



**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**BENGALURU BENCH, BENGALURU**  
**(Exercising powers of Adjudicating Authority under**  
**The Insolvency and Bankruptcy Code, 2016)**

**I.A. No.192 of 2022 in**  
CP (IB) No.196/BB/2020  
U/s 30(6) r/w Section 60(5) of I&B Code, 2016

**In the matter of IA No.192 of 2022:**

Hari Babu Thota  
Resolution Professional for  
Shree Aashraya Infra-Con. Limited. - Applicant / RP

**In the matter of:**

Shree Aashraya Souhard Credit Society Limited - Financial Creditor/  
Petitioner

**Versus**

Shree Aashraya Infra-Con. Limited - Corporate Debtor/  
Respondent

**Order delivered on: 28,February,2023**

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

**Present:**

The RP / Applicant in  
IA No.192 of 2022 : Shri.Hari Babu Thota  
For the R.P. : Shri.Chandramouli Prabhakar

**ORDER**

**Per:Manoj Kumar Dubey, Member (T)**

1. This application is filed by Mr.Hari Babu Thota (hereinafter referred to as "Applicant /Resolution Professional") under section 30(6) r/w section 31 of IBC,2016 seeking approval of the Resolution Plan submitted by promoters namely Mr.Guruprasad V.Hishobkar jointly with Mrs.Laxmi V.Hishobkar and Mr.Venkatesh A. Hishobkar being the promoters corporate debtors (hereinafter referred to as the "Resolution Applicants" or "RAs").



2. Brief facts of the case are given hereunder:

- (a) The main Petition bearing CP(IB)No.196/BB/2020 filed by the Financial Creditor i.e., Shree Ashraya Souhard Credit Society Limited, a Co operative Society under Section 7 of the Code for initiation of CIRP in respect of Corporate Debtor, namely, M/s Shree Aashraya Infra-Con Limited was admitted by this Adjudicating Authority, vide order dated 06.04.2021 and the CIRP of the Corporate Debtor was initiated by appointing Mr. Hari Babu Thota as the IRP and he was directed to take necessary actions in accordance with relevant provisions of the Code and Regulations made thereunder.
- (b) Pursuant to the aforesaid appointment, the IRP had issued public announcement on 11.04.2021, calling upon various creditors of the Corporate Debtor to submit their claims. The IRP filed a report on 01.05.2021 certifying the constitution of the CoC of the Corporate Debtor. CoC in its 1<sup>st</sup> meeting held on 07.05.2021 *inter-alia* resolved to appoint the aforesaid IRP as the RP of the Corporate Debtor. Accordingly, this Adjudicating Authority approved the said appointment as the RP, *vide* order dated 13.08.2021 in IA No.203/2021. The CoC consists of following members:-

<b>Sl no</b>	<b>Name of the Financial Creditor</b>	<b>% of voting share in the meeting</b>
1	Shree Ashraya Souhard Credit Society Limited(Financial Creditor)	88.66%
2	Jaishank Kalkundrikar Multipurpose Souhard Sahakari Society Ltd.(Home Buyer)	6.99%
3	Ganesh K Shirodkar/Priya Ganesh Shirodkar/Mangal Shirodkar(Home Buyer)	4.35%
	<b>Total</b>	<b>100%</b>

- (c) Pursuant to section 25(2) of IBC,2016 read with Regulation 27 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations,2016, Mr.Praveen Subramanya and K.S Venkatakrishnan (replaced by Mr.Shadakshari Shala for registered valuer of Land and Building);Mr.Girish Kambadaraya and Nataraja Nanjundaiah as the registered valuer of Securities and Financial Assets for the purpose of determining the Fair Value and Liquidation Value of the assets of the Corporate Debtor.
- (d) Pursuant to Section 29 of the Code r/w Regulation 36 of the CIRP Regulations, an Information Memorandum ('IM') was prepared by the RP in such form and manner as specified under the CIRP Regulations for formulating a Resolution Plan and the same has only been shared with the members who have provided a confidentiality undertaking as required under the Code and CIRP Regulations, and with the Prospective Resolution Applicants (PRAs).



- (e) It is stated that, the RP in consultation with CoC appointed Mazars Business Advisors Private Limited as Forensic Auditor to examine the books of accounts of the Corporate Debtor and upon verification submitted their final report to the RP.
- (f) In the 3<sup>rd</sup> meeting held on 04.08.2021, RP requested the members of the CoC to consider and approve re-issuance of invitation for Expression Of Interest (EOI) in Form G, and accordingly, re-issued Form G on 09.08.2021 and published the same in newspapers on 10.08.2021, wherein, the promoters of the Corporate Debtor submitted EOI for submission of resolution plan for revival of the Corporate Debtor.
- (g) It is submitted that, on 23.10.2021, the resolution plan for revival of the Corporate Debtor is received from the promoters of an MSME and the same is opened on 25.10.2021 in the presence of CoC through video conference. Further, the RP reviewed the resolution plan and sought additional documents from the resolution applicant on 30.10.2021. The same were submitted by the resolution applicant on 02.11.2021, as addendum to the resolution plan.
- (h) In the 4<sup>th</sup> CoC meeting held on 09.11.2021, *inter-alia* requested the members to approve Resolution Plan received from the promoters of the CD being an MSME, for the revival of the CD.
- (i) It is stated that the Adjudicating Authority vide its order dated 10.11.2021 in IA NO. 257 of 2021, granted extension of CIRP time by 90 days beyond the statutory period of 180 days.
- (j) It is submitted that, Writ Petitions were filed against the Corporate Debtor and Resolution Professional by deposit holders, with them as Respondent No.2 and Respondent No.3. Further, the petitioners filed a memo for withdrawal and at the hearing held on 01.02.2022 the, Hon'ble High Court of Karnataka rejected all the petitions.
- (k) It is submitted that, the promoters of the Corporate Debtor filed an appeal before the Hon'ble National Company Law Appellate Tribunal, Chennai Bench (Comp App (AT) (CH) (Ins.) No.51/2021), against the admission order passed by this Tribunal, the same is yet to be disposed off by the Hon'ble Appellate Tribunal
- (l) In its 5<sup>th</sup> meeting held on 15.12.2021, the CoC *inter-alia* approved for filing of interlocutory application for exclusion of 54 days from the CIRP, sale of assets of the Corporate Debtor and the Resolution Plan received for the revival of the Corporate Debtor, but the same was deferred for 21.12.2021.
- (m) Subsequently, the RP filed an IA for exclusion of CIRP for a period of 54 days from the date of 21.04.2021 to 14.06.2021, period during which the State Government of Karnataka had imposed lockdown due to Covid-19 pandemic, consequent to which the CIRP period was to conclude on 24.02.2022, instead of 01.01.2022, and the same was allowed *vide* order dated 07.03.2022.



- (n) It is stated that, the members of CoC discussed the resolution plan at their 5<sup>th</sup> (adjourned) meeting held on 21.12.2021 and the financial terms were not acceptable to the CoC, members advised the resolution applicants to submit the revised terms, and the revised resolution plan was again submitted on 19.01.2022.
  - (o) The RP determined that there are certain transactions amounting to Rs.1,70,74,000/-, made by the Corporate Debtor, are preferential in nature as per Section 43 of IBC,2016. In this regard, the RP filed an IA bearing IA NO. 26 OF 2022 and the same is pending before this Tribunal.
  - (p) In the 6<sup>th</sup> CoC meeting held on 28.01.2022, the revised resolution plan was presented before the CoC, and after deliberations, the CoC approved the resolution plan with 100% voting share. The full text of the approved resolution plan is submitted by the Resolution Applicant has been annexed to this Application as 'Annexure 4'.
  - (q) Pursuant to Regulation 39(4) of the CIRP Regulations, the Applicant has filed the Compliance Certificate in Form -H *vide* diary no 4010 dated 22.09.2022 and the same is placed on record as Annexure -2.
  - (r) It is certified by the RP in Para 4 of Form-H that the said Resolution Plan complies with all provisions of the Insolvency & Bankruptcy Code,2016 (Code), the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations,2016('CIRP Regulations') and does not contravene any of the provisions of the law for the time being in force. It is also stated in Para 4(ii) of Form-H that the Resolution Applicant Mr.Guruprasad V. Hishobkar jointly with Ms.Laxmi V. Hishobkar and Mr.Venkatesh A.Hishobkar has submitted an affidavit pursuant to section 30(1) of the Code confirming its eligibility under section 29A of the Code to submit resolution plan. The contents of the said affidavit are in order.
  - (s) It is stated that CoC authorized the RP to submit the Resolution Plan to this Adjudicating Authority u/s 30(6) of the Code for its approval. Hence, this application.
3. On 15.11.2022, this Tribunal directed the RP to file an Affidavit regarding the eligibility of the Resolution Applicant as per Section 29A of Insolvency and Bankruptcy Code,2016, copy of MSME registration certificate of Successful Resolution Applicant, copies of Bank Guarantee issued by SRA and accepted letter of intent issued by SRA and affidavit regarding how the funds will be distributed in the event of realization of proceeds arising from avoidance transaction as per IBBI Notification dated 14.06.2022. Pursuant to the same, the RP filed a compliance affidavit *vide* diary no.5261 dated 06.12.2022 enclosing the above documents and as regards how the funds will be distributed in the event of realization of proceeds arising from avoidance transactions, he stated as under:



- 1) *“That we nor any of our related parties never submitted any resolution plan for revival of a corporate debtor and hence not failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past.*
  - 2) *That we are also the respondents in the application filed by the Resolution Professional under section 43 of the IBC,2016 vide IA No. 26 of 2022 in CP(IB) No.196/BB/2020 for an amount of Rs,1,70,74,000.*
  - 3) *We state that there was a dispute with the sole financial creditor of the Corporate Debtor,Shree Aashraya Credit Society Limited, Belagavi and the Corporate Debtor had to borrow the interim finances for its business operations from the known people. Further, considering the dispute between the sole financial creditor and the Corporate Debtor, no payment was made to the financial creditor but repaid the other interim finances availed.*
  - 4) *Further, Shree Aashraya Souharda Credit Society Limited, Belagavi has agreed to receive the payment of Rs.8,25,00,000/- as full and final settlement and approved the resolution plan being the member of the Committee of Creditors with majority voting share.*
  - 5) *We further state that as 100% payout has been proposed in the resolution plan to the stakeholders of the Corporate Debtor; no further payout towards the stakeholders out of the amount realized in the avoidance application shall arise.*
  - 6) *That in case the above stated application is allowed by this Hon’ble Adjudicating Authority after taking into account and considering the merit in our valid and serious objections to the allegations contained therein, we shall undertake to infuse such amount as the Adjudicating Authority may in such order specify and utilized towards the business operations of the Corporate Debtor.”*
4. Further, during the hearing on 09.12.2022, the Counsel for the RP stated that promoters of the Corporate Debtor will complete the property and two homebuyers, who are the CoC Members of the Corporate Debtor have agreed to take the completed properties as per the Agreement for Sale executed by the Corporate Debtor instead of receiving money, after approval of the Resolution plan by this Tribunal. It is further submitted that he has not received any claims with regard to government/provident fund dues. This Tribunal directed the Counsel for RP to file an affidavit with regard to the claims of statutory authorities in view of the decision in *Rainbow Papers Ltd* and with regard to the PF/Gratuity dues in view of the decision in *Jet Airways Ltd.* along with a clarification note regarding whether fixed deposit obtained from the resolution applicants towards Performance Bank Guarantee is in accordance with the Code/Regulations, the applicable Regulatory fee payable to the IBBI as per Regulations 31A and pending litigations, if any, against the Corporate Debtor. Further, an explanatory note was to be filed regarding the justification of Plan Value as compared with the Fair Market/Liquidation Value. This was since it was noticed that

total amount mentioned in the plan was only Rs.11,51,01,195/-; whereas the liquidation value was Rs.30,57,80,347/- and fair market value was Rs. 31,04,80,347/-.

5. In compliance to the order dated 09.12.2022, the RP filed Memo *vide* diary no.5625 dated 21.12.2022 stating that, in the present case there are no debts or liabilities due and payable to the Central Government, any State Government or any Authority. The resolution professional has not received any claim from any government department, institution or any statutory authority. It is stated that no claims have been made, even belatedly after nearly 2 years of the CIRP being initiated. No employees have filed any claims or claimed any unpaid Provident Fund/Gratuity payments by the Corporate Debtor. The Provident Fund Commissioner or the EPFO have not filed any claims before the resolution professional. Further, the resolution applicant in the Resolution Plan (at Page No.98 of the application submitted for the approval of resolution plan-para D in the table under Clause II of the Resolution Plan), has proposed to make 100% payment towards the outstanding statutory dues, if any, anytime. The relevant clause is reproduced as under:

*“D. There are no claims received from the Statutory Authorities. However, any Statutory Authority claims outstanding anytime, shall be paid in full”.*

*Therefore, the Resolution plan as duly approved by the CoC unanimously does not fall foul of the ratio laid down in Rainbow Papers nor Jet Airways.*

- (a) *As regards Bank Guarantee, RP stated that he has duly transferred the amount of performance security as prescribed by the CoC to the bank account of the Corporate Debtor opened during the CIRP period and the same is under the sole control of the Resolution Professional. The said amount has been kept as a fixed deposit by the undersigned in order to earn Interest upon the same until the approval of the resolution plan. It is submitted that the resolution applicant has not given a Fixed Deposit but has duly transferred the money into the Corporate Debtor’s Account, which has been put in an interest –bearing FD by the Resolution Professional.*
- (b) *Regarding the regulatory fee, it is submitted that the Resolution plan value is lesser than the liquidation Value, the payment of Regulatory fees as the Regulation 31A does not arise. Moreover, even assuming that the same is held to be payable, the same would be duly paid by the Resolution Applicants as undertaken in Clause 1 (D) of the Resolution Plan.*
- (c) *It is submitted that, on the date of filing of the instant Compliance Affidavit before this Tribunal, two cases i.e., Case No.4638/2018-2019 and Case No. 1850/2017-2018 in the Court of Dy Registrar of Co-operative Societies/Sahkaris under Rule 441,Karnataka State Shakari Federation Souhard Court,Malleswaram Bengaluru Karnataka to which the Shree Aashraya Souhard Society Belagavi is the Petitioner*



*and CoC Member who approved the Resolution Plan submitted by the Resolution Applicants.*

- (d) It is submitted that the difference in Resolution Plan amount and Liquidation Value arises on account of the fact that several units of the Corporate Debtor's construction remained unsold which have immense value. Thus, there is significant value to the Resolution Applicants (former directors who are not ineligible under S.29A) to complete the Project by way of implementing the Resolution Plan so that the said units may be finished by such infusion. While all Creditors are paid 100%, 2 Homebuyers given their Homes as per their wishes, Creditors settled on a going concern basis as per letters issued by them, the interests of no person are not affected.*
- (e) It is submitted that the Valuation report unlocks the intrinsic value of the Corporate Debtors, as the same is a valuable property and the resolution applicant shall continue to carry out the Corporate Debtor's business of property development.*

## **6. Satisfaction of condition under Section 29A of the IBC, 2016**

In respect to this IA filed under section 30(6) of IBC for approval of resolution plan; first of all, the satisfaction of conditions given under section 29A of the IBC r.w.f. 240 A of the Code is to be looked into.

**i).** Section 29A of the IBC, 2016 deals with the persons not eligible to be Resolution Applicants and Clauses (a-j) have specified the list of such persons. In accordance with Regulation 39 (1)(a) of IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, it is stipulated that for approval of Resolution Plan, the prospective Resolution Applicant has to submit an affidavit stating that it is eligible under Section 29A to submit Resolution Plans. Moreover, in Section 240A of the IBC, it is specified that the provisions of Clause (c)&(h) of Section 29A shall not apply to the Resolution Applicant in respect of CIRP of any Micro, Small and Medium Enterprise (MSME); that is, an exemption has been granted to MSMEs from the restriction imposed under Section 29A (c)&(h).

**ii).** In the instant case, it was noticed that the affidavit regarding the eligibility of Resolution Applicant which was to be filed by the Resolution Applicant itself as per Regulation 39(1)(a), was instead given by the Resolution Professional, filed along with the compliance memo for submission of revised Form-H vide diary no.4010 dated 22.09.2022. This affidavit has been given by the RP on 21.09.2022; in which it has been certified that none of the Resolution Applicants was ineligible under the provision of Section 29A of the IBC, 2016.

**iii).** However, there is requirement under Regulation 39(1)(a) that such an affidavit has to be given by the Resolution Applicant himself. From the Resolution Plan dated 19.01.2022 submitted vide diary no.143 dated 30.03.2022 also it is noticed that there is no such affidavit of the Resolution Applicant enclosed. There was only one letter of the Resolution Applicant addressed to the RP that



the Corporate Debtor was a MSME Company, and being the Promoters of the MSME, the Resolution Applicants were eligible to submit the Resolution Plan as per Section 29A read with Section 240A of the IBC. It is further stated that a copy of MSME Registration Certificate (UDYAM-KR-04-0015104) was enclosed herewith. However, no such certificate was enclosed and filed with this letter enclosing the Resolution Plan which was filed on 30.03.2022.

**iv).** Accordingly, vide order dated 15.11.2022, this Adjudicating Authority directed to the Petitioner to file the affidavit signed by the Resolution Applicants regarding the eligibility of the Resolution Applicants as per Regulation 39(1)(a); and also the copy of the MSME registration certificate of the Corporate Debtor on the basis of which the Promoters of the MSME have claimed their eligibility to submit the Resolution Plan as per Section 29A, read with Section 240A of the IBC. A compliance to the same was made vide diary no.526 dated 06.12.2022 in which the other documents desired by the order dated 15.11.2022, viz., the Bank Guarantee issued by the successful Resolution Applicant; affidavit regarding the treatment of proceeds from avoidance transactions and proper filing of the columns of the Form-H etc. were also submitted.

**v).** A perusal of the affidavit under Section 29A of the IBC reveals that it is given by Mr. Guruprasad V. Hishobkar and has been given by him on behalf of the two other persons who are also the Resolution Applicants and the same has been signed on 22.10.2021. Moreover, the copy of the MSME certificate has also been enclosed vide Annexure-2 to the letter filed on 06.12.2022; which is numbered as (UDYAM-KR-04-0015104). This “UDYAM Registration Certificate” is dated 15.07.2021. On the other hand, the initiation of CIRP in this case is vide order dated 06.04.2021 of this Adjudicating Authority.

**vi).** In this connection, it is pertinent to place reliance certain judicial precedents. In the recent decision in the case of *Harbans Singh & Ors. vs. Shri Deveander Singh and Anr* order dated 25.11.2022 of NCLT, New Delhi in I.A. No.3024(ND)/2022 in IB 717/2019, it was pointed out that the Corporate Debtor was not registered as MSME prior to the initiation of CIRP and the MSME certificate was obtained subsequently by the related party of the Corporate Debtor without any authorization or approval taken from the COC. It was also contended that no reasons were given by RP for getting registered the Corporate Debtor as MSME. It was not brought to the notice of the members during the various COC meetings conducted. It was concluded that this was impermissible in view of the judgment of Hon'ble National Company Law Appellate Tribunal, dated 04.03.2020 in the case of *T. Johnson of St. John Freight Systems Limited vs. St. John Freight Systems Limited*, the NCLT, Guwahati Bench, in the case of *Bank of India vs. Maxim Infrastructure & Real Estate Limited* and the NCLAT judgment in the case of *Harkirat Singh Bedi vs. Oriental Bank of Commerce*, dated 12.01.2021.

**vii).** The NCLT New Delhi in this case has relied upon to the judgment of Hon'ble NCLAT dated 09.07.2021 passed in CA(AT)(INS)-43-43A of 2021 in the



case of *Digambar Anandrao Pingle vs. Shrikant Madanlal Zawar & Ors.* It is held that the MSME certificate obtained during the CIRP period is required to be ignored and the Promoters cannot suppress it from the RP in order to get over the ineligibility under Section 29A of IBC. Reliance was placed on the above NCLAT judgment specifically in the following paragraph:

*“14. There is yet another factor which is relevant and we find that the Appellant has obtained Annexure-A-3 an MSME Certificate for which application had been made on 5<sup>th</sup> March, 2019. Clearly, CIRP with regard to the Corporate Debtor started on 19<sup>th</sup> July, 2018 and on 05<sup>th</sup> March, 2019 the Corporate Debtor was under the management of IRP/RP. The Appellant has not shown that the application for MSME was made through the IRP/RP. The learned Counsel for Respondent No.5 is claiming that there was no consent of the IRP/RP. When the Corporate Debtor was not under the management of the Appellant, such unauthorized application could not have been made and the claim of the Appellant that the Corporate Debtor is MSME would require to be ignored. Appellant cannot take advantage of his wrongful act. Keeping in view Judgment in the matter of ‘Arun Kumar Jagatramka vs Jindal Steel and Power Ltd.’ 2021 SCC Online SC 220, back door entries cannot be allowed. After CIRP was initiated former Promoter/Director cannot suppress from IRP/RP and apply for MSME Certificate and tide over ineligibility under Section 29A of the IBC.15. Admittedly, M.A. No.3020/2019 regarding Section 43, 66, 65 of IBC is still pending and is not decided one way or the other. The observation in context of Section 29A appears to have been made to demonstrate how sufficient chance was given to the Appellant though he appeared to be undeserving, and was now dragging proceedings.”*

- viii).** Moreover, it was also pointed out in the above decision that though the Corporate Debtor was incorporated in the year 1995, it never sought registration as MSME and it was expressly denied in the Expression of Interest (EOI) issued by the RP pursuant to the order for initiation of CIRP. It was also noted that there were pending Avoidance Applications pending against the Corporate Debtor; though not decided one way or the other, which leads to disqualification under Section 29A(g). Therefore, the NCLT, New Delhi has rejected the claim of eligibility under Section 29A r.w.s 240A of IBC based on such MSME certificate which was obtained subsequent to the initiation of CIRP.
- ix).** Similar observation has been made in the order dated 12.01.2021 by the Hon'ble NCLAT in the case of *Harkirat Singh Bedi vs the Oriental Bank of Commerce & Anr. in Company Appeal (AT)(Ins.) No.40 of 2020* in which also considering that the date of registration as MSME was subsequent to initiation of CIRP, it was held that the erstwhile promoter, being the Appellant was ineligible to take the benefit of Section 240A; and therefore was not qualified under Section 29A.



- x).** We have carefully considered the ratios of the decisions dated 25.11.2022 of NCLT, New Delhi; along with Hon'ble NCLAT judgments cited above; along with the facts of this case. In this case also it is noticed that MSME Registration Certificate was obtained much later than the date of initiation of CIRP. Accordingly, we are of the considered opinion that the MSME UDYAM Certificate obtained subsequent to the initiation of CIRP is required to be ignored and the Successful Resolution Applicants in the case are not eligible under Section 29A r. w. s. 240A of IBC. The Resolution Plan submitted in therefore not tenable in law and is rejected under section 31(2) r.w.s 30(2)(e) of IBC. IA No.192 of 2022 in CP IB 196 of 2020 is accordingly disposed of.

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

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