

**IN THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH, BENGALURU
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)
(Through Web-Based Video Conferencing)**

IA No. 371 of 2022

C.P. (IB)No.324/BB/2019

U/s 60 (5) of the IBC, 2016

R/w Rule 11 of NCLT Rules, 2016

In the matter of:

I.A 371 of 2022

Mr. Joseph Jayananda,

Suspended Directors of M/s Navalmar Shipping (India) Private Limited,
R/o No. 8/1, The Angel, Bazar Street, Abbaiah Garden,
Vannarpet Vivekanagar,
Bangalore- 560 047.

Applicant No. 1

Mr. Rosy Rego,

Suspended Director of M/s Navalmar Shipping (India) Private Limited
F3, 1st Floor, Marian Apartments,
No. 17, Cline Roads, Bengaluru,
Karnataka 560 005.

Applicant No. 2

Versus

Mr. Ritesh Prakash Adatiya

Resolution Professional of M/s Navalmar Shipping (India) Pvt Ltd,
B-401, the First, B/h ITC Hotwl,
B/s Keshav Baugh Party Plot,
Vastrapur, Ahmedabad 380 015.

Respondent No. 1

Navalmar (UK) Ltd.

Operational Creditor of Navalmar Shipping (India) Pvt Ltd,
Beulah Hall 3, Beulah Road London,
SW 19 3SB, United Kingdom.

Respondent No. 2

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Andrea Colombo,

(Director of Navalmar Shipping (India) Pvt. Ltd. from 18.03.2002 to 01.04.2019),
Studio 8, The People's Hall,
91-97, Freston Road,
London – W11-4BD.

Respondent No. 3

M/s Navalmaruk Services India Private Limited,

Resolution Applicant of M/s Navalmar Shipping (India) Pvt Ltd,
Sea View Towers,
Phase III, 5TH Floor,
312/9, Krishnan Koil, St. Harbour,
Chennai 600 001.

Respondent No.4

Order Delivered on: 07th December, 2023

Coram: 1. Hon'ble Justice (Retd.) T. Krishnavalli, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Parties/Counsels Present:

For the RP : Shri Abhijit Atur, Adv.
For the Applicant : Ms. Amrita Jain
The RP : Shri Ritesh Prakash Adatiya

ORDER

Per: BENCH

1. The present petition is filed on 05.09.2022 by the Suspended Director of the Corporate Debtor, M/s Navalmar Shipping (India) Private Limited under section 60 (5) of the IBBI, 2016 interalia seeking to set aside I.A 297 of 2021 filed by the Resolution Professional of the Corporate Debtor for approval of the Resolution Plan and to invite fresh Applicants for submitting the Resolution Plan of the Corporate Debtor.
2. The facts of the case as narrated by the Applicant is mentioned below:

- a) It is submitted that Company Petition No. 324/BB/2019 was filed by Respondent No.2 (Operational Creditor) for initiating CIRP against the Corporate Debtor under Section 9 and CIRP was initiated by this Tribunal vide order dated 29.05.2020.
- b) It is submitted that upon the public announcement of Form G for invitation of expression of interest, Respondent No.4 had submitted the Resolution Plan along with the Affidavit under section 29A to Respondent No.1. Further, in the 8th Meeting of the CoC of the Corporate Debtor held on 20.02.2021, the Resolution Plan submitted by Respondent No. 4 was approved by 99.95% majority with Respondent No.2 carrying the voting share of 91.78%.
- c) It is submitted that Respondent No.3, who in addition to being the Director of the Resolution Applicant was also the person responsible for the day-to day affairs and management of the corporate debtor when the CIRP of the corporate debtor was initiated. Further, Respondent No.3 along with Respondent No. 2 were alleged of concealing facts causing for initiation of CIRP by this Tribunal. Moreover, the name of Respondent No. 2, “Navalmar (UK) Limited” resembles very closely to name of Resolution Applicant Company “M/s Navalmaruk Services India Private Limited”.
- d) Further, Respondent No. 3 was appointed as the Director of Resolution Applicant on 14.09.2018 and was also the erstwhile Director on the Board of Corporate Debtor from 18.03.2022 to 01.04.2019. it is submitted that Respondent No. 3 was the Director and also the part of management and control of both the Corporate Debtor as well as Respondent No.4 at the same time, from 14.09.2018 to 01.04.2019, and falls within the ambit of the definition of “connected person” of the Corporate Debtor as

mentioned under Section 29-A(j) of IBC. Furthermore, as per Section 29-A(g) of IBC, Respondent No. 4 is disqualified to proposed a Resolution Plan as Respondent No. 3 was responsible for all the decisions in respect of affairs of the Corporate Debtor including the alleged fraudulent and undervalued transactions that took place during his tenure as a Director of the Corporate Debtor.

- e) Further, the Applicant relied on the decision of Hon'ble Supreme Court in the matter of "*Chitra Sharma v Union of India*" in *Writ Petition (Civil) No. 744 of 2017* dated 09.08.2018 wherein it stated that "*Parliament has introduced Section 29A into the IBC with a specific purpose. The provisions of Section 29A are intended to ensure that among others, persons responsible for insolvency of the corporate debtor do not participate in the resolution process. The court must bear in mind that Section 29A has been enacted in the larger public interest and to facilitate effective corporate governance. Parliament rectified a loophole in the Act which allowed a backdoor entry to erstwhile managements in the CIRP. Section 30 of the IBC, as amended, also clarifies that a resolution plan of a person who is ineligible under Section 29A will not be considered by the CoC*".
 - f) In view of the above judgment it is submitted that the Respondent no.4 is disqualified to propose a Resolution Plan as Respondent No.3 is the "connected party" to the Corporate Debtor, the main stakeholder of the Resolution Applicant, i.e Respondent No.3, is also an ex-director of the Corporate Debtor. Hence the Resolution Plan submitted by Respondent No.4 ought to be dismissed.
3. The Learned Counsel for Respondent No.1 (Resolution Professional) filed his objection vide Dy.No. 1445 dated 14.03.2023 and written submissions on 03.10.2023 submitting that the instant application

was filed more than a year and half after the resolution plan was approved by the CoC with no explanation whatsoever for such enormous delay. Moreover, applicant No. 2 attended the CoC meeting held on 20.02.2021 and did not raise any objections to the resolution plan at any prior point of time or even during the said meeting. It is further submitted that the resolution plan met with all the requisite requirements under the Code, the same was approved and Form H has been duly filed by the Respondent No.1. In the written submission filed by the Respondent No.1 on 03.10.2023, it is stated that the Resolution Applicant is owned by M/s Navalmar U.K Limited (The Operational Creditor and Respondent No2), since the Resolution Applicant was the wholly owned subsidiary of the Operational Creditor.

4. It is further submitted that Respondent No. 3 is not disqualified in terms of the conditions laid down under Section 29A(a) to (i) of the Code and hence, the disqualification under Section 29A(j) of the Code would not be applicable to the Respondent No.4.
5. It is further stated that the Respondent No.3 was not disqualified under Section 29A (g) of the Code, since as on the date of submission of the resolution plan, no order has been passed by this Adjudicating Authority in respect of a past preferential, undervalued, fraudulent transactions. Therefore, since the Respondent No.3 was not disqualified, the issue regarding the Respondent No.4 (Resolution Applicant) being the connected person as defined under Section 29A of the Code or otherwise was not relevant. It is also stated that the admission under Section 9 of the IBC vide order dated 29.05.2020 passed in CP (IB) No. 324/BB/2019 by this Adjudicating Authority was challenged by the Applicants, which was upheld by the Hon'ble NCLAT, New Delhi in Company Appeal (AT) (Insolvency) No.718 of 2020.
6. Further, Learned Counsel for Respondent No. 3 and 4 have filed their objections interalia submitting that the Resolution Plan along

with affidavit 29A filed by Respondent No. 4 was approved by CoC as provided under the Code, thus the CoC has applied its Commercial wisdom for approval of the Plan. Moreover, although Respondent No. 3 was the Director of the Corporate Debtor, he was not responsible for the affairs of the Corporate Debtor. Further, the respondent No.3 had ceased to be the director of the Corporate Debtor with effect from 01.04.2019 and admittedly, the petition against the Corporate Debtor was admitted and CIRP commenced on 29.05.2020 i.e almost after a period of 1 year. Accordingly, the Respondent No. 3 was not a “connected person” as on the CIRP commencement date.

7. Moreover, it is submitted that Respondent No. 3 is not disqualified under Section 29A(g) of the Code. Since no order has been made in I.A No. 304 of 2021 filed by the Resolution Professional under Section 45, 49 and 66 of the Code. Therefore, respondent No.4 is not disqualified from submitting a resolution plan for the corporate debtor.
8. Heard both the counsels and perused the material available on Record.
9. The present application is filed by the suspended director of the corporate debtor inter alia seeking to reject the Interlocutory Application filed for approval of the resolution plan contenting that the Resolution Applicant is disqualified under section 29A of the IBC in submitting a resolution Plan.
10. It is argued by the Applicant that Respondent No. 3, Mr. Andrea Colombo was appointed as the director of the Resolution Applicant on 14.09.2018 and was also the erstwhile Director on the Board of Corporate Debtor from 18.03.2002 to 01.04.2019 and was responsible for the day-to-day affairs of the Corporate Debtor. The filing of the Company Petition for initiation of CIRP was done on 19.08.2019. It is also pointed out that Respondent No. 3 is

disqualified under Section 29A (g) of the Code as he is involved in fraudulent and undervalued transactions during his tenure and the same is pending consideration by this Tribunal.

11. However, it is submitted by the Respondents that Respondent No. 3 was removed from the directorship on 01.04.2019 and the application for CIRP was initiated only on 19.08.2019. Further, respondent No. 3 is not disqualified in terms of conditions laid down under Section 29A (j) of the Code.
12. We have perused the Director Master data of Respondent No. 3 wherein it is observed that Mr. Andrea Colombo, Respondent No. 3 was the director of “Navalmar Shipping (India) Private Limited”, the Corporate Debtor and Navalmaruk Services India Private Limited, the Resolution Applicant during the same period.
13. It is noticed that the Respondent No.3 was the Director of the Corporate Debtor for more than 17 years from 18.03.2002 to 01.04.2019 and this petition was filed on 19.08.2019 i.e., merely 4 ½ months after he left the Directorship of the Corporate Debtor. It is contended by the Applicant that this was the period during which the default took place on the part of the corporate debtor and he was also responsible for the day to day running of the affairs of the corporate Debtor. The argument of the Respondent in this regard that he was not responsible for the day to day affairs of the Corporate Debtor is not acceptable in view of the facts that he continued on the Board of Directors for more than 17 years and was aware of all the matters by way of Board meetings, resolutions and Audited financials of the company. Therefore, the conclusion that during the period when the default arose on the part of the Corporate Debtor, the Respondent No.3 was also at the helm of the affairs being regularly part of the Board of Directors, is inevitable.
14. Further, it is noticed that the Respondent No.3 was appointed as a Director of the Resolution Applicant on 14.09.2018 when he was still continuing as a Director of the Corporate Debtor upto 01.04.2019.

Therefore, necessarily the Resolution Applicant being the Respondent No.4 is to be treated as a related party of the Corporate Debtor having common directors for a considerable period of time. Since the Respondent No.3 was on the Board of Director of both the Corporate Debtor as well as Respondent No.4 at the same time between 14.09.2018 to 01.04.2019, he is liable to be treated as connected person of the corporate Debtor. The fact that he was not on the Board of Corporate Debtor on the date of filing of the CIRP application on 19.08.2019, is immaterial; since it may just be a device to escape the rigours of the tag of 'related party' and at the same time ensure that he is again at the helm of affairs being on the Board of the Resolution Applicant.

15. It is further noticed that the Respondent No.2, M/s. Navalmar UK Limited being the Operational Creditor holds 91.78% voting share in the Committee of Creditors ('COC') and the Successful Resolution Applicant ('SRA') M/s. Navalmaruk Services India Private Limited being the Respondent No.4 is a wholly owned subsidiary of the Operational Creditor. This is another important issue which has been pointed out by the Applicant, that the Operational Creditor has approved the resolution plan submitted by its own group company, due to its holding of 91.78% voting share in the COC, in other words, the Operational Creditor has approved its own Resolution Plan. In fact, it was categorically stated by Respondent No 1 in his written submissions filed on 03.10.2023, that the Successful Resolution Applicant (4th Respondent) was a wholly owned subsidiary of the Operational Creditor (2nd Respondent).

16. Considering the above facts, the main point is whether the SRA is meeting the eligibility criteria under Section 29A of the Code. Under Section 29A, the persons who have contributed to the default of the Corporate Debtor, or are a related party, are debarred to submit the resolution plan under the code. The provision of Section 29A was inserted under the code to prevent the person who has contributed to

the downfall of the company and defaulted, from gaining back its control through back door entry.

17. Infact, in view of the provisions of Section 29A of the Code, specifically under Regulation 36 A (8) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016, it was the responsibility of the Resolution Profession ('RP') to conduct the due diligence and file the report in order to satisfy that the Prospective Resolution Applicant complied with the provisions of the Section 29A of the IBC, apart from the other conditions mentioned in Reg.36A(8). However, no such Due Diligence Report has been filed by the Resolution Applicant. The Prospective Resolution Applicant merely submitting an affidavit under Section 29A regarding the eligibility to submit the resolution plan is not sufficient, and due diligence is necessary to be conducted by the RP in pursuance of the IBBI regulations. The underlined principles of the judicial precedence in the matter and specifically with relation to the provision of Section 29A of the Code was that the promoters of the Corporate Debtor who have contributed to its downfall and default should not be allowed to regain the control of the company.
18. Therefore, by the inclusion of section 29A in the Code, persons who have contributed to the defaults of the corporate debtor or are undesirable due to incapacities as specified in the section or are a 'related party' to another defaulting party, are prevented from gaining control of the corporate debtor by being declared ineligible to submit a Resolution Plan under the Code.
19. It is noticed that the Respondent No. 3 was on the Board of Director of the Corporate Debtor till 01.04.2019. Further he was also the Director of the Resolution applicant from 14.09.2018 till date. In this connection it is observed that the Hon'ble NCLAT New Delhi has merely upheld the admission of CIRP, and the matter regarding applicability of Section 29A and submission of Plan by a related party was not the issue before it, hence this objection by 1st Respondent is not tenable. It is seen that Respondent No.3 was part

of management and control of the Corporate Debtor during the period of default, and also the Director of the Resolution Applicant from 14.09.2018 to 01.04.2019. Hence Respondent No.3 and Respondent No.4 both duly fall within the scope and ambit of the expression “connected person of the Corporate Debtor” under Section 29A of IBC, 2016.

20. Accordingly this Tribunal is of the considered view that the Respondent No.4 is not eligible to be a Resolution Applicant. Therefore, allowing the resolution applicant to proceed with the resolution will defeat the purpose of the Section 29A of the Code.

21. Accordingly **I.A No. 371 of 2022 is disposed** of with the above observations.

-Sd-

**(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)**

-Sd-

**(T. KRISHNAVALLI)
MEMBER (JUDICIAL)**