

**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT- I (*Special Bench*)
KOLKATA BENCH
KOLKATA**

**I.A. (IB) No. 826/KB/2023
in
C.P (IB) No. 409/KB/2021**

*An application under section 60(5) of the Insolvency and Bankruptcy Code,
2016 read with rule 11 of the National Company Law Tribunal Rules, 2016.*

In the matter of:

State Bank of India

...Financial Creditor

Versus

Hardrock Attachments Private Limited

(CIN: U50103JH2008PTC013126),

...Corporate Debtor

I.A. (IB) No. 826/KB/2023

In the matter of:

Dharamveer Singh

Versus

- 1. Daulat Ram Jain,
Resolution Professional of Hardrock Attachments Private Limited**
- 2. State Bank of India**

Date of pronouncing the order : 11 September 2023

Coram:

<i>Smt. Bidisha Banerjee</i>	:	<i>Member (Judicial)</i>
<i>Shri Balraj Joshi</i>	:	<i>Member (Technical)</i>

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Appearances (through Video Conferencing/physical)

For the Applicant

1. Ms. Manju Bhuteria, Advocate
2. Ms. Urmila Chakraborty, Advocate
3. Mr. Arnab Dutt, Advocate

For the RP

1. Mr. Nikunj Berlia, Advocate
2. Mr. Sourojit Dasgupta, Advocate

ORDER

Per Bidisha Banerjee, Member (Judicial)

1. The Court convened *via* hybrid mode.
2. The present I.A. has been filed by Dharamveer Singh, a suspended Board of Director of Hardrock Attachments Private Limited (“**Corporate Debtor**”) against Daulat Ram Jain, the Resolution Professional of Hardrock Attachments Private Limited and State Bank of India seeking the following reliefs:
 - a. *An order and/or direction upon the resolution professional to re-register the corporate debtor as an Udyam enterprise and to obtain the Udyam Registration Certificate from the Udyam Registration portal;*
 - b. *An order and/or direction upon the resolution professional to consider the EoI submitted by the applicant and to include the name of the applicant in the final list of Prospective Resolution Applicants eligible to submit resolution plan in respect of the corporate debtor;*
 - c. *An order and/or directions upon the resolution professional to provide the Information Memorandum, evaluation matrix and a request for resolution plans to the applicant;*

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the Interim Resolution Professional (“IRP”). He was confirmed as the Resolution Professional.

4. ***Submissions of the learned Counsel appearing on behalf of the Applicant***

4.1. It is submitted that the Corporate Debtor is a medium enterprise under the Ministry of Micro, Small & Medium Enterprises (“MSME”) engaged in the business of manufacturing of fabricated metal products. The Corporate Debtor has a Udyog Aadhar Registration Certificate having UAM No. KR13C0020376. The said Certificate was valid till 30 June 2022.

4.2. The Resolution Professional published Form ‘G’ on 30 January 2023 which was updated on 15 February 2023 and 02 March 2023 inviting Expression of Interest (“EoI”). Pursuant to an Invitation for submission of EoI, the Applicant submitted its EoI on 24 February 2023.

4.3. The learned Counsel submits that the Applicant being the ex-promoter of the Corporate Debtor is eligible under section 29A of read with section 240A of the Code to submit his Expression of Interest and his Resolution Plan.

4.4. The Resolution Professional *vide* his email dated 31 March 2023 shared the list of eligible prospective Resolution Applicants wherein the Applicant’s name was excluded on the ground that the Applicant is ineligible under section 29A of the Code to submit EoI.

4.5. The learned Counsel placed reliance on ***Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Mittal (2019) 2 SCC 1***, paragraph 46 to substantiate her argument that the bar under section 29A of the Code comes into play as on the date of submission of the Resolution Plan.

4.6. The learned Counsel also referred to the “Note” on the email of the Resolution Professional dated 31 March 2023 wherein the Resolution Professional has stated that

“the eligibility of any person or any other person acting jointly or in concert with such person to be the Resolution Applicant (“RA”) will be subject to fulfilment of condition/criteria specified under Section 29A of IBC, 2016 (“Code”) at the stage of submission of resolution plan.”

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- 4.7. Thus, the Resolution Professional could not have excluded the name of the Applicant from the list of Prospective Resolution Applicants.
- 4.8. The Applicant objected to his exclusion from the list of prospective Resolution Applicants *vide* his emails dated 03 April 2023 and 04 April 2023.
- 4.9. In the course of arguments, the learned Counsel submitted that the Ministry of Micro Small & Medium Enterprises issued a notification on 06 May 2022 and as per the said notification the Corporate Debtor was supposed to migrate from Udyog Aadhaar to Udyam enterprise after obtaining Udyam Registration Certificate by 30 June 2022. Hence the Corporate Debtor lost its MSME status, but it is still eligible for MSME registration.
- 4.10. It is submitted that on 05 April 2023, the MSME Department asked to renew the Udyog Aadhaar Certificate of the Corporate Debtor to Udyam Registration Certificate, which is a one-step free of cost renewal process and is only procedural in nature.
- 4.11. The Applicant *vide* its email dated 05 April 2023, requested the Resolution Professional to renew the MSME status of the Corporate Debtor. The Resolution Professional replied to the said email on 06 April 2023, stating that the Corporate Debtor's MSME status had expired and hence the Applicant is ineligible to submit its Resolution Plan.
- 4.12. The learned Counsel submitted that the Resolution Professional is under erroneous assumption of law that once the MSME status of the Corporate Debtor has expired prior to CIRP commencement date, it cannot be registered as an MSME.
- 4.13. Although the Corporate Debtor is undergoing CIRP, it fulfills the criteria under section 7 of the Micro, Small & Medium Enterprises Development Act, 2006 ("MSME Act") and is entitled to apply for the MSME certificate. Reliance has been placed on ***K. Satheesh Babu Rajesh***

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*v. George Varkey, Resolution Professional of Propyl Packaging Limited*¹
and *HDFC Bank Limited v. Tamra Dhatu Udyog Private Limited*².

4.14. The learned Counsel further submitted that there have been instances when the Corporate Debtor was held to be qualified to be an MSME during the liquidation process, and placed reliance on *Rakesh Kumar Agarwal and Others v. Devendra P. Jain, Liquidator of Asis Logistics Limited*³.

4.15. The learned Counsel submitted that the Resolution Professional ought to have included the name of the Applicant in the list of Prospective Resolution Applicants and later could have decided on the feasibility and viability of the Resolution Plan for the maximization of the value of the assets of the Corporate Debtor. The Resolution Professional has overlooked the fact that the Applicant is the ex-promoter of a MSME, the legislative intent is to encourage the Applicant to pay the amount to the satisfaction of the CoC and to regain the control of the Corporate Debtor. Reliance is placed on the judgment of the Hon'ble NCLAT in *Saravana Global Holdings Limited v. Bafna Pharmaceutical Limited*⁴.

4.16. The learned Counsel submitted that there are numerous instances where the Adjudicating Authority has entertained the Resolution Plan from related parties after registration of the Corporate Debtor as a MSME beyond the CIRP commencement date, reliance is placed on an order dated 18 November 2022 passed by this Adjudicating Authority in *Barnaparichay Book Mall Private Limited*⁵ and an order of the learned NCLT, Mumbai Bench on *Vistar Metal Industries Private Limited*⁶.

4.17. There are several benefits of the MSME status and hence the Resolution Professional should have considered registering the Corporate Debtor as a MSME.

¹ (2021) SCC OnLine NCLT 8079, para 7-10

² C.P. (IB) No. 128/KB/2020 dated 21.03.2023, para 16

³ (2021) SCC OnLine NCLAT 631, paras 37-42

⁴ C.A. (AT) (Ins.) No. 203 of 2019 decided on 04 July 2019.

⁵ C.P. (IB) No. 1219/KB/2018, para 3.8

⁶ C.P. (IB) No. 1331/MB/2017 dated 06.01.2023, para 8

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5. *Submissions of the learned Counsel appearing on behalf of Resolution Professional*

5.1.The learned Counsel submits that as on the CIRP commencement date, the Corporate Debtor was not registered as an MSME under the MSME Act. The Corporate Debtor was an MSME unit, having obtained a MSME Certificate.

5.2.As is mandated under the MSME Act, an MSME Unit is obliged to renew the MSME Certificate periodically, upon satisfying the criteria for being declared as a unit falling under the MSME Act. The criteria to be satisfied for registration as a MSME unit have been laid down in section 7 of the said Act.

5.3.Under section 8 of the MSMED Act, any person who intends to establish a MSME unit, must file a memorandum of micro, small or medium enterprise with the appropriate authority. The format of such Memorandum has been provided in the Notification dated 29 September 2006, being SP 1643(E) issued by the Central Government. The procedure to be followed while submitting application for registration as a MSME has also been provided in section 8 of the MSME Act, and in rules 3 and 4 of the MSME (Furnishing of Information) Rules 2016.

5.4.The Union of India, *vide* various notifications dated 26 June 2020, 19 January 2022 and 06 May 2022, had extended the time for validity of all MSME Certificates, from time to time.

5.5.As a result, all licenses granted under the MSME Act were automatically null and void as of 30 June 2022. As a result, the Corporate Debtor ceased to be an MSME unit as of and with effect from 30 June 2022.

5.6.After that, on 02 December 2022, after more than five months after the MSME registration had expired, CIRP was initiated against the Corporate Debtor.

5.7.It is pertinent to mention that since the Corporate Debtor ceased to be a MSME unit registered under the MSME Act, the Corporate Debtor was also

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not entitled to receive any benefit under the said Act or under the Code. As on the date of commencement of CIRP, the Corporate Debtor was not a MSME Unit. As such, the applicant could not have invoked the provisions of the Code to submit a EoI as a suspended director of a MSME unit.

5.8. It is now well settled that for an entity to be considered as a MSME unit, the same must be registered with the appropriate authority under the MSME Act. Unless a unit holds a Certificate under the MSME Act, the said unit cannot be termed as a MSME Unit at all, notwithstanding the fact that it may satisfy the criteria to be listed as an MSME. The Udyam Registration Certificate and the validity thereof are the only indicators of a valid MSME unit.

5.9. No step whatsoever was taken by the applicant in renewing the registration of the Corporate Debtor as an MSME. Had the applicant been vigilant, the applicant would have opted for renewal of the MSME certificate.

5.10. Under the Code and the Rules and Regulations made thereunder, the Resolution Professional has not been given any authority to change the status of the Corporate Debtor. The Resolution Professional is required to run the Corporate Debtor as a going concern, as it existed as on the date of CIRP. Changing of the status of the Corporate Debtor would amount to violation of the provisions of the Code itself.

5.11. The Corporate Debtor had already lost its MSME status by virtue of the notifications issued by the Government of India. It is not within the scope and power of the Resolution Professional to revive a MSME status of a Corporate Debtor when by operation of law, such status has become invalid.

5.12. The approach and conduct of the Applicant have been totally mala fide, inasmuch as while submitting his EoI, the Applicant had annexed a purported Board Resolution of the Corporate Debtor, whereby the purported Board of Directors of the Corporate Debtor, who were already suspended, authorised and/or empowered the applicant to submit the EoI.

5.13. There could be no Board Resolution of the Corporate Debtor after commencement of the CIRP. After the commencement of the CIRP, the

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powers of the Board of Directors are completely suspended, and the Interim Resolution Professional/Resolution Professional is vested with all the powers of the Board. As such, the fact that the Applicant had managed to procure or manufacture a Board Resolution after the CIRP itself demonstrates that the approach and acts of the Applicant, along with the other suspended directors of the Corporate Debtor has all along been mala fide. On this ground of suspicious activity alone, this application deserves to be dismissed, and no credence can be given to the Applicant at all.

5.14. By an email dated 04 April 2023, the Applicant had objected to the action of the Resolution Professional to allow Ashwa Energy Private Limited to submit EoI. A bare perusal of the said email dated 04 April 2023 would make it evident that there was no reason or justifiable basis of issuing the said email. The Applicant merely issued an email, solely for the purpose of wrongfully interfering in the affairs of the CIRP. In this context, it is pertinent to note that regulation 36(11) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (“CIRP Regulations”) mandates that any person raising any objection must provide documents in support of its objection. As such, the purported objection, albeit without any reason, was completely bereft of any reason or supporting documents.

5.15. By an email dated 05 April 2023, the Resolution Professional called upon the Applicant to provide reasons and supporting documents for the purported objection so raised by the Applicant. However, instead of responding to the same, the Applicant chose to approach this Adjudicating Authority after almost two weeks. This itself proves that the Applicant has the intention of putting a spanner in the CIRP.

5.16. That apart, after expiry of almost two weeks from the date when the objections of the applicant were rejected by the Resolution Professional, the said application was affirmed by the Applicant, and the application was listed for the first time even after much delay. This itself proves that the Applicant’s only intention is to derail the CIRP, since the CIRP is to be

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conducted in a time-bound manner. It is evident that the Applicant was aware that other Resolution Applicants have participated in the process. As such, the delay has been caused intentionally, in order to somehow derail the smooth running of the CIRP and the possibility of successful resolution of the Corporate Debtor. The only intention of the Applicant is to grab and retain control over the Corporate Debtor, in the garb of the MSME Act. The shelter taken by the Applicant under the MSME Act is of no consequence, as the Applicant or the Corporate Debtor is not entitled to any benefits or relaxations under the said MSME Act or the Code.

- 5.17. The Applicant has relied upon the following decisions:
- a. Judgment dated 21 March 2023 passed by the National Company Law Tribunal, Kolkata Bench in *HDFC Bank Limited v. Tamra Dhatu Udyog Private Limited*;
 - b. Judgement passed by the National Company Law Tribunal, Kochi Bench, in the case of *K. Satheesh Baby Rajesh v. George Varkey, reported in 2021 SCC Online NCLT 8079*.
- 5.18. None of the above-cited decisions are applicable in the facts of the present case. In the case of *Tamra Dhatu Udyogn supra.*, the application for registration of the Corporate Debtor under MSME Act was almost 10 months prior to the date of CIRP. (Paragraphs 9 and 10 of the said decision). The MSME Certificate was issued by the Government after the commencement of CIRP. In the instant case, the MSME Certificate had expired prior to the date of CIRP. No application was pending for registration, as on the date of CIRP. There is also no registration as on this date.
- 5.19. Furthermore, the Information Memorandum also specifically mentioned that the Corporate Debtor had been registered under the MSME Act (Paragraph 12 of the said decision). In the present case, there is no assertion to such effect. The Corporate Debtor has not been treated as a MSME.

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5.20. In the case of *K. Satheesh Baby Rajesh v. George Varkey*, the MSME Certificate of the Corporate Debtor had expired during the period of CIRP. (paragraph 2 of the said decision). As such, the Corporate Debtor was an MSME as on the date of commencement of CIRP. As such, a status of the corporate debtor was sought to be taken away during the CIRP period, and therefore, the Adjudicating Authority ordered that the Corporate Debtor ought to be treated as a MSME. However, in the present case, the MSME Certificate had expired prior to the date of CIRP. No application was pending for registration, as on the date of CIRP. There is also no registration as on this date. The corporate debtor was not a MSME unit, as on the date of commencement of CIRP.

5.21. The learned Counsel submitted that in view of the above facts, the present application is not maintainable and deserves to be outrightly dismissed. The Applicant is not entitled to submit EoI and is also not entitled to any benefit under the MSME Act. The other Resolution Applicants, on being found eligible, have been allowed to submit their respective EoIs.

Analysis and Findings

6. Heard the learned Counsel appearing for the Applicant and the Resolution Professional and perused the records.

7. The following issues are involved:

7.1. Whether the Corporate Debtor is an MSME?

7.2. Eligibility of the Applicant to submit EoI?

7.3. The duty of the Resolution Professional to obtain an MSME certification for the Corporate Debtor?

8. The fact that the Corporate Debtor was an MSME and it lost its status as an MSME due to the failure on the part of the suspended Board of Directors to register the Corporate Debtor and migrate the status of the Corporate Debtor from Udyog Aadhaar to Udyam Enterprise after obtaining Udyam Registration Certificate by 30 June 2022 is not in dispute. The Corporate Debtor lost its status as an MSME and thereafter no application was filed for

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- renewal of the MSME Certificate or the migration of migrate from Udyog Aadhaar to Udyam Enterprise after obtaining Udyam Registration Certificate.
9. Hence, it is clear that as on date the Corporate Debtor is not registered as an MSME.
10. But one cannot deny that although the Certificate was not migrated, the Corporate Debtor, the Corporate Debtor is still eligible and comes under the purview of MSME. Be that as it may, it would not be prudent to allow the Applicant, being a part of the suspended Board of Management to take cover or advantage, stating that the Corporate Debtor is an MSME and enter the CIRP of the Corporate Debtor, when it has clearly neglected the Corporate Debtor when the Applicant was responsible of handling the management and administration of the Corporate Debtor.
11. Now, coming to the last issue, section 25(1) of the Code emphasizes that it is the Resolution Professional's responsibility is to safeguard the Corporate Debtor's assets, including the continuation of its business operations. Hence, the Resolution Professional should have endeavored to maintain the Corporate Debtor as a going business by obtaining the Certificates for which the Corporate Debtor is entitled as the Corporate Debtor would have received several benefits if it had an MSME Certificate.
12. In view of the above facts and observations, we direct the Resolution Professional to register the Corporate Debtor as an MSME and to obtain the necessary Certificates, thus prayer (a) is allowed.
13. We shall not interfere with the decision of the Resolution Professional in not including the name of the Applicant in the final list of Prospective Resolution Applicants eligible to submit resolution plan in respect of the Corporate Debtor, thus prayer (b), (c), (e), f and g are not granted.
14. With respect to **Ashwa Energy Private Limited**, the Applicant has not given any proper reason for seeking the prayer, hence prayer (d) is not granted.

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15. In view of the above, *I.A. (IB) No. 826/KB/2023 in C.P. (IB) No. 409/KB/2021 is hereby disposed of.*
16. C.P. (IB) No. 409/KB/2021 to be listed on 22.09.2023 for further consideration.
17. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

The Order is pronounced on 11th day of September, 2023

GGRB_LRA