

NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS) No. 207 of 2021

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

Against the Impugned Common Order dated 18.06.2021 in IA/33/CHE/2021 and
IA/500/CHE/2021 in CP/158/IB/2018 passed by the Adjudicating Authority,
(National Company Law Tribunal, Division Bench – I, Chennai)

In the matter of:

Mr. C. Raja John,

No. 18, Thasami Park Residency,
G.V.K. Nagar, Singanallur
Coimbatore – 641005.

...Appellant

V

1. Mr. R. Raghavendran

Resolution Professional of
Springfield Shelters Pvt Ltd
Flat # 3, Dhruvatara Apartments
241, Dr. Rajendra Prasad Road,
Tatabad, Coimbatore – 641012.

...Respondent No.1

2. Mr. T. Baskaran,

DGM, State Bank of India,
SAM Branch,
Coimbatore.

...Respondent No.2

3. Mr. Samuthirakani,

Chief Manager
Central Bank of India
Coimbatore.

...Respondent No.3

4. Mr. Gopal Rao,
Manager,
Andhra Bank
Coimbatore.

...Respondent No.4

5. Mr. Ramanujam,
VP, Legal,
Shriram City Union Finance Limited
T Nagar, Chennai.

...Respondent No.5

6. Mr. Kumar ARJR,
DGM,
Repc Bank,
Coimbatore.

...Respondent No.6

7. Mr. GunasekaranGovindaraj,
Authorised Representative for unsecured creditors,
C/o. Flat#3, Dhruvatara Apartments
241, Dr. Rajendra Prasad Road,
Tatabad, Coimbatore – 641012.

...Respondent No.7

Present:

For Appellant : Mr. P.H. Arvinth Pandian, Sr. Advocate
For Avinash Krishnan Ravi
Mr. R. Kannan, PCS

For Respondent No.1/
Caveator : Mr. B. Dhanaraj, Advocate

Coram : Mr. Justice M. Venugopal Member (J)

Mr. Kanthi Narahari Member (T)

JUDGMENT
(VIRTUAL MODE)

Per: Kanthi Narahari Member (T)

1) The present Appeal is filed aggrieved by the Order dated 18th June 2021 passed by the Adjudicating Authority (National Company Law Tribunal, Division Bench-I, Chennai) in IA/33/CHE/2021 and IA/500/CHE/2021 in CP/158/IB/2018, whereby and whereunder the Adjudicating Authority dismissed the application of the Appellant on the ground that the Appellant suffers a disqualification under Section 29(A)(e) of the I&B Code, 2016 and observed that the Appellant trying to gain a backdoor entry on the guise of presenting themselves as MSME.

Appellant's Submissions :-

2) Shri P.H. Arvind Pandian, Learned Senior Counsel appeared for the Appellant submitted that the Appellant filed IA/500/2021 in CP/158/IB/2018 for an early hearing of IA/33/2021, however, the Hon'ble NCLT passed the above Impugned Order in both the IAs without considering the documents and submissions of the Appellant on the points placed before it.

3) The Learned Counsel for the appellant submitted that the IA/33/2021 filed by the Appellant before the Learned Adjudicating Authority (NCLT, Chennai Bench) challenging the rejection of the Resolution Plan vide order dated 20th November 2020 by the Resolution Professional. The Resolution Plan was submitted by the Appellant to consider as a promoter of the Corporate Debtor on the ground that the Corporate Debtor is an MSME and the Appellant is eligible to participate in the Resolution Plan. However, the Resolution Professional rejected the plan on two grounds.

- a. the Appellant does not meet the eligibility norm as per Section 25(2)(h) of I & B Code, prescribing the Net Worth of Rs.2 Crores by the COC.
- b. The Director Identification Number (DIN) of the Appellant is under default and not eligible as per Section 29(A)(e) of the Code, 2016.

Challenging the above rejection of the Appellant's Resolution Plan, the Appellant filed the application being IA/33/2021. The Learned Adjudicating Authority passed the Impugned Order by observing at Para 9 and 10 as under:

“9. A perusal of the MSME Certificate attached with the typed set filed by the Respondent would go on to show that the said certificate was only obtained on 19.12.2020. Thus, it can be seen that the Applicant is trying to play a fraud upon this Tribunal, in order to gain backdoor entry to the assets of the Corporate Debtor in the guise of projecting themselves as MSME. Further, Section 240A of the IBC, 2016 exempts applicability of only Section 29A(C) and 29A(h) in terms of eligibility to be a resolution

applicant as a medium level enterprise under MSME Development Act, 2006. In the present case, the Applicant suffers disqualification under Section 29A(e) and unfortunately, such a protection is not being granted to the Applicant / Corporate Debtor, under Section 240A of IBC, 2016 who claims themselves to be an MSME. In any case, the Applicant suffers disqualification under Section 29A(e) of IBC, 2016.

10. The Learned Counsel for the Respondent during the course of submissions has submitted that they have issued a Fresh Expression of Interest and the last date for the submission of the Resolution Plan was fixed as 03.07.2021. Thus, the Applicant, being the Promoter / Suspended Director of the Corporate Debtor is trying to stall the process of CIRP on the guise of projecting themselves as MSME and thereby trying to gain a backdoor entry to the assets of the Corporate Debtor.”

4) The Learned Counsel for the appellant submitted that without considering the reasons and the documents submitted by the Appellant, the Learned Adjudicating Authority rejected the Application upholding the order passed by the Resolution Professional.

5) The Learned Counsel submitted that with regard to the first ground i.e. not meeting the eligibility norm as per Section 25(2)(h) of the I&B Code i.e. minimum net worth of Rs.2 Crore is concerned, it is submitted that the Appellant has invested all his life earnings and properties worth Rs.10.5 Crores in the company. The Appellant also provided the collateral security of his only house

for the loan raised by the Corporate Debtor amounting Rs.1.75 Crores and the cost of the land of the Corporate Debtor is worth Rs.4.05 Crores.

6) The Learned Counsel submitted that the above investment and the properties can be considered as net worth of the Appellant and requested the Resolution Professional to consider the Plan of the Appellant.

7) The Learned Counsel further submitted that with regard to second point i.e. the Appellant is disqualified to act as a Director under the Companies Act, 2013 and he is not eligible as per Section 29(A)(e) of the Code, 2016. In this regard, the Learned Counsel submitted that the status of the DIN of the Appellant has been restored/reactivated pursuant to the directions of the Hon'ble High Court of Madras and the status of the Appellant i.e. Director is active as per MCA Portal, however, the same was not considered either by the Resolution Professional or by the Learned Adjudicating Authority. In support of the contention the Learned Counsel filed the Judgment of the Hon'ble High Court of Madras at Page 62 of Volume 1.

8) The Learned Counsel further submitted that the criteria prescribed i.e. minimum net worth of Rs.2 Crore cannot be made applicable to the Corporate Debtor since the Corporate Debtor is an MSME Enterprise as per the Certificate issued by the Government of Tamil Nadu, Department of Industries and Commerce dated 28.05.2013 and subsequently, the certificate was also issued by the Government of India Ministry of Micro, Small and Medium Enterprises, recognizing the Corporate Debtor as MICRO Enterprise vide Certificate dated 19.12.2020. Hence, the status of the Corporate Debtor is an MSME. In this regard, the Learned Counsel relied upon the Judgment of this Appellate Tribunal dated 04.07.2019 passed in Company Appeal (AT)(INS) No.203 of 2019 in the matter of Saravana Global Holdings Ltd. & ors. v Bafna Pharmaceuticals Ltd. and Ors. In the aforesaid Judgment, this Tribunal held that if the Corporate Debtor is an MSME the promoters are not ineligible in terms of Section 29(A) of the I&B Code. Further held that it is not necessary for the Committee of Creditors to find out whether the Resolution Applicant is ineligible in terms of Section 29(A) or not.

9) The Learned Counsel submitted that in view of the decision of this Appellate Tribunal, the Appellant is eligible to submit the Resolution Plan and the same may be considered by the Resolution Professional.

10) In view of the reasons, the Learned Counsel submitted that the Corporate Debtor is an MSME and the Appellant DIN was activated by virtue of Judgment of the Hon'ble High Court of Madras. Therefore, the stand taken by the Resolution Professional and upholding the stand of the Resolution Professional by the Adjudicating Authority by passing the Impugned Order need to be set aside.

RESPONDENT'S SUBMISSIONS:

11) Shri B. Dhanaraj, Learned Counsel appeared for the Respondent submitted and supported the Impugned Order stating that there is no infirmity in the Impugned Order. He submitted that the criteria in respect to the net worth of the prospective Resolution Applicants to submit the Resolution Plan as per Section 25(2)(h) of the I&B Code, 2016 is within the purview of the Committee of Creditors and the Committee of Creditors in their meeting took a decision to restrict the prospective Resolution Applicants those who have Net Worth of Rs.2 Crore can submit their Resolution Plans.

12) He further submitted that the Appellant is not met the criteria as prescribed, therefore, the Resolution Professional rejected the plan as one of the grounds. Further the Appellant was disqualified as Director therefore, he is not eligible as

per Section 29(A)(e) of the I&B code. On the above two grounds the application of the Appellant was rejected. However, the Appellant by his e-mail dated 18.11.2020 addressed to the Resolution Professional informing that the minimum eligibility criteria will be provided at the time of submission of Resolution Plan by an investor and relied upon the Judgment of the Hon'ble High Court of Madras in respect to the disqualification as Director. However, the Resolution Professional rightly taken a stand that the eligibility criteria had to be complied with at the time of presenting the application and no order was obtained from the ROC in respect of removing the name of the Appellant from the list of Default Directors. Therefore, the plan of the Appellant was not considered. Further, the Appellant filed an application before the Ministry of Micro, Small and Medium Enterprises and availed a certificate dated 19.12.2020 with regard to the status of the Corporate Debtor as Micro Enterprise subsequent to the initiation of CIRP against the Corporate Debtor, therefore the same has not been considered.

13) The Learned Counsel submitted that as per Regulations 36(A) of I&B (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 stipulates that only interested and eligible prospective Resolution Applicants entitled to submit Resolution Plans. Further the Learned Counsel submitted that the Commercial Wisdom of Committee of Creditors (COC) cannot be interfered

by relaxing the minimum eligibility criteria as fixed by the COC under Section 25(2)(h) of I&B Code, 2016.

14) In view of the reasons as stated above, the Learned Counsel submitted that the appeal is devoid of merits and requested the Tribunal to dismiss the same.

Analysis/Appraisal

15) Heard the Learned Counsel appeared for the respective parties, perused the pleadings, documents and citations relied upon by them. After analyzing the pleadings, the only issue needs to be addressed whether the Appellant is eligible to be considered as one of the Prospective Resolution Applicant for the reason that the Corporate Debtor being an MSME Enterprise and whether the Appellant fulfill the requisite qualification as per Section 29(A)(e) of the I&B Code.

16) In sixth COC which was held on 22.10.2020, one of the items is to approve Form-G i.e. invitation for Expression of Interest (EOI) under Regulation 36(A)(1) of the IBBI Regulations, 2016. It is opined by one of the members of the COC that entry level criteria for eligibility should be fixed based on the net worth of the applicant and experience in the industry. The other members of COC agreed to the said suggestions and accordingly the eligibility criteria were fixed as

follows. Extracts of Minutes of COC annexed at page 103 of the Respondent's Counter Affidavit which reads as under:

- a. Net worth of the Applicant should be at least Rs.2 Crores as per the latest Audited Financial Statements which shall not be before 31.03.2019.
- b. Should have demonstrated experience of at least a year in the Real estate Industry.

In the said item the procedure has been prescribed for calling the EOI and the last date was mentioned as 21.12.2020.

17) It appears that the Appellant had submitted the application on 09.11.2020 to the Resolution Professional. The Resolution Professional vide its e-mail dated 20.11.2020 communicated to all the Resolution Applicants the Provisional List of eligible Resolution Applicants to all the participants in the EOI. It appears that the Resolution Professional after receipt of Resolution Applications, scrutinized the applications and called for objections. The Appellant vide its letter dated 18.11.2020 submitted his reply to the objections raised by the Resolution Professional. The Resolution Professional communicated the Provisional List of eligible Resolution Applicants vide above order dated 20.11.2020 in which the reasons have been recorded by the Resolution Professional rejecting the

application. The reasons as recorded in the order of the Resolution Professional dated 20.11.2020 is as follows:

“The Application of Mr.C. Raja John, was rejected on the following two grounds:

- a. (He does not meet the eligibility norm as per Section 25(2)(h) of prescribed Net Worth)
- b. His DIN is under the ‘default’ Directors list and hence he is disqualified to act as a Director under the Companies Act, 2013 (18 of 2013). Accordingly, he is not eligible as per Section 29A(e).”

The Resolution Professional also recorded the response of the Appellant whereat the Appellant in response to ground No.(a) stated that he will be providing suitable Net Worth Certificate, issued by the Chartered Accountant at the time of submission of Resolution Plan as it will be done in case of other Investors. However, the Resolution Professional has taken a stand that at the time of presenting the EOI Application, the Applicant/Appellant does not have the required Net Worth, hence the response was rejected and stated that he shall not be considered in the Final List of eligible Resolution Applicants. With regard to ground No.(b) (i.e. disqualified as Director), the Appellant by way of response to the above objection stated that the Appellant had already applied to the Competent Authority for the reactivation of the DIN based on the decision by the Division Bench of the Madras High Court. For the above response, the Resolution

Professional stated that the Appellant has not obtained any such order from the ROC removing his name from the list of Defaulting Directors.

18) Aggrieved by the same the Appellant filed IA 33 of 2021 in CP/158/2018.

19) The point for consideration is whether the Adjudicating Authority had taken into consideration the documents submitted by the Appellant. From the perusal of the Appellant's paper book it is seen that the appellant filed an Affidavit dated 05.02.2021 at page 61 of the Appeal Paper Book wherein it is stated as under:

"I hereby submit a copy of High Court Order in WP No.17862 of 2020 and WMP No.21340 & 21342 of 2020 dated 08.12.2020."

"I further state that a copy of old MSME certificate bearing Form No.017801 dated 28.05.2013 is attached."

"I further state that a copy of new MSME Registration Certificate bearing UDYAM Registration No.UDYAM-TN-03-0017034 is attached."

20) It is a fact that the Hon'ble High Court of Madras vide Judgment dated 08.12.2020 in WP No.17262 of 2020 filed by the Appellant herein, the Hon'ble High Court relying upon the Judgment of the Division Bench of the Madras High Court allowed the Writ Petition filed by the Appellant by quashing the disqualification as published by the ROC. Further the Hon'ble High Court

directed to reactivate the DIN within 30 days from the date of receipt of copy of the order. In view of the directions of the Hon'ble High Court dated 08.12.2020, the Registrar of Companies, Tamil Nadu has to comply with the order and reactivate the DIN of the Appellant. Therefore, the Appellant had rightly brought to the notice of the Learned Adjudicating Authority with regard to his reactivation of DIN and the Learned Adjudicating Authority failed to consider the same. Further, the Learned Adjudicating Authority failed to consider the status of the Corporate Debtor as Medium Enterprise by virtue of the Certificate issued by the Government of Tamil Nadu, Department of Industries and Commerce dated 28.05.2013. The Appellant applied for the Status of the Corporate Debtor as Micro Enterprise and the Government of India had issued certificate in respect of Corporate Debtor treating it as Micro Enterprise vide Certificate dated 19.12.2020. Though the Government of India issued the Certificate on 19.12.2020, however the status of the Corporate Debtor was already a medium enterprise pursuant to the certificate issued by the Government of Tamil Nadu. The Government of India issued classification of enterprise and revised the turnover of Micro, Small and Medium Enterprises. As stated supra, the Corporate Debtor was already classified as a Medium Enterprise as early as 28.05.2013. This Tribunal observes from the Impugned Order that the Adjudicating Authority has not given any finding on Net Worth criteria of the Appellant. However, in the

written submissions of the Appellant vide Diary No.856 dated 16.11.2021 it is stated that the Appellant is ready to file his Net Worth Certificate even as on today, which would qualify the Appellant to act as Resolution Applicant for the Corporate Debtor.

21) The Legal point for consideration is that an Amendment was brought to Section 240-A of the IBC, 2016, whereby some of the clauses of the Provisions of this Code not made applicable to Micro, Small and Medium Enterprises. The said provision thus reads as under:

“240-A Application of this Code to Micro, Small and Medium Enterprises

- i) Notwithstanding anything to the contrary contained in this code, the provisions of clauses (c) and (h) of Section 29-A shall not apply to the Resolution Applicant in respect of Corporate Insolvency Resolution Process of any Micro, Small and Medium Enterprises.”

22) By the above amendment, the intention of the Legislation is to encourage the Promoters of MSME accordingly the amendment was brought to the provisions of I&B Code, by allowing the Promoters of MSME to file Resolution Plan, which is viable, feasible and fulfills other criteria as laid down by the Code.

23) The Appellant had brought to the notice of the Learned Adjudicating Authority, about the fact that the Corporate Debtor is an MSME as defined by the

Central Government. However, the same has not been considered by the Adjudicating Authority.

24) The bone of contention in this appeal is that the Resolution Professional rejected the application of the Appellant on the ground that the Appellant does not meet the eligibility norm i.e. Minimum Net Worth of Rs.2 crore and DIN of the Appellant is under default.

25) Section 25 of the I&B Code, 2016 envisages the duties of Resolution Professional. Clause (h) of sub section 2 of section 25 reads thus:

“h. invite prospective resolution applicants, who fulfill 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.”

26) From the plain reading of the above Provision the duties have been envisaged under the Code to be carried out by the Resolution Professional and accordingly the Resolution Professional can Laid down certain criteria for inviting the prospective Resolution Applicants who will fulfill such criteria. However, the same need to be done with the approval of Committee of Creditors.

However, this Tribunal is not going into the issue with regard to the duties to be exercised by the Resolution Professional or the Committee of Creditors.

27) It is seen that the Committee of Creditors in their COC dated 22.10.2020 prescribed the criteria with regard to the net worth of the resolution applicant should be at least Rs.2 crore. Basing on the decision taken in the COC the Expression of Interests called for and the Appellant's application was rejected on 20th November 2020 on the ground that the Appellant does not meet the eligibility norms as prescribed by the COC.

28) This Tribunal considering the Judgment in Saravana Global Holdings Ltd. and Anr v Bafna Pharmaceuticals Ltd. and Ors. in Company Appeal CA (AT) (INS) No.203 of 2019 dated 04.07.2019 NCLAT, Principal Bench whereby this Tribunal held at para 20, 21 and 22:

“20. The Committee of Creditors is to consider the feasibility, viability and such other requirements as has been specified by the Board. If it proposes 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 example, 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 satisfies all the creditors and is in a position to keep the Corporate Debtor as a going concern, it is always open to Committee of Creditors to accept the terms of settlement and approve it by 90% of the voting shares. The same principle can be followed in the case of MSME.

21. 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.

22. Therefore, we hold that in exceptional circumstances, if the Corporate Debtor is MSME, it is not necessary for the Promoters to compete with other Resolution Applicants to regain the control of the Corporate Debtor.”

Findings:

29) This Tribunal reiterate that if the Corporate Debtor is an MSME it is not necessary for the Promoters to compete with other ‘Resolution Applicants’ to regain the control of the Corporate Debtor.

30) Admittedly, the DIN of the Appellant is activated pursuant to the directions of the Hon'ble High Court Madras and accordingly he is qualified and the observations of the Adjudicating Authority is hereby set aside and quashed.

31) It is a fact that the Appellant stated that he will provide Net Worth Certificate at the time of submission of Resolution Plan. It is also pertinent to note that the Resolution Professional vide his order dated 20.11.2020 also recorded the reason given by the Appellant that the Appellant will be providing suitable Net Worth Certificate issued by the Chartered Accountant at the time of submission of Resolution Plan, as it will be done with other Investors. Further, the Appellant in its Written Submissions at Para 5 has stated the reasons regarding Net Worth criteria of Rs.2 Crores stated that the appellant was unable to submit the same on account of the wrongful disqualification under Section 29A(e) which rendered the Appellant ineligible to submit the Resolution Plan/EOI. Taking into consideration the Appellant's Averments (as recorded by the Resolution Professional in his order dated 20.11.2020) this Tribunal permits the Appellant to file/submit Net Worth Certificate to the Resolution Professional and the Resolution Professional may consider the same.

32) In any event, it is unequivocal that the Corporate Debtor is an MSME and as held by this Tribunal that it is not necessary for the Promoters to compete with other Resolution Applicants to regain the control of the Corporate Debtor.

33) It is apt to mention that the Appellant in Grounds of Appeal stated that the Appellant is ready to bring Rs.45 Crore in various forms and settle the liabilities and stated that this amount is much more than the submissions made by other two applicants in the first Expression of Interest and submitted that the same has been communicated to the Resolution Professional several times.

34) Further, this Tribunal, keeping in view of the object of the Code that the Maximization of the Value of the Assets of Corporate Debtor is to be kept in mind in achieving its object. To give an opportunity to regain the control of the Corporate Debtor, the Management/Promoters/Erstwhile Directors of the Corporate Debtor being an MSME, not necessary to compete with other Resolution Applicants.

Conclusion:

35) Having considered the facts and legal position as explained above, this Tribunal is of the view that the Appellant has made out a prima facie case to grant reliefs. Accordingly following directions are passed.

- a. The Resolution Professional is hereby directed to consider the Resolution Plan of the Appellant being erstwhile Director/Promoter of the Corporate Debtor (admittedly an MSME).
- b. It is made clear that the Appellant do not fall under the category of 29A(e) of the Code (i.e. disqualified to act as Director), in view of the directions of the Hon'ble High Court of Madras, whereby the Hon'ble High Court of Madras set aside the disqualification of the Appellant.

36) With the above directions, the order passed by the Adjudicating Authority in IA No.33 of 2021 in CP No.158 of 2018 dated 18.06.2021 dismissing the IA is hereby quashed and set aside. Consequentially the order passed by the Resolution Professional dated 20.11.2020 rejecting the Resolution Plan of the Appellant is also hereby quashed and set aside.

37) Accordingly, the Appeal is allowed. No orders as to cost. Applications pending if any, stand disposed of.

[Kanthi Narahari]

Member (Technical)

[Justice M. Venugopal]

Member (Judicial)

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01.12.2021