in order to support their contention, the Applicants have submitted the following:

(i) That the Expression of Interest in Form-G was published by Resolution Professional (RP) on 14.05.2021. As per the Process Memorandum, last date of receipt of Expressions of Interest was notified as 31.05.2021 and the last date for submission of

Resolution Plan was notified as 15.07.2021. The Applicant has also placed on record the Eligibility Criteria published for the Potential Resolution Applicants. The scanned copy of the same is reproduced below:

ANNEXURE A

ELIGIBILITY CRITERIA FOR POTENTIAL RESOLUTION APPLICANTS

1. **For Private/Public Limited Company/Limited Liability Partnership("LLP")/Body Corporate/ any other Potential Resolution Applicant:**

- Minimum Tangible Net Worth ("**TNW**")/ Net Owned Funds ("**NOF**") and Turnover of Indian Rupee ("**INR**") 5 Crore and 25 Crore respectively at the Group Level in the immediately preceding completed financial year as per the latest audited financial statements along with a declaration that the net worth has not eroded below the minimum eligibility criteria in the intervening period after date offinancial statements.
- TNW/NOF shall be computed as aggregate value of paid-up share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, and does not include reserves created out of revaluation of assets, write back ofdepreciation and amalgamation
- Group may comprise of entities either controlling or controlled by or under common control with the Potential Resolution Applicant. Control means at least 26% ownership.

2. **For Financial Institution/ Investment Company/ Fund House/ Private Equity ("PE") Investor/ Non-Banking Financial Company ("NBFC")/ Asset Reconstruction Company ("ARC"):**

- Minimum Assets Under Management ("**AUM**") of INR 100 Crore (5 crores as depicted by in the immediately preceding completed financial year*@; or
- Minimum committed funds ("**Committed Funds**") available for investment/ deployment inIndian companies or Indian assets of Rs. 100 Crore in the immediately preceding completed financial year*@, "Committed funds" mean that potential resolution applicant can demonstrate availability of liquid funds which can be immediately invested.
- ***@ as per latest audited financial statements along with declaration that the net worthhas not eroded below the minimum eligibility criteria in the intervening period after date of financial statements.**

3. **For Consortium Potential Resolution Applicant:**

- Consortium Potential Resolution Applicant must also satisfy eligibility criteria pertaining tominimum TNW/NOF/AUM/Committed Funds as applicable in addition to other conditions stipulated herein.
- In case the consortium is of Private/ Public Limited Companies/ LLPs/ Body Corporates / any other Potential Resolution Applicants, TNW/NOF and Turnover of the consortium shall be calculated as weighted average of individual member's TNW/NOF. Provided that only such portion of their TNW/NOF as is proportionate

Page 4

to their shareholding in the consortium will count towards the eligibility criteria of TNW/NOF.

- Number of Members of Consortium Potential Resolution Applicant must not, in any case, exceed 5 in number with share of the lead member of the consortium being not less than 26%.
- In case the consortium is of Financial Institutions/Investment Companies/ Fund Houses/ PE Investors/ NBFCs/ ARCs/ any other Potential Resolution Applicants, the minimum AUM ofconsortium shall be calculated as weighted average of individual member's AUM or Committed Funds available for investment/ deployment in Indian companies/Indian assets shall be calculated as weighted average of individual member's Committed Funds for investment/ deployment in Indian companies/Indian assets. Provided that only such portion of their AUM/ Committed Funds as is proportionate to their shareholding in the consortium will count towards the eligibility criteria of AUM/ Committed Funds.
- Incorporation of an Indian entity shall be mandatory to enter into definitive agreements postsubmission and approval of resolution plan.

4. Other Conditions:

- Further conditions/criteria including control, lock-in restrictions, other eligibility conditions and evaluation criteria for the resolution plans at the sole discretion of Committee of Creditors("CoC") may be stipulated in the documents which will be provided to Potential Resolution Applicants in due course
- Relevant experience in metal industry is desirable.
- Turnover of INR.100 Crore shall be considered on the basis of last Audited Accounts whichshould be for an year not earlier than 1 year from the date of Insolvency Commencement Date i.e., 26th February, 2020.
- Potential Resolution Applicant must be a fit and proper person not under any legal disabilityto be a promoter under the applicable laws
- Potential Resolution Applicant shall submit certified copies of financial statements, proof ofaddress, incorporation documents, copy of PAN card/ Tax identification number and documents certifying the above-mentioned criteria to be certified by Auditor/ Chartered Accountant Certificate for Private/ Public Limited Company/ LLP/ Body Corporate/ any other Potential Resolution Applicant; and Management Certificate for Financial Institution/ Investment Company/Fund House/PE Investor/NBFC/ARC. In case of consortium, each member of theconsortium has to submit these documents.
- Resolution Professional ("**RP**") may seek additional information from the Potential Resolution Applicants, if required, including as directed by the CoC

Potential Resolution Applicants are encouraged to submit their expressions of interest along with the documents satisfying the eligibility criteria and confidentiality undertaking (as per the format available on demand from RP's email ip.jpeng@gmail.com at the earliest to start receiving the information memorandum and other relevant information.

(ii) It is stated that as soon as the Applicants came to know about the invitation for expression of interest issued for the corporate debtor, the Applicants jointly submitted the EOI on 31.05.2021 along with refundable earnest deposited of Rs. 5 lacs.

(iii) It is submitted by the Applicants that during the aforesaid period, Union Bank of India (Member of CoC) issued the order dated 07.06.2021 passed by the Identification Committee classifying the Corporate Debtor M/s J.P. Engineering Pvt. Ltd. along with its Directors and Guarantors as Wilful Defaulters. The said order was communicated to the RP vide email dated 07.06.2021.

ANNEXURE-A3

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UNION BANK OF INDIA

Stressed Asset Management Vertical

M-93, Connaught Circus, New Delhi – 110001

Ref No. OR/DEL:SAMV/140/2021-22 Date: 07/06/2021

To:

M/s J.P. Engineers Pvt. Ltd Reg. Office: 3/8, 2nd Floor, SAB House, Asaf Ali Road, New Delhi -110002	Shri Mohinder Jain S/o Late Sh. Jatinder Nath Jain R/O K4-20, Model Town, New Delhi-110009
Shri Adiish Jain S/o Shri Mohinder Jain R/O K4-20, Model Town, New Delhi-110009	Mrs. Anita Jain W/o Shri Mohinder Jain R/O K4-20, Model Town, New Delhi-110009
M/s Siddhartha Holdings At: 3/8, 2nd Floor, SAB House, Asaf Ali Road, New Delhi -110002.	M/s Tantra Solutions AT: SH-1, 2nd Floor, Vardhman Grand Plaza, Sector-3, Rohini, New Delhi-110085
M/s Simla Holdings At: 3/8, 2nd Floor, SAB House, Asaf Ali Road, New Delhi -110002.	

Sir,

Sub.: M/s J P Engineers Pvt. Ltd – Classifying M/s J. P. Engineers Pvt. Ltd as Wilful defaulter by Identification Committee

Ref.: Central Office Lr. No. WD:IDC:Order:1109 dated 03.06.2021

***

With reference to captioned subject, copy of "order" passed by Identification Committee for Wilful Defaulter in its meeting held on 03.04.2021 the order passed as under -

This has reference to the credit facility sanctioned to you by erstwhile Andhra Bank now Union Bank of India. The committee observed that no satisfactory justification/ defense could be submitted by the borrower/ promoters/ whole time directors/ guarantors against Bank's wilful connotation.

Hence, the committee decided to classify the following as wilful defaulters based on the grounds mentioned in the show cause notice served to you earlier –

Borrower Company	M/s J. P. Engineers Pvt. Ltd
Prompters/ Directors	Mr. Mohinder Jain S/o Late Sh. Jatinder Nath Jain Mr. Adiish Jain S/o Mr. Mohinder Jain
Guarantors	Mrs. Anita Jain w/o Mr. Mohinder Jain M/s Siddhartha Holding M/s Tantra Solutions M/s Simla Holding

UNION BANK OF INDIA

Stressed Asset Management Vertical

M-93, Connaught Circus, New Delhi – 110001

In case you are not satisfied with the order of Identification Committee, you may prefer an appeal before the Review Committee against the said order within 15 days from the date of receipt of the order.

Regards,

07/06/2021

(Rajesh Tiwari)

Asst. General Manager

(iv) It is further submitted that vide email dated 08.06.2021, the RP communicated the detailed reasons for rejection of the EOI of the Applicants. Thereafter, emails were exchanged between the Applicants and RP regarding ineligibility of the applicants.

(v) It has been added that vide email dated 10.06.2021, the RP communicated the Provisional List of Prospective Resolution Applicants, to which the Applicants submitted objections vide their email dated 15.06.2021. The scanned copy of the same is reproduced overleaf :

To,
Mr. Vivek Raheja
Resolution Professional
J.P Engineers Private Limited

Objections to the exclusion of Joint Resolution Applications namely Mr. Adiish Jaiin, Mr. Mohinder Jaiin and Mr. Anuj Goyal from the list of Prospective Resolution Applicants dated 10.06.2021 in the matter of J.P Engineers Private Limited under Regulation 36A (11) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

Sir,

We have perused the abovementioned list of Prospective Resolution Applicants wherein you have excluded the joint applicants comprising of the undersigned on grounds of ineligibility. The reasons for exclusion/rejection have been brought to our attention vide your emails dated 08.06.2021 and 10.06.2021. We raise our objections as follows:

1. Re: MSME Classification:
   a) Corporate Debtor is not merely a trading concern but also a small manufacturing enterprise which is into the business of manufacturing/processing of basic precious and other non-ferrous metals including Aluminium. This is reflected in the Udyog Aadhaar Registration Certificate with UAM No. DL01B0007896. (Copy attached herewith)
   b) As per the MOA of the Corporate Debtor, the objects of the company include the business of manufacturing of ferrous and non-ferrous metals and tools/appliances related thereto, amongst other objects. It is incorrect to assume that the company is restricted to trading business.
   c) As per the revised notification for MSME classification dated 01.06.2020, read along with the Financial Statement of 2018-19 of the corporate Debtor, it is reflective that the corporate debtor has made an investment of Rs. 91.78 lacs in plant and machinery and also meets the turnover criteria required.
   d) As per Notification dated 30.07.2017, issued by the Ministry of MSME, it is the General Manager of the District Industries Centre of the concerned District, who is the competent authority to cancel the MSME Certificate. As a Resolution Professional, it is beyond the scope of your duties to go into the determination of the MSME status of the Corporate Debtor, particularly when a prima facie record of MSME Certificate is being brought to your attention. Your observation is based merely on conjectures and surmises, which is contrary to the spirit of the Code and your duty as a court officer.

2. Re: Eligibility Criteria under Section 25(2)(h) of the Code:
   a) No rationale has been provided for the strict and arbitrary eligibility criteria of having 25 Cr turnover to be eligible as Resolution Applicant
   b) When all conditions otherwise are fulfilled, COC is empowered to consider waiving the criteria of turnover, in appropriate cases. As RP you must propose the waiver request before the COC instead of unilaterally rejecting on such a ground.
   c) In any event, Assets of the Corporate Debtor ought to be deemed to be the assets of the Directors/Promoters, for the limited purpose of being Resolution Applicants as all the gains of the Directors/Promoters have always been invested into the Corporate Debtor prior to the CIRP.

d) Various Judgements & Orders have been passed by NCLT wherein, similar waivers and exemptions have been granted from time to time.

3. Re: Eligibility under Section 29A(b) of the Code:

a) Ineligibility on grounds of Show cause notice dated 12.04.2021 issued by ICICI Bank is unacceptable being an absolutely premature assumption of wilful defaulter status of Adish Jain and Mohinder Jain. Section 29A (b) does not get triggered in at the stage of issuance of Show cause notice.

b) Ineligibility on grounds of Order dated 03.06.2021 issued by the Union Bank of India declaring the promoters as wilful defaulters, is also a premature determination of wilful defaulter status. In it brought to your attention that as per clause 3(c) of the RBI Master Circular on Wilful Defaulters dated 01.07.2015, the wilful defaulter status becomes final only after it is confirmed by the Review Committee. Relevant Extract:

"The Order of the Committee should be reviewed by another Committee headed by the Chairman / Chairman & Managing Director or the Managing Director & Chief Executive Officer / CEOs and consisting, in addition, to two independent directors / non-executive directors of the bank and the Order shall become final only after it is confirmed by the said Review Committee."

c) Pursuant to the above, Review has been preferred by the Directors/Promoters of the Corporate Debtor on 15.06.2021 before the Review Committee. Copy of the Letter seeking Review is attached herewith. The matter is under consideration before the Review Committee. Till the matter is pending, the status of wilful default does not have finality and cannot constitute a ground for rejection/exclusion of the promoters.

Arguendo: Without prejudice to the above and assuming that, Mr. Adiish Jaiin and Mr. Mohinder Jaiin are not considered eligible for the abovementioned reasons, there is no plausible explanation coming forthwith as to why Mr. Anuj Goyal be not considered in his individual capacity, in segregation from the other two joint applicants, as proposed Resolution Applicant. Concern related to paucity of time, is not a reasonable ground for non-inclusion, particularly in the present circumstances when the RP is well aware that various unexpected developments have taken place after submission of EOI.

(vi) It is further added that the RP disposed of the objections and confirmed exclusion of the Applicants from the final list of Prospective Resolution Applicants vide email dated 24.06.2021. The scanned copy of the email dated 24.06.2021 is reproduced overleaf :

Gmail Anuj Goyal <anujgoyal1985@gmail.com>

Re: Provisional List of Prospective Resolution Applicants

RP of J.P.Engineers Pvt Ltd <ip.jpeng@gmail.com> Thu, Jun 24, 2021 at 10:56 AM
To: Mohinder Jaiin <mohinderjain2003@yahoo.com>, Adish Jaiin <adish.jain@smwmetal.in>, Anuj Goyal <anujgoyal1985@gmail.com>
Cc: Vivek Raheja <Vivek@vpgs.in>

Sir:

Your objections are already being dealt with in accordance with law. Further details may be availed from the perusal of the emails already sent to you. The emails already sent in this regard are as follows:

a. June 8, 2021 at 1:32 p.m.
b. June 10, 2021 at 1:16 p.m.
c. June 10, 2021 at 1:48 p.m.
d. June 14, 2021 at 5: 18 p.m.

We state, in reference to the point no. 2 of your objections, that the eligibility criteria is as per the discussion with the CoC members and its approval thereof in the 7th CoC meeting. Further, it is stated that the eligibility criteria was voted upon by the CoC members and was accordingly passed with majority votes.

Hence, your averment of eligibility criteria of being irrational and arbitrary is unfounded and bad in law.

On Tue, Jun 15, 2021 at 2:15 PM Mohinder Jaiin <mohinderjain2003@yahoo.com> wrote:

> Dear Sir,
>
> Please find attached our objections pertaining to your mail dated 10/06/2021.
>
> Thanks & Regards
>
> Mohinder Jaiin
> (Erstwhile Director of J.P. Engineers Pvt. Ltd.)
>
> On 10 Jun 2021 17:52, "RP of J.P.Engineers Pvt Ltd" <ip.jpeng@gmail.com> wrote:
>
> > Sirs:
> >
> > In terms of Regulation 36A(12) of IBBI(Insolvency Resolution Process for corporate persons) Regulations, 2016, please find attached the final list of Prospective Resolution Applicants (PRAs) of J. P. Engineers Private Limited.
> >
> > --
> > **Thanks and Regards**
> > **Vivek Raheja**
> > **Resolution Professional**
> > **IP Registration Number: IBBI/ IPA-001/ IP-P00055/2017-18/ 10133**
> > **JD- 2C, 2nd Floor. Pitampura, Delhi- 110034**
> > **Contact No. 9811065170**
> > ip.jpeng@gmail.com

--
Thanks and Regards
Vivek Raheja
Resolution Professional
IP Registration Number: IBBI/ IPA-001/ IP-P00055/2017-18/ 10133
JD- 2C, 2nd Floor. Pitampura, Delhi- 110034
Contact No. 9811065170
ip.jpeng@gmail.com

(vii) It is also submitted by the Applicants that the Corporate Debtor is a Small Enterprise processing/manufacturing basic precious and other non-ferrous metals as reflected in Udyog Aadhar Registration Certificate dated 27.09.2019, the scanned copy of which is reproduced overleaf :

भारत सरकार
Govt. of India
सूक्ष्म, लघु और मध्यम उद्यम मंत्रालय
MINISTRY OF MICRO, SMALL & MEDIUM ENTERPRISES

उद्योग आधार Udyog Aadhaar

MSME

B

Type of Enterprise	Micro	Small	Medium
Manufacturing	A	B	C
Services	D	E	F
UAM No.	DL01B0007896		

Udyog Aadhaar Registration Certificate

Udyog Aadhaar Number DL01B0007896

Name of Enterprise J.P. ENGINEERS PRIVATE LIMITED

Location of Plant Details

SN	Flat/Door/Block No.	Name of Premises/Building Village	Road/Street/ Lane	Area/Locality	City	Pin	State	District
1	Ground Floor 15/17	Lal Dora Village	Daulatpur	Shahbad	Delhi	110042	DELHI	NORTH WEST

Official Address of Enterprise 3/8,, SECOND FLOOR, ASAF ALI ROAD, CHANDNI CHOWK, DELHI

District CENTRAL State DELHI PIN 110002

Mobile No: 9810943327 Email: secretarial@smwmetal.com

Date of commencement 20/03/2014

Major Activity MANUFACTURING

Enterprise Type Small

Previous Registration details-if any ::

National Industry Classification Code

SN	NIC 2 Digit	NIC 4 Digit	NIC 5 Digit Code	Activity Type
1	24 - Manufacture of basic metals	2420 - Manufacture of basic precious and other non-ferrous metals	24202 - Manufacture of Aluminium from alumina and by other methods and products of aluminium and alloys	Manufacturing

Acknowledgement Date of Filing 27/09/2019 Date of Printing 27/09/2019

Disclaimer: This is computer generated statement, no signature required.

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(viii) That as regards to seeking relaxation in the eligibility criteria of having minimum turnover of Rs. 25 Crore, the Applicants have placed reliance on the Judgement dated 20.04.2021of the Hon'ble NCLAT in the matter of 'Sarvana Global Holdings Limited Vs. Bafna Pharmaceuticals Ltd.' in Company Appeal (AT) Insolvency No. 203/2019 and the Order dated 20.04.2021 passed by NCLT, Kochi Bench in IB No. 52/KOB/2019, wherein, it has been observed that "If the Corporate Debtor is an MSME, it is not necessary for the promoters to compete with other Resolution Applicants to regain control of the Corporate Debtor."

(ix) In regard to the declaration of the Applicants as Wilful Defaulter and barring them under Section 29A(b) of the IBC, 2016, it is submitted by the Applicants that as per clause 3(c) of the "RBI's Master Circular dated 01.07.2015 on Willful Defaulters", the Wilful Defaulter status becomes final only after it is confirmed by the Review Committee. The applicants have further argued that assets of the corporate debtor ought to be deemed to be the assets of the Directors/Promoters for the limited purpose of being Resolution applicants as all the gains of the Directors/Promoters have always been invested into the Corporate Debtor prior to the CIRP.

6. That during the course of hearing on 23.07.2021, the Ld. Counsel for the Union Bank of India (Majority Stakeholder in COC), Mr. P.B.A. Srinivasan submitted that vide order dated 07.06.2021 of the Union Bank of India Stressed Asset Management Vertical, New Delhi, the Applicants herein are classified and declared as Wilful Defaulters in terms of the order passed by the Identification Committee for wilful defaulters. On a query raised by this Bench, Mr. P.B.A. Srinivasan stated that the said order passed by the Identification Committee is valid till the same is challenged or reversed by the Review Committee.

7. Subsequently, during the hearing on 03.08.2021, it was brought to our knowledge by the Applicants through IA-3308/2021 that they, in the meantime, had approached the Hon'ble High Court of Delhi in a Writ Petition bearing no. W.P(.C) 6970/2021 & CM APPL NO. 20020/2021 titled as "Mohinder Jain & Anr. Vs Union Bank of India". The said writ Petition

was disposed of in terms of the submissions made by Ld. Counsel appearing on behalf of the Union Bank of India, Mr. P.B.A. Srinivasan. The relevant extracts of the order are reproduced below :

> *"3. Mr. P.B.A. Srinivasan, learned counsel who appears for Bank on advance notice, states that the Bank has never represented before any authority that the proceedings before the Review Committee have concluded. The only factual submission that the Bank has made is that the petitioners have been identified as wilful defaulters by the Identification Committee and the matter is pending before the Review Committee. Mr. Srinivasan further clarifies that the declaration of the petitioners as wilful defaulters under the Master Circular will take effect only if the order of the Identification Committee is confirmed by the Review Committee.*
>
> *4. In view of the aforesaid clarification, no further orders are required in this writ petition. The writ petition, alongwith the pending application, is disposed of, recording Mr. Srinivasan's submissions as above.*

8. In the light of the aforesaid submissions vide IA 3308/2021, the Applicants prayed for rehearing of the present Application which was heard on 03.08.2021 and rejected. However, the parties were given liberty to file additional written synopsis.

9. That the RP/Respondent No.1 has filed its reply to the present application and written submissions and disputed the status of the Corporate Debtor as MSME as well as reiterated that the Applicants continue to be wilful defaulters. The detailed objections filed by the RP are summarised below:

(i) That as regards to the claim of the Applicants of the Corporate Debtor being MSME, it is averred in the Reply by the RP :

> *"a) That Section 2(e) of the Micro, Small and Medium Enterprises Development Act, 2006 (the "Act") defines the word "enterprise" as "an industrial undertaking or a*

business concern or any other establishment by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (55 of 1951) or engaged in providing or rendering of any service or services.

b) That inasmuch as the Legislature has not given any technical or artificial meaning to the word "manufacture" used in the definition of "enterprise" in the Act, it may be of significance to refer to the dictionary meaning of the word "manufacture". Webster's New International Dictionary, Second Edition, Vol. II, gives the following meaning of the word "manufacture" :

> *"(a) The process or operation of making wares or any material products by hand, by machinery or by other agency, often such process or operation carried on systematically with division of labour and with the use of machinery;*
>
> *(b) Anything made from raw materials by hand, by machinery or by art;*
>
> *(c) The making of anything by any agency or process."*

ii) It is stated by the RP that the Balance Sheet of the Corporate Debtor as on 31st March 2020, depicts inventory of 'NIL' value. He has contended that the Corporate Debtor was never engaged in the business of manufacturing anything.

iii) That when, "Significant Accounting Policies & Notes to the Accounts" section of the audited Balance Sheet for the F.Y. 2019-20 of the Corporate Debtor is perused, the nature of business of the Corporate Debtor as reported by the Auditor is "Trading of Aluminium Ingot, Aluminium Billet and Aluminium Rod, etcetera".

iv) It is further stated by the RP that, to be eligible for MSME classification under Section 7 of the MSME Act, an industrial undertaking or a business concern or any other establishment must show itself to be an "enterprise" under Section 2(e) of the Act. He has submitted that being an "enterprise" is a condition precedent to the "classification as MSME". It is added that mere investment in Plant & Machinery cannot be taken or deemed to be the sufficient criterion for classifying an industrial undertaking or a business concern or any other establishment as 'MSME'.

v) As regards to the prayer for seeking relaxation in eligibility criteria of having minimum turnover of Rs. 25 Crore, it is averred by the RP :

> *"e. That in the 7th CoC meeting, while keeping into consideration the complexity of business (vide sub-para c above) and scale of operation (vide sub-para d above), the CoC, in its commercial wisdom, had fixed the eligibility criteria as A) Net worth: ₹5 crores, and B) Turnover: ₹25 crores. The eligibility criteria [Item No. 11 and Resolution No. 4] was placed for e-voting, wherein 93.46% votes were cast in favour of the Resolution."*

vi) That in order to support its contention, the RP has placed emphasis on the Judgement of Hon'ble Supreme Court in the matter of K. Sashidhar v. Indian Overseas Bank & Ors. [Civil Appeal No. 10673 of 2018], which upheld the supremacy of the commercial wisdom of COC.

vii) It is added by the RP that the reliance placed by the Applicants on the Judgment of Hon'ble NCLAT in Sarvana Global Holdings Ltd. & Anr. v. Bafna Pharmaceuticals Ltd. & Ors. [Company Appeal (AT) (INS) No. 203 of 2019] is misplaced inasmuch as the said judgment is distinguishable on the facts and merits of the case. He has stated that in the matter of Sarvana Global Holdings Ltd. & Anr. v. Bafna Pharmaceuticals Ltd. & Ors., the Hon'ble Appellate Authority was dealing with a case where the 3rd Respondent's (corporate debtor being MSME) Resolution Plan was approved by the CoC without giving an opportunity to the Appellants. The judgment does not even bleakly whisper that the eligibility criteria as decided by RP with approval of CoC, as per the requirements of Section 25(2)(h) can be relaxed for the promotors of a corporate debtor who are classified as MSME.

viii) It is further added that the Hon'ble Appellate Authority, in Para 19 of the said judgment, records that eligibility under Section 29A is a prerequisite for the consideration of a Resolution plan. Further, it holds in Para 22 of the Judgment that:

> *"... in exceptional circumstances, if the 'Corporate Debtor' is MSME, it is not necessary for the Promotors to compete with other 'Resolution Applicants' to regain the control of the 'Corporate Debtor'.*

It is stated that only in exceptional circumstances, the promoters of corporate debtor being MSME, can be permitted to not compete with other Resolution Applicants and it cannot be taken as the strait jacket rule.

ix) As regard to the status of Applicants as 'Wilful Defaulters' and the order of Hon'ble High Court of Delhi passed in the matter of W.P. (C) 6970/2021- the following is submitted by the RP in its additional written Synopsis :

> *"1. The order dated 26.07.2021, passed in the aforesaid writ has only recorded the submissions made by the Union Bank of India (Respondent therein);*
>
> *2. The order dated 26.07.2021, passed in the aforesaid writ, has not been passed on merits after considering the facts of the case as set out by the Applicants in I.A. 2757 of 2021, sub-judice before this Hon'ble Adjudicating Authority;*
>
> *3. The order dated 26.07.2021, passed in the a foresaid writ, has not stayed the order (WD: IDC: ORDER: 1109) dated 03.07.2021, passed by the Identification Committee for Wilful Defaulter of the Union Bank of India; and*
>
> *4. The Hon'ble Writ Court has not tested the applicability of the Master Circular on Wilful Defaulters, issued by the Reserve Bank of India (the 'Master Circular'), on the anvil of Section 29A(b) of the Insolvency and Bankruptcy Code, 2016 (the "Code")."*

x) As regards to the para 3 of the Master Circular of RBI dated 01.07.2015 on Willful Defaulters, the following is averred by the RP sub clause-wise :

Sub-clause of clause 3	Language of the Master Circular used in Clause 3 thereof	Our submissions
	its promoter/whole-time director at the relevant time should be examined by a Committee headed by an Executive Director or equivalent and consisting of two other senior officers of the rank of GM/DGM.	must "*examine*" the evidence of wilful default of a borrower before proceeding to sub-clause (b). Clause 3(b) comes at the stage of completion of examination of the available evidence whereupon the committee may or may not conclude that an event of default has occurred. If it does, only then will it take steps for issuing a Show Cause Notice under the said clause. Further, after considering the submissions of the concerned borrower, it shall issue an order.
(b)	If the Committee concludes that an event of wilful default has occurred, it shall issue a Show Cause Notice to the concerned borrower and the promoter/whole-time director and call for their submissions and after considering their submissions issue an order recording the fact of wilful default and the reasons for the same. An opportunity should be given to the borrower and the promoter/whole-time director for a personal hearing if the Committee feels such an opportunity is necessary.	

(c)	The <u>Order of the Committee</u> should be reviewed by another Committee headed by the Chairman / Chairman and Manging Director or the Managing Director & Chief Executive Officer/CEOs and consisting, in addition, to two independent directors/non-independent directors of the Bank and the Order shall become final only after it is confirmed by the said Review Committee. However, if identification	The opening words of clause 3(c) of the Master Circular are "The Order of the Committee", which prove beyond a reasonable doubt that the order of the committee has the strength of law. If the committee after examination of the available evidence, and after having issued a Show Cause Notice, and after having given a fair opportunity of hearing to the concerned borrower has come to a conclusion that the concerned borrower has committed a default then it shall issue an order to that effect. The master circular nowhere states that the

Sub-clause of clause 3	**Language of the Master Circular used in Clause 3 thereof**	**Our submissions**
	committee does not <u>pass an Order declaring a borrower as a wilful defaulter</u>, then the Review Committee <u>need not</u> be set up to review such decisions.	order of the committee under clause 3(b) shall be vitiated under the shadow of clause 3(c) of the Master circular. Moreover when Clause 3(c) is perused in deeper details, it clearly states that if identification committee does not pass <u>**an order declaring a borrower as a wilful defaulter**</u>, then the Review Committee need not be set up to review such decisions. **It means that the order of identification committee is the order whereby a borrower is declared a wilful defaulter.**

xi) The RP has further argued that the Clause 3 of the Master Circular should be read in stages for the purposes of Section 29A(b) of the Code and it cannot be construed to mean that order of the Identification Committee is without an administrative strength inasmuch as sub-clause (c) to clause 3 of the Master Circular is not a non-obstante clause. In other words, sub-clause (c) of clause 3 of the Master Circular does not override sub-clauses (a) and (b) thereto.

xii) It is further added that Section 29A(b) of the Code starts with the expression, "is a wilful defaulter", which is the mandate 'in affirmative' and 'without exceptions'. It is followed by the expression "in accordance with", which clearly means that if a person has been declared as a wilful defaulter at the stage of order of the Identification Committee, the said person is a wilful defaulter for the purposes of Section 29A(b) of the Code, notwithstanding the order of the Review Committee

xiii) It is also submitted by the RP that the Applicants have challenged the order of the Identification Committee before the Review Committee only on 15th June 2021 i.e., subsequent to the date of issue of List of PRAs on 10.06.2021.

11. After hearing submissions of both the Parties, perusing reply, documents and additional written synopsis placed on record, we observe that the major grounds of rejection of the EOI of the applicants by the RP are certain reservations about the MSME status of the Corporate Debtor and declaration of the Applicants as Wilful defaulter by the Identification Committee of the Union Bank of India, thus rendering them ineligible

under section 29A(b) of IBC. Additionally, the RP has stated that the Applicants have also not met the eligibility criteria.

12. As regards the reservation of RP regarding the MSME status of the Applicants/Corporate Debtor, we observe that though the Applicants have furnished the online generated Udyog Aadhar Certificate, it is a matter of fact which can be ascertained by the Resolution Professional. We are not inclined to interfere or investigate into the status of the Applicants, since it is a fact which can be verified by the RP from the Director of Industries of the State concerned, where the enterprise is said to have been located.

13. As regards the Wilful Defaulter status of the Applicants, on the one hand, the Ld. Counsel for the Union Bank of India (majority stakeholders in CoC) during the hearing on 14.07.2021 submitted that the Applicants are classified as wilful defaulters in terms of order of the Identification Committee and the order passed by the Identification Committee is valid till the same is challenged or reversed by the Review Committee, on the other hand in the submissions made before the Hon'ble High Court of Delhi, the Ld. Counsel for the Union Bank of India submitted that the status of the Applicants as wilful defaulter will take effect only if the order of Identification Committee is confirmed by the Review Committee. As regards the second prayer regarding relaxation in the eligibility criterion of having a minimum Turnover of Rs. 25 Crore for submission of an EOI, it has been submitted by the Resolution Professional that the same has been set by the CoC by passing a resolution in its 7th Meeting held on 03.04.2021 by 93.46% voting share.

14. Hence, the issues which remains for our adjudication are –

I. *"Whether the issue regarding status (i.e., declaration /classification) of Applicants as 'Wilful Defaulters' be Adjudicated by this Authority under Section 60 of IBC read with Rule 11 of the NCLT rules, 2016 and whether RP could be directed to accept the EOI as PRA of the Applicants under section 240A of IBC ?"*

II. "Whether this Adjudicating Authority can *waive / relax the Eligibility Criterion of having a minimum Turnover of 25 Crore for the Applicants fixed by the COC ?."*

15. That here, it is worthwhile to refer to the Judgement dated 08.05.2019 passed in the matter of **State Bank of India Vs M/S. Jah Developers Pvt. Ltd. & Ors. Civil Appeal no. 4776 of 2019,** wherein the Hon'ble Supreme Court held that both the Identification and Review Committees as referred to in the Master Circular of RBI cannot be considered as Judicial Bodies. The relevant extracts of the Judgement are reproduced below -

> *"12..... Applying the aforesaid tests to the facts of the present case, it cannot be possibly said that either in-house committee appointed under the Revised Circular dated 01.07.2015 is vested with the judicial power of the State. The impugned judgment's conclusion that such Circulars have statutory force, as a result of which the State's judicial power has been vested in the two committees, is wholly incorrect. First and foremost, the State's judicial power, as understood by several judgments of this Court, is the power to decide a lis between the parties after gathering evidence and applying the law, as a result of which, a binding decision is then reached. This is far from the present case as the in-house committees are not vested with any judicial*

> *power at all, their powers being administrative powers given to in house committees to gather facts and then arrive at a result. Secondly, it cannot be said that the Circulars in any manner vests the State's judicial power in such in-house committees. On this ground, therefore, the view of Delhi High Court is not correct, and no lawyer has any right under Section 30 of the Advocates Act to appear before the in-house committees so mentioned. Further, the said committees are also not persons legally authorised to take evidence by statute or subordinate legislation, and on this score also, no lawyer would have any right under Section 30 of the Advocates Act to appear before the same."*

16. From the aforesaid Judgement, it is observed that none of the two Committees (i.e., *the Identification Committee* and the *Review Committee)* appointed under the Revised Circular dated 01.07.2015 are vested with Judicial Powers. Evidently, both the Committees are internal bodies of a Bank and the decision to declare a person as 'wilful defaulter' is the decision of these in-house/administrative committees.

17. Further, it is observed that these In-house Committees are required to work as per the framework and guidelines issued by the RBI. Neither the constitution or their working or decision-making power of these Committees is governed by the IBC, 2016 nor the Code empowers this Adjudicating Authority to Adjudicate upon any dispute relating to or legality of the decision of declaring/classifying a person(s) as wilful defaulter arrived at by these In-house committees.

18. That under Section 29A(b) of IBC 2016, the only thing which this Adjudicating Authority is required to see whether a person is a 'wilful defaulter' in accordance with the guidelines of the Reserve Bank of India

issued under the Banking Regulation Act, 1949. The IBC nowhere empowers this Adjudicating Authority to adjudicate upon any dispute regarding declaration of a person(s) as Wilful Defaulter.

19. That from the order of the Identification Committee dated 07.06.2021 of the Union Bank of India as quoted in para 5(iii) supra, we observe that besides the Applicants/Promoters, the borrower Company/Corporate Debtor i.e., M/s/ J.P. Engineering Pvt. Ltd. has also been classified as the Wilful Defaulter. With the commencement of CIRP, RP is in the control and management of the Corporate Debtor, who has neither challenged nor filed any application challenging the status of the Corporate Debtor as wilful defaulter. Therefore, in our considered view, the dispute with regard to classification of wilful defaulters essentially lies between the Applicants and Union Bank of India, and certainly, it is not arising out of the CIR Process of the Corporate Debtor.

20. Here, since the present Application has been preferred under Section 60(5) of IBC 2016 read with Rule 11 of NCLT Rules 2016, it is worthwhile to refer to the recent decision dated 08.03.2021of the Hon'ble Supreme Court in the matter of Gujarat Urja Vikas Nagar Nigam Limited Versus Amit Gupta & Ors. in Civil Appeal Number 9241 of 2019, wherein it has been clearly laid down that NCLT cannot exercise its jurisdiction over matters dehors the Insolvency Proceedings. The relevant extracts of the Judgement are reproduced below :

> "*87 The residuary jurisdiction of the NCLT under Section 60(5)(c) of the IBC provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. If the*

jurisdiction of the NCLT were to be confined to actions prohibited by Section 14 of the IBC, there would have been no requirement for the legislature to enact Section 60(5)(c) of the IBC. Section 60(5)(c) would be rendered otiose if Section 14 is held to be the exhaustive of the grounds of judicial intervention contemplated under the IBC in matters of preserving the value of the corporate debtor and its status as a 'going concern'. We hasten to add that our finding on the validity of the exercise of residuary power by the NCLT is premised on the facts of this case. We are not laying down a general principle on the contours of the exercise of residuary power by the NCLT. ***<u>However, it is pertinent to mention that the NCLT cannot exercise its jurisdiction over matters dehors the insolvency proceedings since such matters would fall outside the realm of IBC</u>****. Any other interpretation of Section 60(5)(c) would be in contradiction of the holding of this Court in Satish Kumar Gupta (supra). "*

(Emphasis Supplied)

21. As regards the prayer of directing the RP to accept the EOI as PRA of the Applicants under section 240A of IBC, it is necessary to refer to the contents of Section 240A.(1) of IBC, 2016, which are reproduced below-

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

From the above, it is observed that the issue relating to Section 29A.(b) is beyond the purview of Section 240A of IBC, 2016.

22. The **Second issue** which requires our consideration is "Whether this Adjudicating Authority can/should *waive/relax the Eligibility Criterion of having a minimum Turnover of 25 Crore for the Applicants ?"*

23. That the Applicants have relied upon the Judgement of the Hon'ble NCLAT in 'Sarvana Global Holdings Limited Vs. Bafna Pharmaceuticals Ltd.' [Company Appeal (AT) Insolvency No. 203/2019] and Order dated 20.04.2021 passed by NCLT, Kochi Bench in IBA No. 52/KOB/2019, wherein, it has been observed that "If the Corporate Debtor is an MSME, it is not necessary for the promoters to compete with other Resolution Applicants to regain control of the Corporate Debtor." Per contra, the Resolution Professional has stated that the aforesaid Judgment has not dealt with the issue of relaxing the criteria. He further stated that it is also held in the aforesaid Judgement that in exceptional circumstances, if the 'Corporate Debtor' is an MSME, it is not necessary for the Promotors to compete with other 'Resolution Applicants' to regain the control of the 'Corporate Debtor.

24. We notice that the Resolution for setting the Eligibility Criteria in terms of turnover, net worth etc for submitting the Expression of Interest has been passed by the CoC in its wisdom in the 7th Meeting with 93.46% voting share. In our considered view, setting of the criteria in terms of Turnover and Net Worth for inviting Expressions of Interest is a Commercial decision of the CoC, which is applicable to all and is *in rem.* Therefore, in our view, a preference cannot be given by this Adjudicating

Authority to the applicants over all other proposed or such Applicants, who could not apply because of the eligibility criteria duly notified.

25. That from the Provisional List of the Prospective Resolution Applicants (PRAs) published by the RP, we notice that in the present case, there are 02 other Prospective Resolution Applicants, who have fulfilled the eligibility criteria. The scanned copy of the Provisional List of Prospective Resolution Applicants (PRAs) is reproduced below :

J. P. ENGINEERS PRIVATE LIMITED

Provisional List of Prospective Resolution Applicants (PRAs)

In respect of Form G dated 18th April 2021 bearing 03rd May 2021 as the last date of submission of Expression of Interest (EOI), and subsequent republication whereof vide Form G dated 14th May 2021 whereby the last date of submission of EOI was extended till 31st May 2021, the Resolution Professional has received EOIs from interested parties in accordance with IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The list of PRAs who had participated in the Corporate Insolvency Resolution Process of J.P. Engineers Private Limited (along with the results) is tabulated as under:

S. No.	Name of the Prospective Resolution Applicants (PRAs)	Eligible/ Ineligible
1.	RKG Fund- I (A scheme of RKG Trust) (Managed by RKG Asset Management LLP)	Eligible
2.	M/s Green Overseas	Eligible
3.	Joint Resolution Applicants namely Mr. Adiish Jain, Mr. Mohinder Jain and Mr. Anuj Goyal	Ineligible

Note A: The list of PRAs has been issued in accordance with the provisions of Regulation 36A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

Note B: The Prospective Resolution Applicants as stated above can raise the objections within 5 days from the date of issue of provisional list i.e., by 15th ~~May~~ 2021 by sending an email on ip.jpeng@gmail.com and vivek@vpgs.in. After considering the objections, if any, received by the resolution professional, final list of Prospective Resolution Applicants (PRAs) will be issued within 10 days of the last date of receiving of the objections.

26. Hence, it is not the case of ‘no’ or ‘single’ Prospective Resolution Applicant (PRA) for resolution of the Corporate Debtor. As evident from the List (Supra), there are 02 PRAs for competition/maximizing the value of assets during the process of resolution. Therefore, no exceptional circumstances have been made out, for which the criteria notified and already acted upon by the COC shall be tinkered.

27. We also notice that the Applicants who seems to be keen to regain the control and the management of the Corporate Debtor by seeking relaxations such as above have not explored at any stage post-formation of COC, the ‘exit route’ available under Section 12(A) of IBC, 2016.

28. In sequel to the discussion above, we do not find any merit in the Application. **The IA-2757/ND/2021 is Dismissed, being devoid of merits.**

Sd/-	**Sd/-**
(L. N. Gupta) **Member (T)**	**(Abni Ranjan Kumar Sinha)** **Member (J)**