

NATIONAL COMPANY LAW TRIBUNAL  
GUWAHATI BENCH

I.A.No.43/2019  
In  
C.P.(IB).04/GB/2018

*Under Section 7 of the Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating) Authority) Rules 2016.*

In the matter of:

Bank of India	... Financial Creditor
-Versus-	
M/s Maxim Infrastructure & Real Estate Ltd.	... Corporate Debtor
And	
H.M. Cements Pvt. Ltd.	... Resolution Applicant
Versus	
Mr Kamalesh Kumar Singhania	... RP of Maxim Infrastructure and Real Estate Pvt. Ltd.

**Coram:**

**Hon'ble Mr Hari Venkata Subba Rao, Member (J)**

**Hon'ble Mr Ashutosh Chandra, Member (T)**

For the Resolution Applicant : Mr Rishav Banerjee, Advocate  
Mr Rajarshi Banerjee, Advocate

For the Resolution Professional : Mr R. Dubey, Advocate

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**ORDER**

**Date of Order: 6<sup>th</sup> August, 2019**

The above I.A.43/2019 is filed by Mr Pankaj Jhunjunwala, Managing Director of H.M. Cements Private Limited, for a declaration that the Resolution Plan submitted by the applicant is eligible for consideration on commercial merits by the Committee of Creditors (in short, COC) and also other consequential reliefs including staying the discussion of eligible Resolution Plans/Revised Resolution Plans by the COC.

2. The admitted facts of the application are that the applicant jointly with certain other persons submitted an Expression of Interest (in short, EOI) in the matter of resolution of Maxim Infrastructure & Real Estate Ltd. on 27.04.2019. The resolution applicant is the promoter of the said Corporate Debtor (in short, CD) and a related party under Section 29A of IBC. The said applicant claimed exemption from the ineligibility provided under Section 29A of the Insolvency & Bankruptcy Code, 2016 (in short, Code of 2016) contending that the resolution applicant is in the Micro Small and Medium Enterprises (in short, MSME) category and is entitled to submit a resolution plan under Section 240A of the Code of 2016. The COC after due discussions and deliberations and after obtaining the legal opinion from Ms Piyali Basak and Mr Anirban Ray, Advocates, rejected the Resolution Plan submitted by the applicant. The applicant for the first time at the 6<sup>th</sup> COC meeting held on 19.07.2019 provided an acknowledgment obtained from the Office of the General Manager, District Industries and Commerce Centre, Kamrup, Government of Assam which was also recorded in the minutes of the COC meeting. Therefore, the applicant filed the above application finding fault with the decision of the COC in rejecting the applicant's resolution plan contending that neither the Resolution Professional nor the COC has a right to challenge the MSME status of the Resolution applicant. It is the contention of the resolution applicant that the only remedy available to the COC or RP is to file necessary writ before the Supreme Court or High Court if at all they intend to dispute the MSME status of the resolution applicant.

3. The learned Resolution Professional filed affidavit-in-reply opposing the above application contending inter alia, that the present applicant is none other than the ex-promoter of the CD and the said CD was originally registered as a Large Scale Unit having registered with the Ministry of Industries, Government of India. It is also contended by the Resolution Professional that the acknowledgment was obtained as MSME by the applicant by expressing the interest to set up the service enterprise only in respect of the Guwahati Project of the CD by showing an amount of 4.8 crores towards investment in the plant and machinery and no such acknowledgment has been obtained by the applicant in respect of the Shillong project of the CD. It is the further contention of the RP that both the CD's projects at Guwahati and Shillong are akin to each other and if the investment in plant and machinery of both projects is

taken into consideration as a whole, the resolution applicant does not fall under MSME category and cannot be exempted under Section 240A.

4. Before deciding the above application on merits, it is important to place on record that this Tribunal vide its order dated 30.07.2019 directed the learned RP to receive the revised Resolution Plan submitted by the applicant and simply keep it on record to save limitation without prejudice to the rights and contentions of all the stakeholders as an interim order on account of the urgency expressed by the learned counsel for the Resolution applicant.

5. In the backdrop of the above contentions of both sides, the only short point that falls for consideration is:

- i) *Whether the Resolution applicant can be considered as a bona fide MSME unit simply basing on the acknowledgement issued by the competent authority, that too, having obtained after rejection of the Resolution Plan by the COC?*
- ii) *Whether the COC is right in rejecting the Resolution Plan of the applicant?*

6. Before dealing the above issues, it is important to mention here that Section 29 A and 240 A of IBC are not there in the Statute Book when the Code was introduced and they were subsequently brought on the Code by way of an amendment to stop the foul play of the ex-promoters and Directors of the Corporate Debtor and to protect the genuine MSME entrepreneurs. It is matter of record that the present resolution applicant is claiming to be a separate MSME entity of the ex-promoter of the CD which is under resolution process. It is an admitted fact that the present resolution applicant obtained acknowledgement from the concerned District Industries and Commerce Centre, Government of Assam and produced the said acknowledgment before the 6<sup>th</sup> COC meeting held on 19.07.2019 that too in respect of only Guwahati project of the CD. Therefore, it is very clear from the above facts and circumstances that the above act of obtaining MSME status by the ex-promoter is nothing but another attempt to submit Resolution Plan through back-door entry which is not at all as per the true letter and spirit of Section 240 A of IBC. The true spirit of Section 240 A is to protect genuine MSME entrepreneurs which are MSME entrepreneurs from the beginning and not the entities like the present applicant. If that

is the true spirit of the legislation, every ex-promoter or Director will get himself registered as a MSME unit to get over the clutches of Section 29 A and if the said acts and attempts of ex-promoters and Directors are allowed, it would amount to clear abuse of the process of the Code and amount to achieving something in an indirect manner which cannot be done directly. The COC after obtaining the legal opinion from two Advocates and after applying their mind and commercial wisdom rejected the Resolution Plan submitted by the resolution applicant which cannot be so lightly interfered with by this Tribunal.

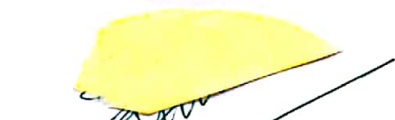
7. Under these circumstances, this Tribunal has no hesitation in holding that the act of obtaining the MSME status by the applicant is nothing but a deliberate attempt to escape the clutches of Section 29 A and there are no merits in the above argument as well as the petition and the same cannot be accepted.

8. Accordingly, the above I.A. is rejected and the COC can go ahead with their meeting scheduled on 07.08.2019.



Member (Technical)

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Member (Judicial)