



THE NATIONAL COMPANY LAW TRIBUNAL

COURT VI, NEW DELHI

I.A/2399/2023

Company Petition No. (IB) – 607/(PB)/2020

*Under Section 60(5) of the Insolvency and Bankruptcy
Code, 2016.*

IN THE MATTER OF:

BANK OF BARODA

...FINANCIAL CREDITOR

VERSUS

MB MALLS PRIVATE LIMITED

...CORPORATE DEBTOR

AND IN THE MATTER OF –

MR. JAI PRAKASH KESWANI

...APPLICANT

VERSUS

1. M/S. MB MALLS PRIVATE LIMITED

Through Mr. Abhimanyu Mittal

Resolution Professional of M/s M.B. Malls Private Limited

At: 29FF, The White House, Sector-57, Gurgaon,

Haryana- 122003

...RESPONDENT NO. 1



2. Bank of Baroda

Having its Head office at: Baroda Bhawan, RC Dutta Road,
Delhi-110033

...RESPONDENT NO. 2

CORAM:

SHRI. BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, MEMBER (TECHNICAL)

For the Applicant: Mr. Kumar Anurag Singh

For the RP: Mital and Mital Advocates

ORDER

PER- RAHUL BHATNAGAR, MEMBER (TECHNICAL)

Order Pronounced on: 13.10.2023

1. The present application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 praying for the following reliefs:

- i. Direct the Respondent to accept the Expression of Interest of the Applicant as a prospective Resolution Applicant under Section 240A of the Insolvency and Bankruptcy Code, 2016 since the Corporate Debtor is a deemed MSME and/or;



- ii. Direct the Respondent to register the Corporate Debtor as an MSME in the light of the gazette notification no. SO 2119(E) dated 26.06.2020.and/or;
- iii. Direct the Respondent and committee of creditors to relax the eligibility criteria requirement for the Applicant/Corporate debtor of minimum tangible net-worth;
- iv. Pass any other further relief(s) as this Tribunal may deem fit and proper.

2. Briefly stated the facts of the case as mentioned in the instant application, which are necessary for adjudication, are as follows:

- i. That the present Application is being filed by the Applicant who is the suspended director as well as the shareholder of the Corporate Debtor seeking direction upon the Resolution Professional of the Corporate Debtor to accept the Expression of Interest of the Applicant as Prospective Resolution Applicant (“PRA”) under Section 240A of the Insolvency and Bankruptcy Code and a further direction to register the Corporate Debtor as an MSME in light of the gazette notification dated 26.06.2020.



- ii. That vide order dated 04.06.2019, an application by the Financial Creditor of the Corporate Debtor u/s 7, IBC, 2016 was admitted by this Adjudicating Authority.
- iii. That on 18.09.2020 the property of the Corporate Debtor was put up for public auction under the SARFAESI Act by the Financial Creditor. After a passage of over 7 years, the Respondent Bank preferred an application u/s 7 of IBC bearing number CP (IB) No. 607/PB/ 2020 on 14.02.2020 which was admitted by this Tribunal on 03.08.2022.
- iv. That in the meanwhile, the Government of India, Ministry of Micro, Small and Medium Enterprises came up with two notifications one bearing notification no. S.O. 2119(E) dated 26.06.2020 D.O. No. 16/11/2019-P&G/Policy dated 01.07.2020 laying down classifications for registration under MSME.
- v. That in view of the fact the proceedings under the SARFAESI Act were already initiated against the Corporate Debtor on 08.10.2015 and another Petition U/s 7 of the Code was filed by the Respondent bank on 14.02.2020 and also in view of the fact that vide an order dated 04.06.2019, CIRP was



initiated against the Corporate Debtor, the Corporate Debtor even though qualified the eligibility criteria under the notifications issued by the Government of India, could not apply for UDYAM certificate (MSME registration certificate) on the website.

- vi. That thereafter, in view of the fact that the earlier CIRP was withdrawn, the Applicant herein contacted a consultant namely Mr. Rakesh Kumar for the purpose of applying for UDYAM certificate on behalf of the Corporate Debtor on 10.06.2022. However, this Adjudicating Authority vide an order dated 03.08.2022 initiated Corporate Insolvency Resolution Process against the Corporate Debtor.
- vii. That thereafter on 18.10.2022, an advertisement was published by the Resolution Professional of the Corporate Debtor seeking invitation of expression of interest for submission of Resolution Plan.
- viii. That since the Applicant who is the suspended director and promotor of the Corporate Debtor replied to the said invitation of expression of interest (“EoI”) and vide a letter dated 06.11.2022 submitted his reply to the said Expression



of Interest. The Applicant showed its intention to file a resolution plan along with the other shareholders of the Corporate Debtor i.e. Mr. Shri Chand Keswani, Om Prakash Keswani and Harish Keswani. While expressing their intention to submit a Resolution Plan, the Applicant herein confirmed from the Resolution Professional who assured the Applicant that the Resolution Professional, in view of the fact that the Corporate Debtor is eligible for registration as MSME will register the same so that the Applicant can file its resolution plan.

- ix. That vide an email dated 21.11.2022, the Resolution Professional of the Corporate Debtor sought for some additional information from the Applicant including bank guarantee of Rs. 50,00,000/- (INR Fifty lakhs).
- x. That in compliance of the said request made by the Resolution Professional for submission of Bank Guarantee of Rs. 50,000,00/- (INR Fifty Lakhs) the Applicants herein to show their bonafide deposited a bank guarantee of the said amount.



- xi. That thereafter vide an email dated 06.12.2022 the Applicants herein were informed by the Resolution Professional of the Corporate Debtor that in compliance with Regulations 36A of the IBBI (Corporate Insolvency Resolution Process for Corporate Persons) Regulations 2016, their Expression of Interest was considered and approved by the CoC of the Corporate Debtor.
 - xii. That on 13.12.2022 the Resolution Professional addressed an email to the Applicant the (contents whereof were contrary to the earlier email dated 06.12.2022) and informed that their Expression of Interest to submit a Resolution Plan has not been included in the list of PRAs.
 - xiii. That the account of the corporate debtor has not been declared as willful defaulter and is not eligible U/s 29 A of the Code to apply as a Prospective Resolution Applicant.
- 3.** The Respondent No. 1/Resolution Professional of the Corporate Debtor has filed his reply to the averments of the Applicant stating as follows:



- i. That on 06.11.2022, the Applicant submitted his Expression of Interest along with the other shareholders of the Corporate Debtor i.e. Mr. Shri Chand Keswani, Om Prakash Keswani and Harish Keswani (in consortium) in the capacity of suspended board of directors (“SBD”).
- ii. That as per eligibility criteria in the detailed EoI, the criteria for submitting the EoI as a Consortium is that there should not be more than three individuals in a Consortium.
- iii. That Applicant was not eligible to submit the EoI in terms of the detailed EoI approved by the Committee of Creditors ("CoC") as the EoI was submitted by the SBD in Consortium of four (4) members.
- iv. That as per the provisional list of Prospective Resolution Applicants ("PRA") shared with the CoC in the 4th CoC meeting on 06.12.2022, there were 13 PRAs including the Applicant herein as suspended board of directors of the Corporate Debtor.
- v. That vide email dated 09.12.2022, the Respondent/RP informed the Applicant that they had submitted the EoI as the SBD and in terms section 29A, SBD can submit the EoI only if the Corporate Debtor is registered as MSME and the RP could not



find any MSME certificate as an enclosure with EoI submitted by Applicant.

- vi. That the Respondent/RP sent an email to the Applicant on 10.12.2022, requesting the Applicant to provide the requisite information and also informed the Applicant that in terms of EoI, consortium cannot be of more than 3 members and Applicant submitted the EoI in the consortium of 4 members.
- vii. That the Applicant participated in the 5th, 6th, 7th, 8th, 9th CoC meeting, but never raised any issue or objection regarding exclusion of Applicant from the list of PRAs.

4. The Respondent No. 2 has filed its reply stating as follows:

- i. That the expression of interest submitted by the Applicant was not compliant with the requirements as published in the Form 'G". It was incumbent upon the Applicant to submit the expression of interest or any additional information accompanied by requirements in terms of Section 36A of Insolvency IBBI (Corporate Insolvency Resolution Process for Corporation Persons), Regulation, 2016.



- ii. That the Resolution Professional being satisfied that the expression of interest submitted by the Applicant has not complied with requirements of the terms and conditions as specified in the notification for expression of interest has rightly rejected the said expression of interest.
5. We have gone through the documents on record filed by all the parties and arguments advanced by the counsels of all the parties.
6. The present Application has been filed by the Applicant who is the suspended director as well as the shareholder of the Corporate Debtor seeking directions to the Resolution Professional of the Corporate Debtor to accept the Expression of Interest of the Applicant as Prospective Resolution Applicant (“PRA”) under Section 240A of the Insolvency and Bankruptcy Code. The Respondent, in its reply has stated that the EoI submitted by the Applicant does not fulfil the criteria as specified in the notification for expression of interest. Further, the Applicant has contended that the Corporate Debtor is eligible to be registered as an MSME in light of the notification no. S.O. 2119(E) dated 26.06.2020 D.O.



No. 16/11/2019-P&G/Policy dated 01.07.2020 laying down classification for registration under MSME.

- 7.** As per the averments of the Applicant, he had informed the Respondent No. 1/RP about the same and had requested the RP to get the Corporate Debtor registered as MSME. However, the CIRP was initiated on 03.08.2022 and the Applicant, being the ex-director of the Corporate Debtor, had a time period of over two years to register the Corporate Debtor as MSME. It appears that the intent of the Applicant to now ask for registration of the Corporate Debtor as MSME is to open the doors, that are otherwise shut to enable him to submit EoI/Resolution Plan to regain entry and control/management over the Corporate Debtor through the backdoor.
- 8.** On the perusal of Section 25(h), it is seen that the RP is duty-bound to invite prospective resolution applicants, who fulfill such criteria as may be laid down by him with the approval of the Committee of Creditors, to submit Resolution Plan(s) and such criteria have to be consistent with the Code and cannot be laid down by ignoring Section 29A of IBC 2016. The provisions under



Section 25 of IBC 2016 nowhere authorize an RP to obtain an MSME Certificate of the Corporate Debtor for the purpose of opening back door entry to a defaulting Ex-Director.

9. The Hon'ble NCLAT vide its Judgement dated 12.01.2021 passed in the matter of "*Harkirat Singh Bedi Vs. The Oriental Bank of Commerce & Anr.*" has held the following:

*"39. **Also, the date of registration of the Corporate Debtor as MSME as on record was 5th June, 2019, i.e after CIRP admission order dated 29th March, 2019. The application for registration of MSME by the Appellant was without authorization, being subsequent to initiation of CIRP and hence was invalid. Therefore, the Appellant is ineligible to take the benefits of section 240A under I&B Code."*

10. In our view, the benefit of Section 240A of IBC 2016 can only be availed by a genuine MSME Enterprise, whose registration or MSME Certification is done prior to the commencement of CIRP of a Corporate Debtor. Further, the Resolution Professional had informed the Applicant vide e-mails dated 09.12.2022 & 10.12.2022 that the Applicant was ineligible as per Section 29A as the Corporate Debtor is not an MSME and also, the Applicant is ineligible in terms of the requirements under EoI issued by the



Resolution Profession. The Resolution Professional is bound to conduct due diligence of the prospective resolution applicants in terms of Regulation 36A(8) of the IBBI(Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The decision of the RP to not include the Applicant in the final list of PRA appears to be just and reasonable. Further, even after the RP had conveyed the Applicant about his decision to not include the Applicant in the final list of PRAs vide e-mail dated 13.12.2022, the Applicant continued attending CoC meetings and never at that point contested the decision of the RP. The present Application was filed only on 26.04.2023 i.e. after a lapse of more than 4 months.

11. In view of the above, we find no merit in the present Application. IA/2399/2023 stands dismissed.

Let copy of the order be served to the parties concerned.

SD/-

**(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)**

SD/-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**