

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**MUMBAI BENCH COURT III**

**I.A. 317/2022**

**In**

**C.P. No. (IB) 126/MB/C-III/2019**

Under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016

Filed by

**Central Bank of India** )  
Having its registered office at: )  
Stressed Asset Management )  
Branch-II, Chandramukhi )  
(Ground Floor), Nariman Point )  
Mumbai - 400021 ) *... Applicant*

**Vs**

**1. Mr. Nandkishore Despande** )  
(Resolution Professional of )  
ETCO Denim Pvt. Ltd.) )  
Having office at: )  
708, Raheja Centre, Nariman ) *... RP /*  
Point, Mumbai – 400021 ) *Respondent No.1*

**2. Mr. Ramesh Shah** )  
In consortium with Masitia )  
Capital Services Pvt. Ltd. )  
(Resolution Applicant) )  
Having office at: )  
S-13 & S-14, 2<sup>nd</sup> Floor, Pinnacle )  
Business Park, Shanti Nagar, )  
MIDC, Mahakali Caves Road, ) *... Ex-Promoter /*  
Andheri (E), Mumbai – 400093 ) *Respondent No.2*

IN THE MATTER OF

**Mahakali Fuel Pvt. Ltd.**

*... Petitioner/Operational Creditor*

Vs

**ETCO Denim Pvt. Ltd.**

*... Respondent/Corporate Debtor*

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**Order pronounced on: 8<sup>th</sup> December 2023**

**Coram:**

Hon'ble Ms. Lakshmi Gurung, Member (Judicial)

Hon'ble Sh. Charanjeet Singh Gulati (Technical)

**Appearances:**

*For the Applicant:* Adv. Akanksha Hambir

*For the Respondent:* Mr. Shyam Kapadia a/w. Mr. Ayush Rajani, Ms. Khooshbu Shah Rajani, Ms. Mitali Bhatt, Ms. Priyank Jadav

**Per: Shri. Charanjeet Singh Gulati, Member (Technical)**

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**ORDER**

1. The above I.A. is filed by the Applicant, Central Bank of India, under section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 ("the Code"), seeking following reliefs:
  - a) *Declare that the CD is not an MSME Company eligible under Section 240A of the Bankruptcy Code;*
  - b) *The Approval of the Resolution Plan submitted by Respondent No. 2 be stayed with immediate effect;*
  - c) *(i) Extend the CIRP process appointing a new RP in place of Mr. Nandkishore Deshpande and to invite for a fresh Resolution Plan by extending the CIRP period;  
or in the alternate*

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*(ii) Direct the CD to be liquidated under the Bankruptcy Code as the CIRP process is already over with liberty extended to the Applicant to appoint Liquidator of their own choice;*

*d) Any other order as this Hon'ble Tribunal may deem fit and proper.*

**Facts of the Case, in brief:**

2. This Tribunal vide order dated 14.02.2020, admitted a Company Petition filed under Section 9 of the Code by Mahakali Fuel Private Limited (Operational Creditor) and Corporate Insolvency Resolution Process (CIRP) was initiated against ETCO Denim Private Limited (Corporate Debtor). Pursuant to this order, Mr. Swapnil Mukund Agarwal was appointed as Interim Resolution Professional (IRP) who was later on replaced by Mr. Nandkishore Deshpande ("RP" / "Respondent No. 1").

2.1 The Resolution Professional prepared the Information Memorandum dated 28.09.2021. According to the Information Memorandum, the following claims have been admitted against the Corporate Debtor:

| <b>Sr. No.</b> | <b>Description</b>              | <b>Amount Claimed (Rs. in crore)</b> | <b>Claim Admitted (Rs. in crore)</b> |
|----------------|---------------------------------|--------------------------------------|--------------------------------------|
| 1              | Financial Creditors (Secured)   | 409.95                               | 360.47                               |
| 2              | Financial Creditors (Unsecured) | 11.80                                | 4.99                                 |
| 3              | Operational Creditors           | 37.75                                | 33.11                                |
| 4              | Workmen & Employees             | Nil                                  | Nil                                  |
| 5              | Other Creditors                 | Nil                                  | Nil                                  |
|                | <b>Total Claims</b>             | <b>456.19</b>                        | <b>398.57</b>                        |

2.2 When the CIRP of Corporate Debtor was in action, the Government of India had issued Notification dated 01.06.2020 whereby the classifications/definitions of MSMEs were re-classified as follows:

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| <b>Classification</b>   | <b>Micro</b>   | <b>Small</b>  | <b>Medium</b>  |
|---|--|---|--|
| <b>Manufacturing Enterprises and Enterprises rendering Services</b> | <i>Investment in Plant and Machinery or Equipment: Not more than <b>Rs. 1 crore</b> and Annual Turnover; not more than <b>Rs. 5 crores</b></i> | <i>Investment in Plant and Machinery or Equipment: Not more than <b>Rs. 10 crores</b> and Annual Turnover; not more than <b>Rs. 50 crores</b></i> | <i>Investment in Plant and Machinery or Equipment: Not more than <b>Rs. 50 crores</b> and Annual Turnover; not more than <b>Rs. 250 crores</b></i> |

2.3 Subsequent to the above notification, the Corporate Debtor got registered as MSME on the ground that it falls under the category of medium enterprise as per the amended criteria of MSME. The application was submitted on 23.10.2020 and the certificate was received on the same date i.e. 23.10.2020.

2.4 Pursuant to the receipt of MSME Certificate, the Ex-Promoter of the Corporate Debtor, Mr. Ramesh Shah in consortium with Masitia Capital Services Pvt. Ltd. (Respondent No. 2) submitted a Resolution Plan which was approved by the CoC in the 26<sup>th</sup> meeting held on 17.11.2021.

2.5 The dissenting financial creditor has filed this Interlocutory Application bearing no. 317 of 2022 challenging the eligibility of the Ex-Promoter as Successful Resolution Applicant while also opposing the Resolution Plan submitted by the Ex-Promoter on certain grounds.

**Submissions of the Applicant, in brief:**

3. The Applicant submits that after the issuance of the Information Memorandum, the Promoter of the Corporate Debtor, Mr. Ramesh Shah (Respondent No. 2), in consortium with one Masitia Capital Services Pvt. Ltd. has submitted a Resolution Plan based on Section 240A of the Code that after the obtainment of MSME certificate they are not disqualified

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under section 29A of the Code as per the recent amendment made on MSME Companies.

3.1 The payment proposed to be made under the Resolution Plan is as follows:

| <b>Sr. No.</b> | <b>Particulars</b>  | <b>Amount (in Rupees)</b> |
|----------------|---|---------------------------|
| 1              | <i>Payment of CIRP Costs</i>  | 50,00,000                 |
| 2              | <i>Payments toward claims of Financial Creditors (including Equity Shares of Rs. 5 Crores of Corporate debtor to be issued to Financial Creditors as per Clause 7.1(h) of this Resolution Plan)</i> | 105,06,00,000             |
| 3              | <i>Payments towards claims of Operational Creditors</i>   | 50,00,000                 |
| 4              | <i>Payments towards claims of Workmen and employees</i>   | 56,53,000                 |
| 5              | <i>Payment towards any other debts</i>  | 0.00                      |
| 6              | <i>Plant starting operations</i>  | 11,01,00,000              |
| 7              | <i>Working Capital Contribution</i>   | 21,01,00,000              |
| 8              | <i>Capex for Finishing Equipments, Electricals, Pollution Control etc.</i>  | 20,00,00,000              |
|                | <b>Total Capital Outlay under this Resolution Plan</b>  | <b>158,64,53,000</b>      |

3.2 It is submitted that Masitia Capital Services is a Private Ltd Company and is involved in activities auxiliary to financial intermediation except insurance and pension funding. The Directors of the said Company are Mr. Ramesh Dahyahal Shah (Promoter/Director of CD herein) and one Mr. Gajendra Bhupendra Sartanpara. Though it is shown on record that the Promoter/Director of CD is joining hands with some other Company to submit the Resolution Plan, in reality, the Promoter/Director of the CD is active participant inter alia the Promoter/Director in the other Company viz. Masitia Capital Services Pvt. Ltd. which is shown in consultation with Promoter Director to stand as Resolution Applicant herein to restructure the Corporate Debtor.

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- 3.3 In the 13<sup>th</sup> CoC meeting dated 06.04.2021, it is mentioned that the discussions were made regarding the eligibility of Mr. Ramesh Shah – Promoter/Director of CD as Resolution Applicant (RA) in line with Section 29A of the Code read with Section 240A of the Code. The letter issued by the Applicant objecting the Resolution Plan of Promoter Director was also discussed in the said meeting. The RP was relying upon the Legal Opinion dated 30.10.2021 from one Vaish Associates, Advocates confirming that RA is eligible to submit Resolution Plan dated 30.10.2020. The opinion has relied upon a Supreme Court Judgment in the matter of **Arcellor Mittal v/s Satish Kumar Gupta & Ors** concluding that Section 29A would get attracted as on the date of submission of First Resolution Plan. It was thus concluded in the Opinion that the eligibility under Section 29A has to be determined on the date of submission of Resolution Plan. It was opined that Resolution Plan was submitted on 30.10.2020 and the CD received MSME certification on 23.10.2020 and thus CD is eligible to submit Resolution Plan.
- 3.4 In the minutes mentioned above, it was also stated that RP had requested Ms. Mansi H. Shrivastav, employee of CD to apply for MSME certification to avail various benefits available to MSME Units and to maximise the value of CD for all the stakeholder (Nowhere in the Minutes the date on which the RP had requested Ms. Mansi H. Shrivastav, employee of CD to apply for MSME certification and the reasons why the same was not kept informed to other CoC members that time was minuted). It is also recorded that the copy of MSME Application was shared with the members.
- 3.5 In the minutes of the afore-mentioned meeting, the criteria for classifying the CD as MSME was also discussed and recorded as below:

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a) **First criteria:** “Investment” in Plant & Machinery, as per Income Tax Act for Assessment Year (AY) 2020-21 at the end of financial year ended on 31.03.2020.

| <b>WDV of Plant &amp; Machinery as IT Act for AY 2020-21</b> |                             |
|--|-----------------------------|
| <b>MSME Classification</b>                                   | <b>WDV as on 31.03.2020</b> |
| <b>Plant &amp; Machinery – (A)</b>                           | <b>45,80,56,200</b>         |
| <b>Excluded Items – (B)</b>                                  |                             |
| Electrical Equipment   | 6,95,74,062                 |
| Office Equipment   | 87,89,707                   |
| Pollution Control Equipment                                  | 7,46,15,374                 |
| Software (intangibles)                                       | 16,55,772                   |
| Storage Equipment  | 5,14,156                    |
| Testing / R&D Equipment                                      | 92,41,431                   |
| Tools, jigs, spares, etc.                                    | 4,30,57,694                 |
| Vehicles   | 26,44,731                   |
| Sub Total (Exclusion Items)                                  | <b>21,00,92,928</b>         |
| <b>Grand Total (A+B)</b>                                     | <b>66,81,49,127</b>         |

WDV of Plant & Machinery : Rs. 66,81,49,128

Less: WDV of excluded items : Rs. 21,00,92,928

**Balance : Rs. 45,80,56,200**

(It was mentioned in the COC minutes that WDV of Plant & Machinery for A.Y. 2020-21 is less than the cap of Rs. 50 Crore (for medium enterprise) being Rs. 45.81 Crores as calculated above to establish that CD is a medium sized MSME).

b) **Second criteria:** “Turnover of the CD. As per audited financials of FY 2019-20, turnover of CD stands as Rs. 55,54,62,705 much below the cap of RS. 250 Crore for medium enterprise).

3.6 a) In the 22<sup>nd</sup> COC meeting held on 26.08.2021, the detailed working of CD under MSME Act have been provided hereunder:

| <b>Dep Rat e</b> | <b>WDV as on 31.03.2019</b> | <b>Addition during the year 19-20</b> | <b>Deletion during the year 19-20</b> | <b>Depreciation for the year 19-20</b> | <b>WDV as on 31.03.2020</b> |
|------------------|-----------------------------|---------------------------------------|---------------------------------------|--|-----------------------------|
| 15%              | 1,01,22,14,386              | -                                     | 22,77,73,213                          | 11,76,66,176                           | 66,67,74,997                |
| 40%              | 27,73,246                   | -                                     | 5,038                                 | 11,07,283                              | 16,60,925                   |
|                  | <b>1,01,49,87,632</b>       | -                                     | <b>22,77,78,251</b>                   | <b>11,87,73,459</b>                    | <b>66,84,35,922</b>         |

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**WDV of Plant & Machinery as per MSME Act as on 31.03.2020**

b) Minutes of the 13<sup>th</sup> and 22<sup>nd</sup> meeting show that the value of the plant & Machineries of the CD have been drastically brought down from **Rs. 1,01,49,86,632** to **Rs. 66,84,35,922** (this was done by way of huge deletion and by way of depreciation). Further, this was once again brought down to **Rs. 45,80,56,200** (by excluding value of certain plant & Machineries under different heads in MSME Act). It is argued by the Applicant that the value brought down under each head seems to be exaggerated and done with the sole purpose to bring down the total value under Rs. 50 Crores as required under the MSME Act. For eg. the Installation & Erection charges have been shown as of huge amount of Rs. 14,05,021,556, the Pollution Control Equipment cost is shown as of Rs. 6,34,23,067 and the cost of Electrical equipment is shown as of Rs. 5,91,37,953. The Applicant submits that all these are not supported with any Invoices / Purchase Bills / documents.

c) It is further alleged that though in the COC meeting (13<sup>th</sup> meeting) it was discussed that the RP has requested one of the employees of the CD Mr. Mansi H. Shrivastav to apply for MSME certification and further certain criteria have also been discussed in the same meeting (as to why the CD shall have to be classified as MSME enterprise) the entire process adopted for bringing down the valuation / investment in plant and machineries to less than Rs. 50 Crores by way of huge deletion appears to be not satisfactory. The entire process that have been adopted to slash down the value of the Plant & Machineries on certain exaggerated values shown on excluded items into half is also not convincing excepting to help out the Promoter of the CD to make a backdoor entry under section 240A of the Code.

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- 3.7 The Applicant relied on the NCLAT judgement delivered on 12.01.2021 in the matter of **Harikrat Singh Bedi v/s Oriental Bank of Commerce** wherein it was held that if the date of registration of CD as MSME is after CIRP admission order, the Application for registration of MSME by the CD was without authorization being subsequent to the initiation of CIRP and hence was invalid. Here, in the instant matter, nowhere, in the Application made on behalf of RP before the authorities, it is shown that Application is made by Ms. Mansi H. Shrivastav on behalf of RP representing the Corporate Debtor.
- 3.8 The claim admitted for Financial Creditors is to the huge extent of **Rs. 360.47 Crores** and the Plan Value is very low to the extent of **Rs. 150 Crores** only. The haircut for the Financial Creditors is to the extent of **71.90%**. If the Promoters of the CDs are allowed to convert their entities into MSME's by slashing down the valuation of their plant and machineries drastically like in the instant matter without the same being supported or substantiated by any documentary evidence, then Promoters of all CDs may try the same route to have access / re-own / retake control of the Corporate Debtor. This is not the real intention for which Section 240A have been amended/added. The purpose of the said Section is to help out the genuine actual MSME Sector and the workers employed in the said entities. MSME Companies being the backbone of economic development of our Country have to be treated in a different / specialized manner and have to be accorded certain benefits is the holistic view. Only on the basis of the same Section 240A have enacted which cannot be misused by any Promoters to have a backdoor entry in the Company.
- 3.9 It is stated that the Central Government has power to exempt any industrial undertaking in public interest from applying all or any of the provisions of that Act subject to conditions as it may think fit. The said

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conditions are very much crucial. In any CIRP process the system cannot be manipulated in the books of the CD to bring down the value of the Plant & Machineries with the intention to be governed by the classification to declare an entity as MSME in order to grab the benefits under the exemption clause.

3.10 Applicant Company states that in the instant matter the workout has been done so that the value can be brought down under the heads of deletion / depreciation / exemption. The entire exercise is not supported / substantiated by any documents inter alia the Purchase Orders / Invoices and other miscellaneous documents to prove that under the said heads huge amounts have been invested by the CD over the years. This should be proven from the balance sheets of the Company and other documentary proofs. Randomly an amount cannot be picked up for eg. Installation & Erection charges, Pollution Control Equipment cost and Electrical equipment cost. Just because in the analysis of the RP the Company can be brought into the bracket of MSME the Application cannot be made behind the back of the COC members that to by an employee of the CD themselves without keeping the COC members informed while applying. After obtaining the MSME certification from Government of India, the COC members were informed in the 13<sup>th</sup> COC meeting which approach is totally incorrect. The Resolution Professional is duty bound to inform COC Members before beginning any such exercise.

3.11 It is submitted that in the instant matter the Promoter Directors guarantee are also getting discharged and further Promoter Director is again having re-entry to the Company whereas the Financial Creditors are forced to sacrifice their huge outstanding (haircut is to the extent of **71%**). Even though the CD cannot be classified as MSME the RP has proceeded on and placed the Resolution Plan received from the Promoter

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Director COC for voting and the same was voted with 77.56% majority in the 26<sup>th</sup> COC meeting held on 03.12.2021.

3.12 The RP has filed for approval of Resolution Plan. Aggrieved by the same the present Application is filed on the above said grounds.

3.13 In the written submissions filed by the Applicant, it was submitted that as per the terms and conditions in the Resolution Plan, the Guarantors liability is getting extinguished. The Applicant states that this is in direct conflict with the Apex Court Judgment in the matter of **Lalit Kumar Jain v/s Union of India**. Para no. 111 of the said Judgment reads as under:

*“In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this Court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process i.e. by operation of law or due to liquidation or insolvency proceeding, does not absolve the surety / guarantor of his or her liability, which arises out of an independent contract.”*

3.14 Claim admitted for Financial Creditors is to the huge extent of **Rs. 360.47 Crores** and the Plan Value is very low to the extent of **Rs. 105 Crore** only. The haircut for the Financial Creditors is to the extent of **71.90%**. In the instant matter the Ex-Directors guarantees are also getting discharged whereas the Financial Creditors are forced to sacrifice their huge outstanding (haircut is to the extent of **71.90%**).

3.15 The fact that MSME Certificate was received after initiation of CIRP was also pointed out in the written submission. In the written submission, the Applicant quoted the judgment of Hon’ble NCLAT Delhi Bench in

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***Anilkumar Dudalal Kaneriya & Ors. v/s CA Vineeta Maheshwari,  
para no. 19:***

*“It is an admitted position that the CIRP commenced on 26.04.2019, the MSME Notification amending the threshold was notified on 26.06.2020 wherein it was clearly specified that the MSME Act, 2006 would be effective from 01.07.2020. This itself makes it clear that the provisions therein are effective prospectively from 01.07.2020, keeping in view the ratio laid down by the Hon’ble Supreme Court in S.L. Srinivas Jute Twine Mills P. Ltd (Supra), we hold that the amendments are prospective in nature. It is also not in dispute that the Corporate Debtor as on the date of filing of the CIRP was not registered as an MSME. For all the aforesaid reasons, this Appeal and the OAs are dismissed accordingly.”*

**Submissions of Respondent No.1, in brief:**

4. The Respondent No. 1 submits that the Applicant has completely misconceived the provisions and applicability of Micro, Small and Medium Enterprises. The Applicant has also erred in not considering the amendment Notification No. SO 1702(E) dated 01 June 2020 whereby the thresholds have been amended and increased for an entity to be categorized as Micro, Small and Medium Enterprise. Considering the provisions of Micro, Small and Medium Enterprises Development Act, 2006 along with the amendment as introduced w.e.f. 01 July 2020 and provisions of section 240A and 29A of the Code, the successful Resolution Applicant is found to be an eligible prospective Resolution Applicant. The Applicant has misconceived the provisions.
- 4.1 It is further submitted that the Applicant has made baseless and false averments which are contrary to facts. Reference is made to the 13<sup>th</sup> CoC meeting held on 06 April 2021. In fact, Item 3 therein provides for detailed discussions on the applicability of benefit of MSME to the present Corporate Debtor. The averment of the Applicant that nowhere

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in the minutes the date on which the RP requested the employee to do the needful has not been stated is completely misstatement of facts. It was during when detailed discussions were undertaken, hence, there cannot be any question as to why the CoC members were not informed. The relevant extract of the discussion can be seen at Page 30 of the application. It is also relevant to note that the said discussion was done in April 2021 when the personnel of the Applicant was also present during the CoC meeting. However, no such objections were ever raised until now vide this Application filed in February 2022.

4.2 All the calculations mentioned in the Application regarding the MSME criteria are in line with the MSME notification dated 06 October 2006. The said facts were placed before the COC during the 12<sup>th</sup> and 13<sup>th</sup> CoC meeting while the resolution plan was only approved during the 26<sup>th</sup> CoC meeting. Hence it only goes to show that the present application is merely an attempt to derail the resolution plan process while the Applicant is a minority CoC member and the only financial creditor out of five who has voted against the resolution plan.

4.3 It is submitted that the said resolution plan has attained the necessary votes of 77.56% which is beyond the requisite threshold beyond 66%. The allegations of the Applicant are baseless and bad in law and ought to be quashed. It is also clear that the Applicant has not appreciated how the threshold is to be calculated which is fact is laid down in the statute itself. The Notification of 06 October 2006 itself provides on which assets ought to be considered and which ought to be excluded for the purpose of considering whether or not a Corporate Debtor falls under the category of Micro, Small and Medium Enterprises. The Applicant is merely looking at the opening WDV of the assets, without considering the deletions of the assets, exclusion of “specific assets” as required under the notification, reduce the amount of depreciation from the said value and

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then the net block ought to be considered which itself forms part of the 13<sup>th</sup> CoC meeting and can be seen at page 32 of the Application.

- 4.4 Respondent No. 1 submits that it is trite law that the commercial wisdom of CoC is non-justiciable. Accordingly, the Application deserves to be dismissed as devoid of any merits.
- 4.5 The Applicant is blatantly making allegations against Respondent No. 1 without any document or evidence on record and claims that there is manipulation of books by Respondent No.1. These are serious allegations without any bases. In fact, not even an iota of evidence or document is placed on record. On perusal of the MSME regulations it is evident that the statute has provided how to compute the threshold for the sake of deciding whether or not the Corporate Debtor falls under the category of the Micro, Small and Medium Enterprises. It is clear that the Applicant's own misconception and ignorance of the applicable law does not mean that there is any alteration or manipulation of books of accounts.
- 4.6 There is no question of invoices or audit since these are old assets of the Corporate Debtor and not something which have been purchased during the ongoing corporate insolvency and resolution process. The computation is to be undertaken in terms of the provisions of applicable law. In fact the Applicant has misconceived another crucial requirement of provisions of section 30 of the Code wherein one such requirement is that the RP ought to ensure that it is in adherence to the applicable laws while the Micro, Small and Medium Enterprises Development Act 2006 is also one such applicable law. It is evident that the only intent of the Applicant is to derail the present corporate insolvency and resolution process while being a minority secured financial creditor and hence the present application deserves to be quashed.

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- 4.7 It is submitted that it is a trite law that the Adjudicating Authority ought not to entertain the applications filed by disgruntled or minority dissenting financial creditors merely because of their individual dissatisfaction. Accordingly, on this ground itself the Application deserves to be quashed.
- 4.8 The present Application deserves to be quashed and none of the prayers deserves to be allowed since it would then be clearly contrary to the settled law that the CoC's commercial wisdom is paramount and cannot be altered merely on the basis of whims and fancies of some disgruntled dissenting financial creditor with minority votes.

**OBSERVATIONS AND FINDINGS**

5. Heard the Counsel and perused the documents placed on record.
6. The Company Petition filed by Mahakali Fuel Private Limited (Operational Creditor) against ETCO Denim Private Limited (Corporate Debtor) under section 9 of the Insolvency & Bankruptcy (I & B) Code, 2016 was admitted by the Tribunal on 14.02.2020 and the Corporate Insolvency Resolution Proceeding (CIRP) was initiated against the Corporate Debtor.
7. Mr. Swapnil Mukund Agrawal was appointed as the Interim Resolution Professional who made public announcement on 20.02.2020 under section 15 of the Code. The Committee of Creditors (CoC) was constituted on 06.03.2020 and the 1<sup>st</sup> CoC Meeting was conducted on 13.03.2020. A total of 26 CoC Meetings have been held between 13.03.2020 and 17.11.2021. Mr. Swapnil Mukund Agrawal (IRP) was replaced by the present Resolution Professional, Mr. Nandkishore Deshpande, on 14.07.2020.

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8. The CIRP expiry date i.e. the 270<sup>th</sup> day was 19.07.2021. The Resolution Professional filed an application bearing I.A. No. 1617 of 2021 on 15.07.2021 seeking exclusion of second wave of Covid-19 Pandemic lockdown from 05.04.2021 till 15.07.2021. The RP filed another application bearing I.A. No. 2224 of 2021 on 28.09.2021 seeking further extension of 60 days and accordingly, the 330<sup>th</sup> day of CIRP expired on 28.11.2021. The Tribunal vide order dated 24.11.2021 granted 10 days from 24.11.2021 for the CoC to decide on the Resolution Plan extending the CIRP Expiry period till 03.12.2021.
9. With regards to the Resolution Plans, the first Expression of Interest (EoI) was issued on 10.08.2020. The last date of submission of Resolution Plans was 30.10.2020. It is pertinent to note that Mr. Ramesh Shah, Ex-Promoter of the Corporate Debtor, also submitted a Resolution Plan. It is averred by the Resolution Professional and the Ex-Promoter that pursuant to the Government Notification No. SO 1702(E) dated 01.06.2020 enhancing the limit for obtaining Micro, Small, and Medium Enterprises (MSME) status, the Corporate Debtor had come within the bracket of MSME and therefore, the Ex-Promoter became eligible to submit a Resolution Plan as per Section 29A read with Section 240A of the I&B Code, 2016. The MSME Certificate was obtained on 23.10.2020 and the Resolution Plan was submitted by the Ex-Promoter on 30.10.2020.
10. In the 13<sup>th</sup> CoC Meeting held on 08.04.2021, the eligibility of Mr. Ramesh Shah, Ex-Promoter, as a Resolution Applicant was discussed at length. It is to be noted that the CoC was informed about the new MSME status of the Corporate Debtor only in this meeting whereas the application for MSME certificate was made on 23.10.2020 which was received on the same day i.e. 23.10.2020. This clearly indicates that the CoC had no knowledge of the MSME application and the consequent obtainment of

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the Certificate. This was also pointed out by the Applicant in this Application. The Resolution Professional, who denied the Applicant's allegations, however, did not provide any details as to whether the opinion/approval of CoC was taken before applying for MSME certificate or not. He merely relied on the discussions held during the 13<sup>th</sup> CoC meeting dated 08.04.2021 i.e. 5 months post obtaining the MSME certificate.

11. Notwithstanding the same, the CoC decided to go ahead with the process. However, all the Resolution Plans, including the one submitted by the Ex-Promoter, were rejected in the 15<sup>th</sup> CoC Meeting held on 03.05.2021. Subsequently, the CoC decided to conduct a second round of EoI which was issued on 05.05.2021. A total of 4(four) EoIs were received from prospective Resolution Applicants, including the Ex-Promoter. The last date for submission of Resolution Plans was fixed at 22.06.2021. Three Resolution Plans were received respectively from Classic Solvents Private Limited, Mr. Chetan Jain in consortium with Nandi Vardhan Infrastructure Limited, and Ramesh Shah in consortium with Masitia Capital Services Private Limited (Ex-Promoter/ Respondent No. 2).
12. There were deliberations and discussions regarding the submitted Resolution Plans in the subsequent meetings. Finally, the Resolution Plan submitted by Mr. Ramesh Shah in consortium with Masitia Capital Services Private Limited was approved in the 26<sup>th</sup> CoC Meeting held on 17.11.2021 with the requisite percentage of vote. Out of the 7(seven) Financial Creditors constituting the CoC, 6(six) of them sharing 77.56% of voting rights approved the Resolution Plan submitted by the Ex-Promoter and one voted against the Resolution Plan.
13. On Resolution Plan being approved by the CoC with the requisite majority, the Resolution Professional filed an Interlocutory Application

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bearing no. 2895 of 2021 seeking this Tribunal's approval of the Resolution Plan. The dissenting Financial Creditor, Central Bank of India, with voting share of 22.44%, consequently filed this present Interlocutory Application bearing no. 317 of 2022 praying for stay of the approved Resolution plan on the ground that the Ex-Promoter has no eligibility to submit a Resolution Plan as per Section 29A of the I&B Code.

14. Respondent No. 1, the Resolution Professional, filed his Reply-in-affidavit denying the allegations of the Applicant. However, no separate reply is filed by Respondent No. 2, the Ex-Promoter of the Corporate Debtor.
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.
16. This issue regarding the validity of the records was also questioned by the Applicant. In this connection, it is important to know about the segregation of certain sections of Plant & Machinery as per the requirement of the MSMED Act, 2006. As a general rule, the books of accounts of a company comprises of a definitive list of sectors such as Land & building, Plant & Machinery, etc. and it is also an established fact that such books of accounts do not contain the break ups as required in the case of MSMEs. This is done only when a company proposes to ascertain the value for obtaining MSME status.
17. In the instant case, the Counsel for the Applicant raised a similar concern regarding the exclusion of certain amounts from Plant & Machinery as the same was not supported by any invoices. It is relevant

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here to look at the difference between the value of Plant & Machineries of the Corporate Debtor as on 30.03.2019 and 30.03.2020. The value of Plant & Machineries is reduced from **Rs. 101,49,86,632** as on 31.03.2019 to **Rs. 66,84,35,922** as on 31.03.2020. As pointed out by the Applicant, the change in the value is due to huge deletion and depreciation.

18. The Resolution Professional filed an additional affidavit in support of his Reply wherein he placed certain documents on record, one of them being the Copy of the Minutes of the 13<sup>th</sup> CoC meeting dated 08.04.2020 wherein the Written Down Value of Plant & Machinery as per the Income Tax Act for Assessment Year (AY) 2020-21 was provided as follows:

| <b>WDV of Plant &amp; Machinery as per IT Act for AY 2020-21</b> |                             |
|--|-----------------------------|
| <i>MSME Classification</i>                                       | <i>WDV as on 31.03.2020</i> |
| <i>Plant &amp; Machinery – (A)</i>                               | <b>45,80,56,200</b>         |
| <i>Excluded Items – (B)</i>                                      |                             |
| <i>Electrical Equipment</i>                                      | 6,95,74,062                 |
| <i>Office Equipment</i>  | 87,89,707                   |
| <i>Pollution Control Equipment</i>                               | 7,46,15,374                 |
| <i>Software (intangibles)</i>                                    | 16,55,772                   |
| <i>Storage Equipment</i>   | 5,14,156                    |
| <i>Testing / R&amp;D Equipment</i>                               | 92,41,431                   |
| <i>Tools, jigs, spares, etc.</i>                                 | 4,30,57,694                 |
| <i>Vehicles</i>  | 26,44,731                   |
| <i>Sub Total (Exclusion Items)</i>                               | 21,00,92,928                |
| <i>Grand Total (A+B)</i>   | <b>66,81,49,127</b>         |

WDV of Plant & Machinery : **Rs. 66,81,49,128**  
Less: WDV of excluded items : Rs. 21,00,92,928  
Balance : **Rs. 45,80,56,200**

19. With respect to the above statement submitted by the Resolution Professional in the 13<sup>th</sup> CoC Meeting, it is observed that the Resolution Professional has stated that the figures are taken as per the Income Tax Act. It is pertinent here to make a mention of the New Appendix I read with Rule 5 of the Income Tax Rules which contains a table of rates at

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which depreciation is admissible under the Income Tax Act, 1961. However, in the said table, specific classifications of Plant & Machinery are limited to Vehicles; Pollution Control Equipment; life-saving medical equipment; computers; containers as specified therein; books owned by assesses carrying on profession; and plant & machinery used in semi-conductor industry, textile industry, water supply project and silk manufacturing industry. The classifications of electrical equipment, office and storage equipment, testing and R&D equipment, tools, jigs, spares, etc., installation or erection charges or power genset are not provided under the Plant & Machinery category, and accordingly these cannot be grouped with the other heads specified therein. Even if they can be considered a part of Plant & Machinery other than those mentioned above, there is no clarification from the Respondent in this regard and also no clarification is provided as to how and on what basis the segregation in the calculation sheet was made nor it is backed by any reports. In such a case, the statement of WDV of Plant & Machinery submitted by the Respondent is questionable.

20. The Tribunal also examined the Certificate dated 01.08.2021 issued by Chartered Engineer Er. Naga Mallik Macheroutu certifying the Corporate Debtor's Written Down Value (WDV) of Plant & Machinery. The company's WDV of Plant & Machinery as on 31.03.2020 determined by the Chartered Engineer is as follows:

| <b>Financial Year</b> | <b>WDV AS PER INCOME TAX</b> | <b>Exclusions*</b>  | <b>Net WDV MSME**</b> |
|-----------------------|------------------------------|---------------------|-----------------------|
| 2019-20               | <b>66,84,35,922</b>          | <b>37,57,02,223</b> | <b>29,27,33,699</b>   |

*\*Exclusions are as per defined under MSME Act. The gazette of India – Extraordinary Ref No. 1192. Dt 05.10.2006*

*\*\*Net WDV is to be considered for MSME definition.*

The List of exclusions were attached to the Certificate which is reproduced hereinbelow:

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| <b>WDV of Plant &amp; Machinery as per MSME Act as on 31.03.2020</b>    |  |                  |                     |
|---|--|------------------|---------------------|
| Plant & Machinery as on 31.03.2020 as per Income Tax (A)                |  |                  | <b>668,435,922</b>  |
| Less: Exclusion as per MSME Act   | Point No. in Definition of P&M as per MSME Act | Working Note No. |                     |
| Tools, jigs, spares, etc.   | I  | 1                | 43,057,694          |
| Installation & Erection Charges   | II   | 2                | 165,319,477         |
| Pollution Control Equipment   | III  | 3                | 74,615,374          |
| Power Genset  | IV   | 4                | 289,818             |
| Electrical Equipment  | VI   | 5                | 69,574,062          |
| Storage Equipment   | IX   | 6                | 514,156             |
| Testing/ R&D Equipment  | X  | 7                | 9,241,431           |
| Less: by default, not a P&M   |  |                  |                     |
| Office Equipment  |  | 8                | 8,789,707           |
| Software (intangibles)  |  | 9                | 1,655,722           |
| Vehicles  |  | 10               | 2,644,731           |
| TOTAL of Excluded item as per definition of P&M in MSME Act) (B)        |  |                  | 37,57,02,223        |
| TOTAL VALUE OF PLANT & MACHINERY AS PER MSME ACT AS ON 31.03.2020 (A-B) |  |                  | <b>29,27,33,699</b> |

21. The Government Notification No. SO 2119(E) dated 26.06.2020 and the Office Memorandum No. 2/1(5)/2019- P&GG/ Policy dated 06.08.2020 clearly states that the meaning of 'plant and machinery' with respect to MSME Classification shall be as provided in the Income Tax Rules, 1962. Clause 5(ii) of the said Office Memorandum is reproduced below:

“5 (ii). Para 3 of clause 4 Notification No. SO 2119(E) dated 26.6.2020 reads as follows:

**“The expression plant and machinery or equipment of the enterprise, shall have the same meaning as assigned to the plant and machinery in the Income Tax Rules, 1962 framed under the Income Tax Act, 1961 and shall include all tangible assets (other than land and building, furniture and fittings)”.**

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Thus, based on the fact that the neither the books of accounts of a company nor the Income Tax Act provide for any such classification of Plant & Machinery, it is contentious as to how the Chartered Engineer had arrived at the above-stated figures in absence of any basis or approach provided in respect to the estimation procedure. Further, the Net Written Down Value of Plant and Machinery as per the Statement of RP is Rs. 45,80,56,200 whereas in the Certificate of Chartered Engineer, it is given as Rs. 29,27,33,699. There is a divergence in the calculation because the Chartered Engineer in his estimation included certain more categories like the Installation & Erection Charges, etc. which were not included in the Statement submitted by the RP. However, both the reports are not shown to have been backed by any material/ invoices or any supporting documents.

22. To overcome the ambivalence about the credibility of the calculation sheets prepared as per the requirement under the MSME Act, 2006 read with Government Notification No. SO 1702(E) dated 01.06.2020, the Bench directed the Respondent to file a Chartered Accountant's Certificate giving details of the classification and the amount of block of assets and the exclusion thereof as on 31.03.2020. However, the Respondent has not submitted the Chartered Accountant's Certificate. Such non-submission of Certificate of the Chartered Accountant, who could have examined the categorization/ valuation/ WDV, etc. as per books of accounts and underlying primary documents, could only be for the reason which could suit the Respondents. This raises concern over the plausibility of the already produced reports and skepticism as to whether the Corporate Debtor is at all an MSME. The Respondents failed to evidently establish that the Corporate Debtor is an MSME as per the Notification dated 01.06.2020. In absence of any such demonstration and also keeping in view the fact that neither the mandate of CoC was taken nor the sanction of the Tribunal was sought to change the status

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of Corporate Debtor as MSME, this Tribunal holds that the Corporate Debtor does not fall under the criteria of MSME as per the Government Notification No. SO 1702(E) dated 01.06.2020 read with the MSMED Act, 2006.

23. Having dealt with the issue on facts, this Tribunal also intends to examine the issue on legality in the facts of the case.
24. The Hon'ble **NCLAT** had, on several occasions, held that Erstwhile Management/ Promoters/ Suspended Directors are not authorised to act on behalf of the Corporate Debtor during CIRP process and therefore an MSME Certificate obtained by them at such time period is invalid [*Reference shall be made to observations in **Harkirat Singh Bedi vs. The Oriental Bank of Commerce & Anr (Company Appeal (AT) (Insolvency) No. 40 of 2020** (para 39) and **T. Johnson vs. St. John Freight Systems Ltd [Company Appeal (AT) (Ins) No. 1402 of 2019]** (para 34)]*
25. In the instant case, the CoC members, having believed that the MSME certificate was obtained on 23.10.2020 by the Ex-Promoter, questioned about the same in the 13<sup>th</sup> CoC Meeting dated 08.04.2021 to which the Resolution Professional gave a mere statement that it was only under his authorisation that such an application was made by an 'employee' of the Corporate Debtor.
26. Now, the next point at issue is whether the Resolution Professional, with whom the business of the Corporate Debtor shall vest post CIRP initiation, has the authority to change the nature of the Corporate Debtor as MSME post initiation of CIRP. Section 25 of the Insolvency and Bankruptcy Code has mandated the Resolution Professional to carry out certain duties with respect to the Corporate Debtor.

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Section 25 of the Code is quoted below:

***“25. Duties of resolution professional. -***

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

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

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

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

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

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

*(e) maintain an updated list of claims;*

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

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

*(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.*

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

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

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

27. A bare reading of the above section reveals that nowhere the Resolution Professional is empowered to change the nature of the Corporate Debtor by converting it from a Private Limited Company to an MSME thereby allowing the Ex-Management to participate in the CIRP. Therefore, the MSME certificate which is allegedly stated to have been obtained by

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the Resolution Professional through an employee of the Corporate Debtor can also be perceived to be unauthorised. The observations of NCLT Ahmedabad Bench in **POSCO India Pune Processing Center Private Limited vs. Mr. Dhaval Jitendrakumar Mistry [IA No. 514 of 2020 in CP(IB) No. 268 of 2018]** is worth mentioning to substantiate our view:

*“4. With regard to the issue that the promoters have filed its Resolution Plan, claiming Corporate Debtor to be the MSME. On going through the record, it is found that the Corporate Debtor on the date of admission was not under the category of MSME. However, subsequently the Government of India vide its notification dated 01.06.2020 has carried out certain changes in the criteria for classification of Micro, Small and Medium Enterprises and in view of that the Corporate Debtor is claiming itself to fall under the criteria of MSME and is keen to revive the Corporate Debtor and make it a going concern.... However, it is expected from the RP that while discharging duty, RP must adhere to the provisions of the IB Code i.e. Section 25 of the IB Code, which does not give any power to the RP to change the nature and character of the Corporate Debtor, that too during CIRP period.*

*5. .... It shall be noted that on admission of the Company Petition, the management is suspended, and RP takes over the powers and functions of the Corporate Debtor and he has to discharge his duty as per Section 25 of the IB Code. He has no authority to give direction/permission to the suspended management for changing the nature of the Corporate Debtor.”*

28. Reference shall also be made to the observations of the NCLT, Delhi made in **Deutsche Bank A.G vs. Devendra Umrao [(IA-3846/ND/2022) & IA No. 1175/ND/2022 in CP (IB) No. 2240 ND 2019]** in this regard:

*“19. .... The provisions under Section 25 of IBC 2016 nowhere authorize an RP to obtain an MSME Certificate of the CD for the purpose of opening back door entry to a defaulting Ex-Director(s)/Promoter(s)/Suspended Management.*

*20. .... Thus, we find that neither there is any explicit provision under Section 25 of IBC 2016 enabling an RP to obtain an MSME Certificate nor such is the intention behind the insertion of Section 29A in the Code as observed by the*

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*Hon'ble Supreme Court in the Judgement of Arun Kumar Jagatramka vs. Jindal Steel and Power Ltd. & Anr, Civil Appeal No. 9664 of 2019. Further, under the garb of fixing the criteria for the intending Prospective Resolution Applicants, the RP cannot assume the role of a "Facilitator" to enable the Defaulter Promoter(s)/ Suspended Board of Director(s)/ Ex-Management to submit the EOI/Resolution Plan by abusing the provisions contained under Section 240A of IBC 2016.*

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

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 13<sup>th</sup> 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. 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'.

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**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. 'Shrikant Madanlal Zawar & Ors.'<sup>3</sup>, wherein the Promoter of the 'Corporate Debtor' had filed an Appeal against the 'Liquidation Order' passed by the 'Adjudicating Authority' claiming that the 'Corporate Debtor' was an MSME and that he could file a Resolution Plan, but this Tribunal observed that as the **Application for MSME certificate was made after the commencement of CIRP, such unauthorized Application cannot be considered and cannot tide over ineligibility under Section 29-A.** The ratio of this matter is squarely applicable to the facts of this case and the matters of eligibility under Section 29-A 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.

31. The Tribunal would also like to look into the date of effectivity of the Government Notification No. SO 1702(E) dated 01.06.2020 whereby the limits of classifications of MSME were enhanced. It is an established law of interpretation that every statute has to be given prospective effect unless it is expressly or by necessary implication stated in the contrary. The legal maxim "*Nova Constitutio Futuris Forman Imponere Debt Non Praeteritis*" emphasises that a new law ought to regulate what is to follow, not the past. Thus, a new law must operate prospectively unless it is expressly stated to have a retrospective effect. With respect to the said

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Notification dated 01.06.2020, it is stated that the effective date is 01.07.2020 which clearly indicates that the Notification is not retrospective in nature. Therefore, a Company falling into the MSME Criteria post the Notification will not be considered when such company has entered into CIRP prior to the date of Notification, at which time, it did not fall into the MSME criteria. In this regard, reference is again made to **POSCO** (supra) wherein the NCLT Ahmedabad Bench held the following:

*6. While going through the amendment notification dated 01.06.2020, it prima facie appears prospective one, as the date of its effect is given as 01.07.2020.... On plain reading of the notification, it shows that though it is notified on 01.06.2020, however, its effect has expressly been given on and from 01.07.2020 i.e. prospectively. That itself has drawn line of its effective date.*

*8. It is well established principle of interpretation that no statute can be given retrospective effect unless statute so directs either expressly or by necessary implication. Nor can a power be exercised retrospectively, unless the statute expressly so provided.*

*11. It is admitted position that instant amendment came during pending action (lis pendence). It is also established principle that in the case of pending actions, the law is that the right of the parties is decided according to the law as it existed when the action was commenced unless a clear intention to the contrary is found in the new statute, as the cause of action is the demarcation line for initiating any proceeding and/or any application. In the present case, when application was filed and CIRP initiated, the Corporate Debtor was not falling in the criteria/classification of MSME, hence, the amendment benefit cannot be availed by the Corporate Debtor, when it is under CIRP by giving retrospective effect.*

*14. Under the facts and circumstances, as discussed herein above, the Corporate Debtor at this stage cannot be treated as MSME and cannot take the benefit of MSME, in view of amendment vide notification issued on 01.06.2020, w.e.f. 01.07.2020, by having its retrospective effect when admittedly on the date of filing application under section 9 of IB Code*

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*Corporate Debtor does not fall under the criteria of MSME. Hence, the question of accepting the Resolution Plan filed by erstwhile promoters' does not arise as the erstwhile promoters' will be ineligible under section 29A of the IB Code to file the Resolution Plan."*

We hold the above observations as apropos keeping in view the fact that the same were neither contradicted nor overruled by the Hon'ble NCLAT in **POSCO India Pune Processing Center Pvt. Ltd. vs. Mr. Dhaval Jitendra Kumar Mistry [Company Appeal (AT) (Insolvency) No. 931 of 2021.**

32. Therefore, in view of the aforesaid judgments 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 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 benefits under section 240A of the I&B Code by reason of subsequent status.

33. However, this Tribunal is obliged to look into the citations of the Resolution Professional i.e. Respondent No. 1 for complete discernment of facts and the legal position of the case. The Respondent relied on the judgement in **R. Raghavendran v/s C. Raja John & ors. [Civil Appeal No. 2552/2022]** wherein the Hon'ble Supreme Court observed the following:

*"2. It is sufficient to note that the NCLAT had put a question mark on the status of the entity as MSME on*

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*account of the certificate being procured after the process had begun but in appeal as per the impugned order, the **factual finding is that it was an MSME before the process began and thus the benefit of the MSME Act would be available to the said entity.***

*3. We may also note that the plan submitted by the respondent No. 1 was held by the NCLT to be ineligible for consideration on account of the status of the respondent No. 1 as promoter as the entity was not an MSME and thus incurred the disqualification under Section 29(A)(e) of the said Code and an exception for MSME would not be carved out in the facts of the present case. However, on finding being reached by the NCLAT that the entity is an MSME and had that status prior to the proceedings, the scenario changed and there is no quibble with the proposition.*

The above observations do not apply to the present case as the Corporate Debtor herein allegedly became an MSME only in pursuance of the revised Notification and after initiation of CIRP unlike in the above-mentioned case wherein the Corporate Debtor had that status prior to the initiation of insolvency proceedings.

34. Reliance was also placed by the Respondent on the judgment of NCLT, Kolkata Bench in **HDFC Bank Limited vs. Tamra Dhatu Udyog Private Limited [IA(IB)/78/KB/2023 in CP(IB)/128/ KB/2020]** wherein the Bench allowed the Ex-Director to participate in the CIRP Process. In this case, the Applicant challenged the eligibility of Ex-Director to submit a Resolution Plan under Section 29A read with Section 240A, however, it is to be noted that though the Corporate Debtor became an MSME subsequent to the Notification dated 01.06.2020, no insolvency proceedings were initiated against it at that period. An application for the registration as MSME was made on 27.07.2021 which was ten months before the insolvency commencement date, as stated in the judgment. To affirm the same, when the observation in **POSCO (supra)** was cited by the Applicant, the Kolkata Bench only denied the

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applicability of the decision to the case and not the observations made therein. Relevant extract from the said judgment is reproduced below:

*“15 (i) .... This Tribunal further held that when application was filed and CIRP initiated, the Corporate Debtor was not falling in the criteria/classification of MSME, hence, the amendment benefit cannot be availed of by the Corporate Debtor by giving it a retrospective effect. Under such circumstances it was held that the Corporate Debtor cannot be treated as an MSME which is not a present case. Hence the said decision may not apply to the present fact situation.”*

However, in the instant case, the Corporate Debtor had allegedly fallen within the bracket of MSME post the Notification dated 01.06.2020 and vide Certificate obtained on 23.10.2020 which was much after the commencement of insolvency proceeding on 14.02.2020. Infact, an application for obtaining MSME Certificate was made only on 23.10.2020 which was even later than the date of issue of the first Expression of Interest (EoI) i.e. 10.08.2020. Therefore, the decision in **HDFC Bank Ltd** (*supra*) does not apply here.

35. Therefore, in view of the facts of this case and keeping in view the judgments quoted above, this Tribunal is of the view that the Corporate Debtor cannot claim benefits of MSME, more so when the Certificate of MSME is obtained after the initiation of CIRP process.
36. In the facts and circumstances of the case, this Tribunal concludes that the Corporate Debtor cannot take benefit of Section 29A read with section 240A of the Code and accordingly, the present Interlocutory Application bearing no. 317 of 2022 stands **allowed** in terms of prayer ‘a’.
37. As regards prayer ‘b’, there is a separate Interlocutory Application bearing no. 2875 of 2021 in which this issue is dealt with and separate order is passed. As regards prayer at clause ‘c’, there are no arguments

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made by the Applicant and further the same is consequential in nature and therefore, no directions are required to be given in this regard.

38. The above I. A. No. 317 of 2022 is disposed of in terms of the directions given herein above and stands **disposed of**.

**Sd/-**

**Charanjeet Singh Gulati**

**Member (Technical)**

**Sd/-**

**Lakshmi Gurung**

**Member (Judicial)**

Uma, LRA

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**MUMBAI BENCH COURT III**

**I.A. 2895/2021**

**In**

**C.P. No. (IB) 126/MB/C-III/2019**

Under Section 30(6) of the Insolvency and Bankruptcy Code, 2016

Filed by

**Mr. Nandkishore Despande** )

(Resolution Professional of )  
ETCO Denim Pvt. Ltd.)

Having office at: )

708, Raheja Centre, Nariman )  
Point, Mumbai – 400021 )

*... Resolution Professional /  
Applicant*

IN THE MATTER OF

**Mahakali Fuel Pvt. Ltd.**

*... Petitioner/Operational Creditor*

Vs

**ETCO Denim Pvt. Ltd.**

*... Respondent/Corporate Debtor*

**Order pronounced on: 8<sup>th</sup> December 2023**

**Coram:**

Hon'ble Ms. Lakshmi Gurung, Member (Judicial)

Hon'ble Sh. Charanjeet Singh Gulati (Technical)

**Appearances:**

*For the Applicant:* Mr. Shyam Kapadia a/w. Mr. Ayush Rajani, Ms.  
Khooshbu Shah Rajani, Ms. Mitali Bhatt, Ms. Priyank Jadav

**Per: Shri. Charanjeet Singh Gulati, Member (Technical)**

**ORDER**

1. The above I.A. is filed by the **Applicant**, Mr. Nandkishore Despande, Resolution Professional of the Corporate Debtor under section 30(6) of the Insolvency and Bankruptcy Code, 2016 (“the Code”), seeking following reliefs:
  - a. *Consider and allow the instant IA No. 2895 of 2021 seeking approval of Resolution Plan under Section 30(6) read with Section 31;*
  - b. *Consider and approve the Resolution Plan dated 17 November 2021 submitted by Mr. Ramesh Shah in consortium with Masitia Capital Services Pvt. Ltd. which has been approved by the Committee of Creditors (CoC) u/s 31(1) of the Code;*
  - c. *Consider closure of the Corporate Insolvency and Resolution Process of the Corporate Debtor on approval of the Resolution Plan under the Code;*
  - d. *Consider declaring u/s 31(3)(a) of the Code that the moratorium u/s 14(1) of the Code shall cease to have effect from the date the hon’ble NCLT passes an order approving the Resolution Plan;*
  - e. *Pass such other order(s) and/or direction(s) in the interest of justice which this Hon’ble Tribunal deems fit.*
2. The present Application has been filed under Section 30(6) of the Insolvency and Bankruptcy Code, 2016 (“**Code**”) read with Regulation 39(4) of the IBBI (Insolvency Resolution Process of Corporate Debtors) Regulations, 2016 (“**Regulations**”) by Resolution Professional Mr. Nandkishore Despande seeking approval of the Resolution Plan submitted by Mr. Ramesh Shah in consortium with Masitia Capital Services Pvt. Ltd. (“**Successful Resolution Applicant**”) which was approved by the Committee of Creditors (CoC) at its 26<sup>th</sup> Meeting held on 17.11.2021.
3. While the Resolution Professional sought approval of the Resolution Plan which was approved by the CoC with 77.56% of votes, the

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dissenting Creditor, Central Bank of India, having 22.44% of voting share, filed objections against the Application of the Resolution Professional through IA No. 317 of 2022.

4. We have heard the arguments made by the Learned Counsel for the Applicant. However, before examination of the Resolution Plan as mandated under the Code and the Regulations made thereunder, it is important to consider the objections raised in this regard.
5. The Objections of the dissenting creditor, filed in IA No. 317 of 2022 that the Successful Resolution Applicant, in this case, is the Ex-Promoter of the Corporate Debtor and therefore is ineligible under section 29A to submit a Resolution Plan has been examined on facts and prevailing jurisprudence on the issue.
6. After careful analysis of the facts of the case, this Tribunal in IA No. 317 of 2022 arrived at the conclusion that the Ex-Promoter i.e. the Successful Resolution Applicant is not eligible under Section 29A read with section 240A of the Code to submit a Resolution Plan. Accordingly, objection filed vide IA No. 317 of 2022 has been allowed.
7. Consequently, the Tribunal **rejects** the approval of the Resolution Plan submitted by the Successful Resolution Applicant for reasons elaborately recorded in the Order passed in IA No. 317 of 2022 and hence, the present I.A. No. 2895 of 2021 is accordingly **dismissed**.

**Sd/-**

**Charanjeet Singh Gulati**  
**Member (Technical)**

**Sd/-**

**Lakshmi Gurung**  
**Member (Judicial)**

Uma, LRA