NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI

IA (IBC)/30/GB/2022
in C.P. (IB) No. 18/GB/2021

Coram:
Hon'ble Shri Rohit Kapoor, Member (J): Hearing through
Hon'ble Shri Prasanta Kumar Mohanty, Member (T): Video Conference

ATTENDANCE-CUM- ORDER SHEET OF THE HEARING OF GUWAHATI BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 21.06.2022

In the matter of:

Kamal Kumar Harlalka
Versus
Purshotam Gaggar, RP and 4 others

Section: Under Section 60(5) of IBC, 2016

S. NO.	NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE
1.	P. GAGGAR			Present in Video Conference

O R D E R

The case is fixed for pronouncement of Order.

The Order pronounced in open court vide separate sheets enclosed.

Sd/-

(Prasanta Kumar Mohanty)
Member (Technical)
& Adjudicating Authority

Sd/-

(Rohit Kapoor)
Member (Judicial)
& Adjudicating Authority

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Under Section 60(5) of IBC, 2016

In the matter of:

Kamal Kumar Harlalka ..... Applicant
[Director (Suspended Board) of R.S.H Agro Products Ltd.]

Versus

1. Purshotam Gaggar, RP of CD
2. Punjab National Bank, FC
3. HDFC Bank, FC
4. ICICI Bank, FC
5. IIFL Finance Limited, FC

.... Respondents

Order Delivered on 21.06.2022

ORDER
[Per: Hon'ble Shri Prasanta Kumar Mohanty, Member (T)]

1. This Application has been filed by Mr. Kamal Kumar Harlalka [Director (Suspended Board) of CD-R.S.H Agro Products Ltd] under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016 seeking directions from this Hon'ble Tribunal to allow to submit expression of interest published on 05/03/2022 so that the Applicant can file resolution plan, since the Applicant is not disqualified under section 29A of the insolvency and Bankruptcy code, 2016 in view of provisions of section 240A of the Insolvency and Bankruptcy Code, 2016 which permits Micro, Small and Medium Enterprises to participate in the resolution plan, seeking the following reliefs:

a) stay the further proceedings by the Resolution professional (RP) until a Resolution Plan is placed before him or before this Hon'ble

Tribunal by the Applicant within a stipulated time as may be granted by this Hon'ble Tribunal; and/or

b) set aside the grounds as stated in paragraph (point No. 3) of the reply dated 03.05.2022 of the Resolution Professional and further direct the Resolution professional to allow the Applicant to submit Expression of Interest and subsequently the Resolution plan in view of the competency of the Applicant under section 240A of the Insolvency and Bankruptcy Code, 2016; and/or

c) record the finding to the effect that provisions of section 240A of IBC, 2016 has overriding effect on section 25(2)(h) and/or section 29A of IBC, 2016, so far as the Micro, Small and Medium Enterprises sectors are concerned; and/or

d) pass any further order/s in the facts and circumstances of the present case.

2. The Applicant submits that:

2.1 An application was filed under section 10 of the Insolvency and Bankruptcy Code, 2016 to initiate CIRP in the matter of M/S R.S.H Agro Products Ltd.

2.2 The Applicant was a Director and promoter of the Corporate Debtor of R.S.H Agro Products Ltd and the corporate debtor is Micro, Small and Medium Enterprises (MSME).

2.3 The Applicant has compelled to file the present Interlocutory Application due to violation and misrepresentation of provisions of section 240A of the Insolvency Bankruptcy Code, 2016 (which are inserted by IBC [second amendment] Act, 2018 w.e.f. 06/06/2018) the Resolution Professional after consultation with COC.

2.4 The Applicant had submitted a representation to the Resolution Professional to allow them to submit Resolution plan for RSH Agro Products Ltd. vide letter dated 02.05.2022.

2.5 In the said representation dated 02.05.2022, it was averred that they have been assured by a group of investors to support them in submitting a viable and suitable resolution plan and as the COC has approved to apply for three months' extension to this Hon'ble Tribunal. It was further averred in the said letter that the extended time will not be disturbed as they will submit the proposal within 10 days of issuance of requisite documents by the Resolution Professional for submission of the Resolution Plan.

2.6 It was further averred in the said letter that the eligibility condition prescribed under the expression of interest published on 05.03.2022 preclude the existing promoter from applying as a Resolution Applicant and the same is the violation of section 240A of the Insolvency and Bankruptcy Code, 2016 which permits promoters of Micro, Small and Medium Enterprises (MSME) to bid for their stressed assets.

2.7 Amongst others, it was further averred that there is an express provision under section 240A of IBC 2016, that existing promoters can apply as a Resolution Applicant, and as conditions prescribed in the expression of interest published on 05.03.2022 prohibit the existing promoters to apply as a Resolution Applicant and submit Resolution plan because if an account has become NPA, then obviously the promoter group may not be able to fulfil the conditions laid down in the expression of interest published on 05.03.2022

2.8 The Resolution professional vide reply dated 03.05.2022 rejected the request on the ground as stated hereunder:

a) the eligibility criteria as stated in point No. 2 of your above stated letter approved by the COC in accordance with Sec. 25(2)(h) of the Insolvency and Bankruptcy Code, 2016 are not complied by you.
b) the list of prospective Resolution Applicants was already circulated and request for Resolution plan was also circulated.
c) you are well aware about the timeline of the process under the Insolvency and Bankruptcy Code, 2016 even though after expire of time you are just sending the letter without

complying the required stated in expression of interest published on 05.03.2022

2.9 The Applicant has cited the provisions of sections 25(1)(h), section 29A and section 240A of the Insolvency and Bankruptcy Code, 2016 in the matter:

2.10 The Applicant after publication of the Expression of Interest on 05.03.2022 could not approach the Resolution professional with the request, since, the Director of the Suspended Board namely, Kamal Kumar Harlalka, who is also the promoter of the company was ill and under medical treatment.

2.11 Resolution Professional is oblivious of the fact that the provisions of sections 25(h) of the Insolvency and Bankruptcy code, 2016 cannot empower either him or the CoC to overreach the provisions of Section 240A of The Insolvency and Bankruptcy Code, 2016, in as much as, if such stringent conditions are made for submitting of Expression of Interest/Resolution plan then the provisions of section 240A of Insolvency and Bankruptcy code, 2016 shall become otiose.

2.12 The intention of legislature by inserting sec. 240A of the Insolvency and Bankruptcy Code, 2015 is clear and unambiguous, in as much as, the said provision of section 240A of the Insolvency and Bankruptcy Code, 2016 begins with the non-obstante clause and it states that anything to the contrary contained in the code, the provisions of Clause(c), (h) of Section 29A of the Insolvency and Bankruptcy Code, 2016 shall not apply to the Resolution Applicant in respect of, corporate insolvency Resolution process of any micro, small and medium enterprises.

2.13 The Hon'ble Supreme Court in a catena of cases herd at maximum endeavour should be made for Resolution of the plan and not for liquidation and dissolution of Corporate Debtor.

2.14 None of the grounds as stated in the reply furnished by the IRP-in its letter dated 03.5.2022 are tenable, since, the promoters are the persons who has business wisdom and are capable of understanding the complexities which may arise in adopting a resolution and therefore, are in a better position to put forth better resolution plans for revival of the corporate Debtor which is the aim and object of the Insolvency and Bankruptcy code, 2016. Besides these and imperatively, the RP has failed to take note of the fact that the Corporate Debtor is an MSME and section 240 A of the Code, 2016 carves an exception for the said unit, in order to protect such units from falling into prey of sick units. Therefore, the actions impugned being letter dated 03.5.2022 warrants judicial intervention of this Hon'ble Tribunal for securing ends of justice. Further there is no inordinate delay on the part of the Applicant and the Resolution plan has not yet been approved under section 30(2) of the Insolvency and Bankruptcy Code, 2016 and COC also has sought for 3 months' extension.

2.15 The conditions made in the expression of interest are stringent enough and impossible for any MSME to fulfil whose accounts has been declared NPA by the Bank and moratorium has been declared in respect of the said MSME also. In a way, such conditions will render the entire legislative intention futile by rendering Section 240A of the Code, 2016 otiose.

2.16 This is a fit case where this Hon'ble Tribunal in exercise of its powers shall grant a stay in favour of the applicant staying the further proceedings of the IRP until a resolution plan is placed before him or before this Hon'ble Tribunal, by the Applicant within a stipulated time, as may be granted by your Lordship. The Applicant therefore states that there is a prima facie case in favour of the Applicant as his intent is in consonance with the aim and object of the Insolvency and Bankruptcy Code, of 2016. The balance of convenience also lies in favour of the Applicant as the final resolution plan is yet to be adopted. Irreparable loss both in terms of money as well as to the reputation of the Applicant is bound to be caused to the Applicant, if the interim stay, as prayed for is not granted. That there is a standard dictum in law that *"a* *thing that can not be done directly, can not be allowed to be done indirectly."*

3. On the other hand, the RP submits that:

3.1 The instant I.A. is not at all maintainable in law and in facts and therefore liable to be dismissed in limine.

3.2 The instant I.A. have been filed without application of mind and is also without any substance and only for the purpose to delay the Resolution Process at any cost whatsoever and also frustrate the very purpose behind the Resolution Process and the successful completion thereof. The Applicant has failed to show same tenacity while filing the instant I.A. as against his failure to submit the Expression of Interest for consideration by the RP and the CoC and if qualified/eligible- participate in the resolution process as a Resolution Applicant. Having not done so the Applicant cannot avail the same by invoking the jurisdiction of this Tribunal in total contravention of the laid down provisions of the IB Code, 2016, in connection thereof and as such the instant I.A. is liable to be dismissed.

3.3 The statements made in paragraphs 1 and 2 of the Application are matters of records and the RP do not admit anything which are not consistent with the records of the case.

3.4 The statements made in paragraph 3 of the Application are not correct and the RP denies the same and in this connection the Deponent states that there were absolutely no violation or misrepresentation on the part of the RP or for that matter the CoC as the facts as narrated in the Application itself shall stand to contradict the contentions of the Applicant.

3.5 With regard to the statements made in paragraphs 4, 5 and 8 of the Application, the RP states that the Respondent No. 1 after having been appointed as the Resolution Professional to initiate CIRP proceedings had issued and published an Expression of Interest (EOI) in Form G on 05.03.2022 and the said EOI had been published in the two wide circulated newspapers namely "The Assam Tribune" and "Asomiya Pratidin" dated 05.03.2022. The invitation of EOI also included detailed timeline for the set of procedures to be followed right from the submission of EOI, publication of profession list of Prospective Resolution Applicants, submissions of objection of professional list, circulation of RFRP (Request for Resolution Plan), submission of Resolution Plan and approval of the Resolution Plan by the CoC and the Hon'ble Adjudicating Authority.

3.6 The last date of submission of the EOI was 21.03.2022. It was almost after 41 days from the last date of submission of the EOI that the Applicant vide his Letter dated 02.05.2022 to the Respondent No. 1 (RP) requested for allowing him for submission of Resolution Plan for and on behalf of the Corporate Debtor in which he was Promoter/Director. Interestingly in contravention to all norms and provisions of the Code, the Applicant also requested the Respondent No. 1 (RP) to treat the Letter dated 02.05.2022 as EOI that too without any whisper of the compliance of the terms and conditions of the EOI. There was palpable silence on that aspect even though there was no bar for the Applicant to submit EOI for an on behalf of the Corporate Debtor. The invitation for EOI clearly mentions that the EOI submitted by the Prospective Resolution Applicants shall be verified by the RP and the provisional list of Resolution Applicants shall be published after necessary verification of the eligibility norms as set out in IBC and the invitation of EOI. It is therefore crystal dear that the action on the part of the Applicant and the subsequent filling of the IA, clearly demonstrate the intent of the Applicant to cause delay and defeat the CIRP process of the Corporate Debtor. In fact, the list of Provisional Resolution Applicants had already been issued/declared and the Resolution Plan had already been received and presently the Resolution Plan are being scrutinized/analysed. Had the Applicant was prudent enough and wanted to establish his bonafide he would have surely submitted the EOI within the stipulated timeline and could have submitted an Objection if his name was not considered as Resolution Applicant on the ground of ineligibility. In fact, the Respondent No. 1 (RP) had without wasting any further time, immediately replied to the Letter dated 02.05.2022 by the Applicant vide his Reply dated 03.05.2022 rebutting the contentions of the Applicant in detailed manner and the said Reply is self explicit in nature.

3.7 The statements made in paragraphs 6, 7 and 9 of the Application are not correct and the RP denies the same. In this connection the RP states that the Applicant had miserably failed to appreciate the fact that Section 240A of IB Code, 2016 provides for exemption only from the applicability of Clauses (c) and (h) of Section 29A of the Code. The other eligibility criteria set forth in Section 29A as well as the criteria laid down by RP with the approval of CoC as per the provision of Section 25(2) of the Code shall continue to be applicable to all Resolution Applicants including the Promoters of the Corporate Debtor.

3.8 The eligibility criteria prescribed for EOI for submission of the Resolution Plan of the Corporate Debtor duly approved by the Committee of Creditors are:

a) A Minimum Tangible Net Worth (TNW) of Rs. 20.00 Crores as on 31st March, 2021 and
b) Turnover and profitability during the past 3 years
c) Past Business Experience in trade or industry having average three years' turnover of at least Rs. 15 Crores.
d) Deposit of Rs. 50,00,000.00 (Rupees Fifty lakhs only) as EMD

3.9 The clear cut admission on the part of the Applicant in his Representation dated 02.05.2022 about his inability to comply with the clauses 2a, 2b, 2c and 2d of his Representation. The extract of the said contention had been highlighted herein below for better understanding of the eligibility criteria of the Resolution Applicant

"Since there is an express provision that in case of MSME, existing promoters can apply as a Resolution Applicant, the conditions prescribed prohibit, create barrier and obstruct existing promoters to apply as Resolution Applicant and submit Resolution Plan because if an account has become NPA, then obviously the promoter group may not be able to fulfil the conditions laid out in Para 2a, 2b, 2c and 2d of this letter."

Either way therefore the Applicant cannot be said to be eligible in any manner whatsoever. The eligibility criteria in Para 2a, 2b, 2c and 2d as prescribed in the invitation of Expression of Interest (EOI) are being laid down by RP having regard to the complexity and scale of operations of the business of the corporate debtor and is duly approved in the meeting of the Committee of Creditors held on 02 March, 2022. As envisaged in Section 25(2)(h) of the code, the additional criteria laid down in the invitation of EOI shall be fulfilled by every Resolution Applicant submitting Resolution Plan and no relaxation from such compliances are given to the promoters of MSME under Section 240A of the code. Inexplicably the Applicant in the said Letter dated 02.05.2022 tries to' pressurize and coax the Respondent No. 1 (RP) stating that the applicant having already invested and brought in securities in the account to a great extent and hence, it may not be able to fulfil the above eligibility conditions which are the pre-requisite to submit the resolution plan and therefore desist or refrain from putting such onerous conditions for existing promoter group.

3.10 With regard to the statements made in paragraph 10 of the Application the RP states that in the context of the aforesaid averments the claim of the Applicant that he was ill and under medical treatment does not appear to be believable or genuine as no Medical Documents have been enclosed to prove his claim.

3.11 The RP had followed the provisions of the Code and also the terms and conditions set forth in the EOI and have not deviated from his rights, duties and responsibilities as an RP and have been acting impartially within the parameters of law and the provisions of the

IB Code, 2016. The inability on the part of the Applicant to submit the EOI within the stipulated period and also his own admission of having unable to fulfil the criteria laid down in the EOI themselves speaks volume of the purpose and intent of the Applicant in defeating the entire Resolution Process of the Corporate Debtor through delay and filling such frivolous application. It is also crystal dear that the balance of convenience strictly lies in favour of the Respondent No. 1 (RP) and CoC for successful completion of the Resolution in Process. It is the Applicant who had continuously been causing uncalled hindrances both legal and technical for stopping the entire process at any cost.

3.12 The submissions and the relief sought in the paragraphs 18 and VI of the application are not tenable in law and in facts and therefore the same cannot be granted/allowed by this Hon'ble Tribunal and the Deponent submits that the Instant Application may be dismissed with cost.

4. The Applicant vide his written submissions dated 17.06.2022, further submits that:

4.1 The provisions of section 240A of the Code, 2016 has over ridding effect upon any other provisions of the Code, 2016 including section 25(h). The RP in the guise of exercise of power under section 25(h) of the Code, 2016 can not put such "stringent eligibility criteria" to render the intent of legislature meaningless and/or otiose.

4.2 When a particular provision in a statute starts with a non-obstante clause for a specific purpose by legislature, the same shall prevail upon any other provisions of the said statute or any other statute. But, the RP has exceeded in its jurisdiction by exercising its power under section 25(h) of the Code, 2016, in as much as, the RP put such stringent eligible criteria in the EOI which can not be fulfilled by the MSME, whose account has been declared as NPA.

4.3 This Hon'ble Tribunal will appreciate that the circumstances leading to filling of section 10 application by the Corporate Debtor. It was during pandemic which started from the month of March, 2020 and continued till 2021, the accounts of the Corporate Debtor became NPA. Moreover, the bank in question i.e. Punjab National Bank had after sanction of the further loan put certain conditions which can not be legally complied with by the Corporate Debtor as per the Assam Land & Revenue Regulation Act.

4.4 The Hon'ble NCLAT in the case of ***Saravana Global Holdings*** has held in para 20 as follows:

> *"The Committee of Creditors is to consider the feasibility, viability and such other requirements as has been specified by the Board. If it purposes maximization of the assets and is found to be feasible, viable and fulfil all other requirements as specified by the Board, the company being MSME, it is not necessary for the Committee of Creditors to follow all the procedures under the Corporate Insolvency Resolution Process. For examples, if case is settled before the constitution of the Committee of Creditors or in terms of section 12A on the basis of offer given by Promoter, in such case, all other procedure for calling of application of Resolution Applicant etc. are not followed. If the Promoter satisfy all the creditors and is in a position to keep the 'Corporate Debtor' as a going concern."*

Further in para 21 in the said case it was held that:

> *"The Parliament with specific intention amended the provisions of the I&B Code by allowing the Promoters of MSME to file Resolution Plan. The intention of the legislature shows that the Promoters of MSME should be encouraged to pay back the amount with the satisfaction of the Committee of Creditors to regain the control of the Corporate Debtor and entrepreneurship by filing Resolution Plan which is viable, feasible and fulfils other criteria as laid down by the Insolvency and Bankruptcy Board of India."*

4.5 In ***Swiss Ribbons Pvt. Ltd. and Another vs- Union of India and Others-*** **2019 SCC Online SC 73,** the Hon'ble Apex Court made it clear that I & B Code envisages maximization of value of Assets of the Corporate Debtors so that they are efficiently run as going concerns and in turn will promote entrepreneurship, the liquidation can be ordered as a last resort if there is no Resolution Plan and the Resolution Plans submitted are not fulfilling the criteria laid down therein.

4.6 In the present case the RP has sought for 3 months' extension for completion of the CIRP. This Hon'ble Tribunal has also granted 3 months' extension to the RP for completion of the CIRP vide order dated 13.05.2022. As such, nobody will be prejudiced if the Applicant has given a chance to submit EOI/Resolution Plan by this Hon'ble Tribunal. The Applicant undertakes to submit the said EOI/Resolution Plan within a period of 10 days from the date of the order by this Hon'ble Tribunal.

4.7 This Hon'ble Tribunal will appreciate that the opposition of the RP for allowing the Applicant to file/submit EOI/Resolution Plan is without any cogent reason, more so, when he himself in consultation with COC has sought for and granted 3 months' time by this Hon'ble Tribunal vide order dated 13.05.2022 for completion of CIRP in IA(IBC)No. 32/GB/2022.

O R D E R

5. Heard both the sides at length. On perusal of the documents, affidavits submitted and submissions and arguments made by the counsel for the Applicant and the RP himself, it is observed that:

5.1 The Application under Section 10 of IBC filed by the CD itself for its default to the FCs was admitted by this Bench on 23/11/2021.

5.2 **The RP has submitted that the Resolution Plans had already been received and presently the Resolution Plan are being scrutinized/analysed.** Ninety days' extension has been allowed as prayed for to complete the CIRP.

5.3 When the CIRP Period of 180 days was going to complete on 21/05/2022 and at that stage almost after 41 days from the last date of submission of the EOI, the Applicant on behalf of the Corporate Debtor in which he was Promoter/Director has submitted

a simple letter dated 02.05.2022 to the Respondent No. 1 (RP) requesting the RP to allow them to submit a Resolution Plan and treat the said Letter as EOI without any reference of the compliance of the terms and conditions of the EOI.

5.4 The Applicant has submitted in the said representation that they have been assured by a group of investors to support them in submitting a viable and suitable resolution plan.

5.5 Hence it is apparent that the letter submitted is all hypothetical when the Applicant CD itself couldn't pay the dues to the FCs and had filed application under Section 10 of IBC for CIRP. The question of the Liquidation does not arise, as claimed by the Applicant here, when the Resolution plans received are under consideration.

6. Considering the points mentioned above, it is clear that the intent of the Applicant is only to delay and defeat the CIRP process of the Corporate Debtor by filing this type of IA. The IBC process shall not be allowed to misuse and CIRP has to be completed in time in the interest of all stake holders. We do not find any merit to entertain this IA at this stage which needs to be rejected.

7. The RP is directed to complete the CIRP without further loss of time.

8. **Hence, IA (IBC)/30/GB/2022 in C.P. (IB) No. 18/GB/2021 is hereby dismissed so to no costs.**

Sd/-

(Prasanta Kumar Mohanty)
Member (Technical)
& Adjudicating Authority

Sd/-

(Rohit Kapoor)
Member (Judicial)
& Adjudicating Authority