

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 1176 & 1177 of 2022

IN THE MATTER OF:

Kanti Mohan Rustagi **..Appellant**
Liquidator UTM Engineering Pvt. Ltd.
F-14, First Floor, Kailash Colony,
New Delhi-110048.

Vs.

Redbrick Consulting Pvt. Ltd., **..Respondent No. 1**
having its Registered Office at:
KH. No. 124/10, 3rd Floor (Old Block-
2) Street Gali No. 108 Block B
Sant Nagar Village, Burari,
Delhi-110084.

TCM-UTM JV **..Respondent No. 2**
Having its Registered Office at
550, Udyog Vihar,
Phase-V, Gurugram-122016.

Present:

For **Mr. Abhishek Anand, Mr. Karan Kohli, Mr.**
Appellant: **Sahil Bhatia and Mr. Vaibhav Mendiratta,**
Advocates.

For **Mr. Arvind Nayar, Sr. Advocate with Mr.**
Respondent: **Akshay Joshi, Mr. Angad Mehta, Mr. Vipul**
Agrawal, Mr. Shaurya Dhoundiyal and Ms.
Saloni Agnihotri, Advocates.

JUDGMENT
(06.02.2023)

[Per.: Dr. Alok Srivastava, Member (Technical)]

1. The present appeal CA(AT)(Insolvency) No. 1176-1177 of 2022 has been filed by Kanti Mohan Rustagi, Liquidator, UTM Engineering Pvt. Ltd. (“corporate debtor”) under section 61 of the

Insolvency and Bankruptcy Code, 2016 (in short 'IBC'), aggrieved by the order dated 9.5.2022 (hereinafter called "Impugned Order") passed by the Adjudicating Authority (NCLT, New Delhi) in I.A. Nos. 3172/ND/2021 & 3113/ND/2021 in C.P. (IB) No. 248/ND/2019.

2. Briefly, the case of the Appellant is that in the corporate insolvency resolution process (in short "CIRP") initiated against the corporate debtor, UTM Engineering Pvt. Ltd., an order for liquidation of the corporate debtor was passed by the Adjudicating authority on 15.10.2020 and the Appellant was appointed as the liquidator. He has further stated that the Adjudicating Authority vide order dated 23.11.2020 directed the liquidator to prepare the details of the corporate debtor for sale as 'going concern' and send the same to the JV partner of the corporate debtor Tantia Construction Limited for its possible participation in e-auction process. He has further stated that an Invitation for Expression of Interest (in short 'EOI') with regard to the corporate debtor was published on 22.1.2021 and thereafter e-Auction Process Information Document was issued on 25.1.2021, whereupon only Respondent No. 1 (in short "R-1") Redbrick Consulting Pvt. Ltd. submitted an EOI. The Liquidator/Appellant has stated that the eligibility of R-1 was examined by him in a preliminary manner, inter alia, considering an affidavit filed by the R-1 under section 29-A of IBC.

3. The Appellant has further stated that the period for liquidation was extended by 90 days till 15.4.2021 vide order dated 16.3.2021 of the Adjudicating Authority and again extended by 30 days till 15.5.2021 vide another order dated 26.4.2021 of the Adjudicating Authority as the process of liquidation was taking time. After completion of necessary formalities, an invitation for EOI was published in newspapers on 23.5.2021 and, in the meanwhile, another extension for completion of liquidation for 90 days was granted by the Adjudicating Authority vide order dated 8.6.2021. The Appellant has added that the e-auction of the corporate debtor as an 'going concern' was conducted by Linkstar Infosys Private Limited on 16.6.2021 from 11 am to 2 pm and against a reserved price of Rs.2.04 crores, only one bid was placed by R-1 for Rs. 2.05 crores, which was accepted in accordance with the e-Auction Process Document and consequently a letter of intent was issued in favour of R-1 on 19.6.2021, which was signed by R-1 on 23.6.2021 without any conditionality. Thereafter R-1 deposited 25% of the bid amount i.e. Rs.51,25,000/- inclusive of the EMD amount of Rs. 5 lakhs on 15.7.2021. The Appellant has claimed that the issues raised in I.A. 3172/ND/2021 and I.A. 3113/ND/2021 were viz. (i) the successful e-auction bidder debtor is an MSME, and therefore eligible to receive benefit under section 240-A of the IBC, and (ii) the successful e-auction bidder

R-1 is not covered by any ineligibility under section 29-A to submit a resolution plan.

4. We heard the arguments advanced by the Learned Counsels for both the parties and perused the record.

5. The Learned Counsel for Appellant has argued that the corporate debtor is an MSME in accordance with the parameters of investment in plant and machinery and turnover as per notification no. S.O. 2119 (E) dated 26.6.2020 issued by the Ministry of Micro, Small and Medium Enterprises, Government of India (“Ministry of MSME”) and since the investment and turnover of the corporate debtor satisfy the laid-down criteria for a ‘Small Enterprise’, therefore Redbrick Consulting Pvt. Ltd. was eligible to submit a resolution plan with respect to the corporate debtor, even if Redbrick Consulting Pvt. Ltd’s director Mr. Gnyandeep Kantipudi was also a director of the corporate debtor. He has emphatically argued that since the corporate debtor is an MSME, section 240-A of the IBC becomes applicable in the present case, and hence, there is no ineligibility attached to Redbrick Consulting Pvt. Ltd. for submitting a resolution plan for insolvency resolution of the corporate debtor or to participate in the e-auction of the corporate debtor in its sale as a ‘going concern’.

6. The Learned Counsel for Appellant has referred to the provision under section 29-A of the IBC and argued that ineligibility of the successful purchaser in the e-auction has to be examined strictly with reference to the conditions of ineligibility enumerated in section 29-A and the Adjudicating Authority could not have travelled beyond those ineligibilities in holding the successful auction purchaser as a person ineligible under section 29-A(g), on the basis of an application filed against the suspended director of the corporate debtor for recovery of an amount, as such an application has not been adjudicated and no order passed by the Adjudicating Authority. He has further clarified that Gnyandeeep Kantipudi, who is a director of Redbrick Consulting Pvt. Ltd. is not ineligible under any of the conditions included in sub-sections (a) to (h) of section 29-A. He has clarified that sub-section (g) of section 29-A requires that an order be passed by the Adjudicating Authority, qua either a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction, which is certainly not the case in the instant matter. He has further contended that Respondent No. 2 TCM-UTM JV represented by Mr. K.S. Mandal did not have any *locus standi* to challenge the sale of the corporate debtor as a 'going concern', and therefore the Adjudicating Authority should not have considered his application raising objection on the purchase of the corporate debtor in e-auction by R-1.

7. The Learned Senior Counsel for Respondent-2(in short R-2) has argued that the notification dated 26.6.2020 (“Notification”) issued by the Ministry of MSME is fully applicable in the present case and it was obligatory for the successful bidder to have registered itself under the said notification by filing a memorandum for registration, which is referred as “Udyam Registration”, which quite clearly Redbrick Consulting Pvt. Ltd. did not do. He has further expanded on this argument by explaining that clauses (1) to (5) of the Notification provide the criteria and method for calculation of investment in plant, machinery and equipment, and turnover, and the process for registration is clearly outlined in clause (6) of the said notification, and, therefore, it is only after the enterprise files for “Udyam Registration” does the enterprise receive a valid registration, whereafter an e-certificate, namely “Udyam Registration Certificate” is issued on completion of the registration process. He has argued that the successful e-auction purchaser Redbrick Consulting Pvt. Ltd. has not produced any document or evidence with regard to its completion of “Udyam Registration” or the “Udyam Registration Certificate” in order to bolster its claim of being an MSME, and is therefore not entitled to benefit under section 240-A of the IBC.

8. In support of his contention, the Learned Senior Counsel for Respondent No. 2 has cited the judgment of Hon'ble Supreme Court in the matter of **Silpi Industries v. Kerala State Road Transport Corporation and Anr. [2021 SCC Online SC 439]** and also judgments of this Tribunal in the matters of **Ashish Mohan Gupta v. Liquidator of Hind Motors [2021 SCC Online NCLAT 352]** and **Nikhil Tandon v. Sanjeev Bindal [Company Appeal AT(INS) 13 of 2022]** to emphasise that it is the enterprise's responsibility to register itself as an MSME under the relevant notification of Ministry of MSME and to produce the evidence of such registration while claiming any benefit under section 240-A of the IBC.

9. The Learned Senior Counsel for Respondent No. 2 has adverted to the position of Mr. Gnyandeeep Kantipudi as a director of Redbrick Consulting Pvt. Ltd. to contend that he is ineligible to submit a resolution plan for the corporate debtor as he is *de facto* associated as a director with the successful e-auction purchaser Redbrick Consulting Pvt. Ltd. and he was also a director of the corporate debtor prior to the initiation of CIRP of the corporate debtor. In this connection, he has cited the judgment of Hon'ble Supreme Court in the matter of **Arcelor Mittal India Private Limited v. Satish Kumar Gupta [2019 2 SCC 1]** to strongly argue that it is not just the *de jure* position of a person, but also his *de facto* position, when the eligibility of a

person to submit a resolution plan is to be examined. He has referred to paragraphs 30 to 32 of the **Arcelor Mittal judgment (supra)** in support of his contention. He has claimed that a ‘purposive interpretation’ of the provision under section 29-A of the IBC is absolutely necessary while examining the eligibility of a resolution applicant or e-auction bidder (during liquidation process) otherwise there will be a real risk of handing over the corporate debtor to the same person/s who were responsible for leading the corporate debtor into insolvency.

10. With regard to ‘purposive interpretation’ of section 29-A, the Learned Senior Counsel for R-2 has cited the judgment of Hon’ble Supreme Court in the matter of **Bank of Baroda v. MBL Infrastructures Ltd. [2022 5 SCC 661]** and also in the matter of **Arun Kumar Jagatramka v. Jindal Steel & Power Limited [2021 7 SCC 474]**. He has explained that the Hon’ble Supreme Court has, in a catena of judgments, held that section 29-A was enacted to take care of the larger public interest and to facilitate effective corporate governance, and therefore, both text and context regarding section 29-A’s enactment should be seen while examining the eligibility of a person to submit a resolution plan or to participate in auction of corporate debtor as a ‘going concern’ in liquidation.

11. We first look at the issue whether the successful e-auction purchaser is an MSME to claim benefit under section 240-
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A. Section 240-A, which provides for a special dispensation to MSMEs with regard to the eligibility under clauses (c) and (h) of section 29-A in being a Resolution Applicant during CIRP, or an auction purchaser of corporate debtor during liquidation, is as follows:-

“240-A. Application of this Code to micro, small and medium enterprises. – (1) *Notwithstanding anything to the contrary contained in this Code, the provisions of clauses (c) and (h) of section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process 2 [or pre-packaged insolvency resolution process] of any micro, small and medium enterprises.*

(2) *Subject to sub-section (1), the Central Government may, in the public interest, by notification, direct that any of the provisions of this Code shall—*

(a) *not apply to micro, small and medium enterprises; or*

(b) *apply to micro, small and medium enterprises, with such modifications as may be specified in the notification.*

(3) *A draft of every notification proposed to be issued under subsection (2), shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions.”*

12. We examine the status of the successful e-auction purchaser R-1 whether it is an MSME or not in the light of section 240-A and the Notification dated 26.6.2020 issued by the Ministry of MSME. The Learned Counsel for Appellant has argued that the successful bidder Redbrick Consulting Pvt. Ltd.

is an MSME since its investment in plant and machinery and annual turnover places it in the category of a “small enterprise” as stipulated in notification no. S.O. 2119 E dated 26.6.2020 and no separate registration is required. Against this argument, the Learned Senior Counsel for Respondent No. 2 has brought to our attention the clauses (6), (7) and (8) of the same notification to contend that only after the registration has been carried out in the specified manner on the Udyam Registration portal, and the “Udyam Registration Certificate” is issued as provided in clause (2) of the said notification, can an enterprise claim benefit of being an MSME and also exemption is provided in section 240-A of the IBC. The relevant clauses (2) and (6) of the notification dated 26.6.2020 of Ministry of Micro, Small and Medium Enterprise are reproduced below:-

“2. *Becoming a micro, small or medium enterprise.-*

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

xx xx xx xx

6. *Registration process.-*

- (1) *The form for registration shall be as provided in the Udyam Registration portal.*
- (2) *There will be no fee for filing Udyam Registration.*
- (3) *Aadhaar number shall be required for Udyam Registration.*
- (4) *The Aadhaar number shall be of the proprietor in the case of a proprietorship firm, of the managing partner in the case of a partnership firm and of a karta in the case of a Hindu Undivided Family (HUF).*
- (5) *In case of a Company or a Limited Liability Partnership or a Cooperative Society or a Society or a Trust, the organisation or its authorised signatory shall provide its GSTIN and PAN along with its Aadhaar number.*
- (6) *In case an enterprise is duly registered as an Udyam with PAN, any deficiency of information for previous years when it did not have PAN shall be filled up on self-declaration basis.*
- (7) *No enterprise shall file more than one Udyam Registration:
Provided that any number of activities including manufacturing or service or both may be specified or added in one Udyam Registration.*
- (8) *Whoever intentionally misrepresents or attempts to suppress the self-declared facts and figures appearing in the Udyam Registration or updation process shall be liable to such penalty as specified under section 27 of the Act.”*

13. We also note the judgment of Hon'ble Supreme Court in the matter of **Silpi Industries v. Kerala State Road Transport Corporation and Anr. (supra)**, which relates to the requirement of registration as an MSME, and which is as follows:-

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“26. Though the appellant claims the benefit of provisions under MSMED Act, on the ground that the appellant was also supplying as on the date of making the claim, as provided under Section 8 of the MSMED Act, but same is not based on any acceptable material. The appellant, in support of its case placed reliance on a judgment of the Delhi High Court in the case of GE T&D India Ltd. v. Reliable Engineering Projects and Marketing, but the said case is clearly distinguishable on facts as much as in the said case, the supplies continued even after registration of entity under Section 8 of the Act. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under MSMED Act. There is no acceptable material to show that, supply of goods has taken place or any services were rendered, subsequent to registration of appellant as the unit under MSMED Act, 2006. By taking recourse to filing memorandum under sub-section (1) of Section 8 of the Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified under MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which appellant entered into contract with the respondent. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of MSMED Act 2006, by submitting memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, same will be prospective and applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision would lead legislation.”

14. We also note the judgment of this Tribunal in the matter of **Ashish Mohan Gupta v. Liquidator of Hind Motors (supra)**, which is as follows:-

“15. At the time of arguments, now effort is being made to take benefit of Section 240A of IBC calling upon this Tribunal to go into the definitions of Micro, Small and Medium Company Appeal (AT) (Ins.) No. 1176 & 1177 of 2022

Enterprise and hold the Company to be Micro or Medium Industry. We however find that the caution recorded by the Hon'ble Supreme Court is important. We have noticed the worry recorded of Insolvency Law Committee. We can see the effect of our intervention in importing Section 230 of Companies Act, into Liquidation stages under IBC. There are simply delays. Alternatively, even if the said Section was to be considered, although the Learned Counsel for the Appellant is arguing that this Court should record finding on Micro, Small and Medium Enterprises on the basis of definition in the MSME Act, and records of the three Companies, we decline to go into those details in the absence of memorandum under MSME Act and for reasons we recorded in Judgment in the matter of "Amit Gupta v. Yogesh Gupta" in Company Appeal (AT) (Ins.) No. 903 of 2019 dated 20.12.2019 where we have observed in Para 14 as under:

"14. Section 7 itself shows that the Central Government has to "classify" any class or classes or enterprises either as micro or small or medium on the basis of parameters fixed in Section 7. The Appellant has not brought on record that the Corporate Debtor has been classified by Central Government and if yes, under which parameter. In the Summary Procedure under IBC, the Resolution Professional and Adjudicating Authority are not expected to go into accounts and investigate if and in which category an application falls under Section 7 examining Notifications under Explanation 2 or Sub-Section 9 of Section 7 of MSME Act. "

15. Another judgment of this Tribunal in the matter of **Nikhil Tandon v. Sanjeev Bindal (supra)** clearly holds that filing of entrepreneur memorandum and its acknowledgement is necessary for an enterprise to be treated as a registered MSME. The relevant portion of this judgment is as follows:-

“10. From the materials on the record and the minutes of the CoC meeting, it is apparent that the Resolution Professional did not form any clear opinion that appellant is a Registered MSME nor advised the CoC to treat the Appellant as Registered MSME. We, thus, are of the opinion that the appellant is a Registered MSME within the meaning of act, 2006 and the filing of Entrepreneurs’ Memorandum in Part II which was acknowledged on 30.01.2007 is sufficient to treat the Appellant as a Registered MSME.”

16. The Learned Counsel for Appellant has cited the judgment of this Tribunal in the matter of **Mr. Rakesh Kumar Agarwal & Ors v. Mr. Devendra P Jain judgment dated 1.6.2021 in [CA(AT)(Insolvency) No. 1034 of 2020]** to contend that the Appellant in that case was found eligible to submit a scheme by virtue of satisfying the provisions of notification dated.1.6.2020. We distinguish this judgment from the facts of the present case in that the issue in the matter of **Rakesh Kumar Agarwal (supra)** related to the Appellant not being an MSME on the date of filing the application under section 10 of the IBC, but after the issuing of notification on 1.6.2020 it became eligible to file a resolution plan, whereas in the present appeal the issue is whether the successful auction purchaser has obtained a Udyam Registration Certificate and submitted it to the Liquidator before the e-auction to claim status as an MSME.

17. In light of the above pronouncements including the law laid down by Hon’ble Supreme Court in the matter of **Silpi Industries**

v. Kerala State Road Transportation Corporation & Anr. (supra), we are of the clear view that the successful auction purchaser Redbrick Consulting Pvt. Ltd. should have obtained the Udyam Registration Certificate to get the benefit of MSME under section 240-A of the IBC. The successful auction purchaser Redbrick Consulting Pvt. Ltd. did not produce any Udyam Registration Certificate when the e-auction of the corporate debtor as a 'going concern' took place on 16.6.2021. The notification dated 26.6.2020 of the Ministry of Micro, Small and Medium Enterprise was in existence on the date of e-auction, and therefore, it was incumbent upon the successful auction purchaser Redbrick Consulting Pvt. Ltd. to have obtained and submitted such a certificate to the liquidator to claim benefit under section 240-A. It was necessary for the liquidator to have examined the eligibility of R-1 in the light of the fact required e-certificate had not been produced by the successful auction purchaser. We, therefore, hold that the successful auction purchaser Redbrick Consulting Pvt. Ltd. cannot claim the benefit of an MSME under section 240-A of the IBC.

18. We note that Hon'ble Supreme Court, in the matter of **Arun Kumar Jagatramka v. Jindal Steel & Power Limited (supra)** has held that while doing a 'purposive interpretation' with regard to section 29-A of the IBC while examining the eligibility of

prospective resolution applicant, applies equally to the liquidation process. The relevant part of this judgment is reproduced below:-

“43. By the same amending Act through which: Section 29-A was introduced, Section 35(1)(f) was also amended with the introduction of a proviso. Section 35 specifies the powers of the liquidator as well as their duties, which are subject to the directions of the adjudicating authority. Section 35(1)D provides as follows:

35. Powers and duties of liquidator - (1) *Subject to the directions of the adjudicating authority, the liquidator shall have the following powers and duties, namely.*

(f) subject to Section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.”

Xx xx xx xx x

46. The Report of the Insolvency Law Committee dated 3-3-2018 states that the intent behind introducing Section 29-4 was to prevent unscrupulous persons from gaining control over the affairs of the company. These persons included those who by their misconduct have contributed to the defaults of the company or are otherwise undesirable. The Committee observed:

“14.1. Section 29-A was added to the Code by the Amendment Act. Owing to this provision, persons, who by their misconduct contributed to the defaults of the corporate debtor or are otherwise undesirable, are prevented from gaining or regaining control of the corporate debtor. provision protects creditors of the company by preventing unscrupulous persons from rewarding themselves at the expense of creditors and undermining the processes laid down in the Code.”

47. Significantly, the ineligibility which was engrafted by the amending legislation was incorporated in both the provisions of Chapter II dealing with Company Appeal (AT) (Ins.) No. 1176 & 1177 of 2022

CIRP as well as in Chapter III dealing with the liquidation process. Section 29-A stipulates the category of persons who “shall not be eligible to submit a resolution plan”. The proviso to Section 35(1)(f) incorporates the same norm in the liquidation process, when it stipulates that the liquidator shall not sell the immovable and movable or actionable claims of the corporate debtor in liquidation “to any person who is not eligible to be a resolution applicant” These words in Section 35(1)(f) are clearly referable to the ineligibility which is set up in Section 29-A.

48. The underlying purpose of introducing Section 29-A was adverted to in a judgment of this Court in Chitra Sharma v. Union of India? (hereinafter referred to as “Chitra, Sharma”). One of us (D.Y. Chandrachud, J.) speaking for a Bench of three learned Judges took note of the Statement of Objects and Reasons accompanying the Bill and emphasised the purpose of Section 29-A thus: (SCC p. 601, para 38)

“38. Parliament has introduced Section 29-A into IBC with a specific purpose. The provisions of Section 29-A are intended to ensure that among others, persons responsible for insolvency of the corporate debtor do not participate in the resolution process. The Statement of Objects and Reasons appended to the insolvency and Bankruptcy Code (Amendment) Bill, 2017, which was ultimately enacted as Act 8 of 2018, states thus:

2. The provisions for, insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of a company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults. of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible.

Parliament was evidently concerned over the fact that persons whose misconduct has contributed to defaults on the part of debtor companies misuse the absence of a bar on their participation in the resolution process to gain an

entry. Parliament was of the view that to allow such persons to participate in the resolution process would undermine the salutary object and purpose of the Act. It was in this background that Section 29-A has now specified a list of persons who are not eligible, to be resolution applicants.”

19. We also note the judgment of Hon’ble Supreme Court in the matter of **Bank of Baroda v. MBL Infrastructures Ltd. (supra)**, where Hon’ble Supreme Court, while reiterating its earlier pronouncements, held that the provisions of Section 29-A continue to permeate section 31(1)(f) which is applicable during the liquidation process and that section 29-A has been enacted to facilitate corporate governance and in larger public interest.

20. Keeping the law laid down as above by Hon’ble Supreme Court, we examine whether the successful auction purchaser Redbrick Consulting Pvt. Ltd. was eligible to bid during the e-auction of the corporate debtor as a going concern.

21. It is not in dispute that Mr. Gnyandeep Kantipudi is a suspended director of the corporate debtor/UTM Engineering Pvt. Ltd. and is also a director of Redbrick Consulting Pvt. Ltd alongwith Ms. Radika Kantipudi. The Learned Counsel for Appellant/Liquidator has claimed that Mr. Gnyandeep Kantipudi or the successful auction purchaser do not carry any ineligibility under section 29-A of the IBC. The **Arun Kumar Jagatramka judgment (supra)** reiterates the need to give a ‘purposive *Company Appeal (AT) (Ins.) No. 1176 & 1177 of 2022*

interpretation' of section 29-A as was held earlier by Hon'ble Supreme Court in the matter of **Arcelor Mittal v. Satish Kumar Gupta (supra)**. The relevant part of the said judgment is extracted below:-

“30. A purposive interpretation of Section 29-A, depending both on the text, and the context in which the provision was enacted, must, therefore, inform our interpretation of the same. We are concerned in the present matter with clauses (c), (h), (i) and (j) thereof.

31. It will be noticed that the opening lines of Section 2944 Contained in the 2017 Ordinance are different from the opening lines of Section 29-A as contained in the Amendment Act, 2017. What is important to notes that the phrase "Persons acting in concert" is conspicuous by its absence in the 2017 Ordinance. The concepts of "promoter", "management" and "control" which were contained in the opening lines of Section 29-A under the Ordinance have now been transferred to clause (c) in the 2017 Amendment Act. It is, therefore, important to note that the 2017 Amendment Act opens with language which is of wider import than that contained in the 2017 Ordinance, evincing an intention to rope in all persons who may be acting in concert with the person submitting a resolution plan.

32. The opening lines of Section 29-A of the Amendment Act refer to a de facto as opposed to a de jure position of the persons mentioned. therein. This is a typical instance of a "see-through provision", so that ode is able to arrive at persons who are actually in "control", whether jointly, or in concert, with other persons. A wooden, literal interpretation would obviously not permit a tearing of the corporate veil when it comes to the "person" whose eligibility is to be gone into. However, a purposeful and contextual interpretation, such as is the felt necessity of interpretation of such a provision as Section 29-A, alone governs. For example, it is well settled that a shareholder is a separate legal entity from the company in which he holds shares. This may be true generally speaking, but when it comes to à corporate vehicle

that is set up for the purpose of submission of a resolution plan, it is not only permissible but imperative for the competent authority to find out as to who are the constituent elements that make up such a company. In such cases, the principle laid down in Salomon v. A. Salomon & Co. Ltd. will not apply. For it is important to discover in such cases as to who are the real individuals or entities who are acting jointly or in concert and who have setup such a corporate vehicle for the purpose of submission of a resolution plan.”

22. As is abundantly clear, the above-mentioned judgment of Hon’ble Supreme Court lays down that a ‘purposeful and contextual interpretation’ is necessary in the interpretation of the provision under section 29-A as against a ‘wooden, literal interpretation’. This judgment, therefore, points out to the necessity of piercing of ‘corporate veil’ while examining the eligibility of a successful applicant or an auction bidder (in the case of liquidation).

23. It is thus, seen that in the judgment in **Bank of Baroda v. MBL Infrastructures Ltd. (supra)**, the Hon’ble Supreme Court has held that a ‘purposive interpretation’ of section 29-A is required when the primary aim is to restart the corporate debtor, which is also the case in the present appeal since the corporate debtor is being sold as a ‘going concern’. This judgment, in addition, also clarifies that the management which has ran the company aground, because of which the company has gone into insolvency resolution/liquidation, cannot be allowed to return in a new *avatar* as a resolution applicant. This judgment also lays

down that the erstwhile promoter of a corporate debtor has no vested right to bid for the property of the corporate debtor in liquidation. Such a purposive interpretation of section 29-A also permeates the provisions of section 35 (1)(f) of the IBC and, therefore, a similar prohibition is applicable to a successful auction purchaser so that backdoor entry of erstwhile management is not permissible.

24. On the basis of the law as enunciated by the Hon'ble Supreme Court in the above-stated judgments, we are of the clear view that Mr. Gnyandeep Kantipudi, who by virtue of being a director of Redbrick Consulting Pvt. Ltd., controls and manages its affairs, cannot be allowed to take over control of the corporate debtor of which he is a suspended director. Relying on the principle of "purposive interpretation" of section 29-A of IBC, we are of the clear view that Redbrick Consulting Pvt. Ltd. was not eligible to bid for the corporate debtor in liquidation as a 'going concern'.

25. In view of the findings that the successful auction purchaser Redbrick Consulting Pvt. Ltd. is not entitled to receive benefit under section 240-A as an MSME, and that the liquidator was not correct in giving such a benefit to the Redbrick Consulting Pvt. Ltd., and also that the successful auction purchaser was not eligible to bid for the corporate debtor in

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liquidation as a going concern, we are of the clear opinion that the Adjudicating Authority has correctly set aside the e-auction dated 16.6.2021 and directed the liquidator to re-auction the said property after obtaining fresh valuation of the said property from at least two valuers in the present time.

26. We find no infirmity in the Impugned Order and, therefore, have no reason to interfere with it. The appeal being devoid of merit is disposed of accordingly.

27. There is no order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

**[Mr. Barun Mitra]
Member (Technical)**

**New Delhi
6th February, 2023**

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