

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD
Court 2**

IA 514 of 2020 in CP(IB) 268/NCLT/AHM/2018

**Coram: HON'BLE Ms. MANORAMA KUMARI, MEMBER JUDICIAL
HON'BLE Mr. CHOCKALINGAM THIRUNAVUKKARASU, MEMBER TECHNICAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH
OF THE NATIONAL COMPANY LAW TRIBUNAL ON 06.01.2021**

Name of the Company: POSCO India Pune Processing
Center Pvt Ltd
V/s
Dhaval Jitendrakumar Mistry RP For
Poggenamp Nagarsheth Powertronics
Pvt Ltd
Section 60(5) of IBC, 2016

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
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1.

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ORDER

Advocate, Mr. Atul Sharma appeared on behalf of the Respondent.

The order is pronounced in the open court, vide separate sheet.



**CHOCKALINGAM THIRUNAVUKKARASU
MEMBER TECHNICAL**

Dated this the 6th day of January, 2021



**MANORAMA KUMARI
MEMBER JUDICIAL**

**BEFORE THE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**

**I.A. No. 514 of 2020
in
CP(IB) No. 268 of 2018**

In the matter of:

POSCO India Pune Processing
Center Private Limited

... Applicant

Versus

Mr. Dhaval Jitendrakumar Mistry
Resolution Professional of
M/s Poggenamp Nagatsheth
Powertronics Private Limited

... Respondent

Order delivered on 6th January, 2021

**Coram: Hon'ble Ms. Manorama Kumari, Member (J)
Hon'ble Mr. Chockalingam Thirunavukkarasu, Member (T)**

Appearance: Advocate Mr. Abhay Itagi for Applicant and Advocate Mr. Atul Sharma for Respondent.

ORDER

1. The instant application is filed under section 60(5) Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "IB Code") with the following prayers:

- i. That the Resolution Professional may be directed to forthwith furnish the material information in respect of the Corporate Debtor.
- ii. That the Resolution Professional be directed to extend the date for submission for Resolution Plan by 30 days from the date of receipt of material information;





- iii. That the Resolution Professional be replaced with any other person who is competent, fair and unbiased;
- iv. That the erstwhile promoters be held to be disqualified to submit the Resolution Plan in respect of the Corporate Debtor;
- v. That the Resolution Professional be directed not to accept the Resolution Plan that may be submitted by the erstwhile promoters either individually, jointly or in any other capacity;

2. The brief facts of the case are as under:

2.1 CP (IB) No. 268 of 2018 was filed by Operational Creditor, namely, POSCO India Pune Processing Center Private Limited against the Corporate Debtor viz., M/s Poggenamp Nagatsheth Powertronics Private Limited under Section 9 of the IB Code, seeking initiation of Corporate Insolvency Resolution Process (hereinafter referred as "CIRP"), which was admitted by this Adjudicating Authority vide its Order dated 22.01.2020 and Mr. Dhaval Jitendrakumar Mistry was appointed as Resolution Professional (hereinafter referred as "RP") of the Corporate Debtor, after replacing the Interim Resolution Professional vide order dated 03.06.2020.

2.2 It is stated in the application that the Applicant and the erstwhile promoters of the Corporate Debtor were found to be the two prospective Resolution Applicants. Thereafter, the RP intimated both the prospective Resolution Applicants to file their objections to the list of prospective Resolution Applicants on or before 18.07.2020. The provisional list indicated the erstwhile promoters and the Applicant as the two prospective Resolution Applicants, to which the Applicant did not object after seeing erstwhile promoters as one of the prospective resolution applicant as list was provisional and RP would assess the applicability of the erstwhile promoters under Section 29A of the IB Code.

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- 2.3 It is further stated by the Applicant that the name of the erstwhile promoters were also included in the final list, which was objected by the Applicant vide letter dated 30.07.2020 wherein the Applicant informed the RP that the erstwhile promoters are disqualified under Section 29A of the IB Code and RP shall reconsider their eligibility. During the course of the correspondence exchanged between the parties, RP never disclosed the status of the Corporate Debtor and always asserted that erstwhile promoters are not disqualified under Section 29A of the IB code.
- 2.4 It is stated by the Applicant that only on 12.08.2020, for the first time, RP disclosed the status of the Corporate Debtor being an Micro, Small and Medium Enterprise (hereinafter referred as "MSME"), which was never disclosed through Information Memorandum or through the correspondences seeking reconsideration of eligibility of the erstwhile promoters. Hence, the erstwhile promoters being eligible to submit the Resolution Plan in light of Section 240A of the IB Code since the Corporate Debtor is registered under Micro, Small and Medium Enterprises Development Act, 2006 (as amended w.e.f. 01.07.2020).
- 2.5 Thus, it is pertinent to note that the RP has failed to disclose certain information pertaining to the Corporate Debtor in the Information Memorandum which has made the Applicant handicapped to draw a viable financial proposal and prepare a Resolution Plan in the absence of the information/documents sought for.
3. Heard both sides and gone through the records, from the prayer it appears that the Applicant's main grievance is that 30 days time shall be extended for submission of Resolution Plan. However, it is a matter of record that at the behest of the Applicant, the Company Petition was admitted on 22.01.2020 and thereafter, in the month of July, 180 days was expired and further 90 days expired in the month of October. On exemption of the lockdown period, CIRP

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expired somewhere in end of December 2020. In view of that, when sufficient time in CIRP was there, it is expected from the Applicant to file the Resolution Plan in time as time is the essence of the IB Code and if any time is permitted beyond the prescribed period, the very object of the IB Code will be frustrated. In that view, sufficient time has been availed by the Applicant and no direction can be given to the RP beyond the stipulated time given under the IB Code.

4. With regard to the issue that the promoters have filed its Resolution Plan, claiming Corporate Debtor to be the MSME. On going through the record, it is found that the Corporate Debtor on the date of admission of the Company Petition was not under the category of MSME. However, subsequently the Government of India vide its notification dated 01.06.2020 has carried out certain changes in the criteria for classification of Micro, Small and Medium Enterprises and in view of that the Corporate Debtor is claiming itself to be a MSME as the criteria for classification of MSME has been amended with effect from 01.07.2020. In view of such amendment, Corporate Debtor claiming itself to fall under the criteria of MSME and is keen to revive the Corporate Debtor and make it a going concern, so that the value of the assets can be maximised, while the stakeholders can be benefited. It is also a matter of record that during CIRP, Corporate Debtor with permission of RP registered the Corporate Debtor as MSME. However, it is expected from the RP that while discharging duty, RP must adhere to the provisions of the IB Code i.e. Section 25 of the IB Code, which does not give any power to the RP to change the nature and character of the Corporate Debtor, that too during the CIRP period.
5. Admittedly, in the reply filed by the RP, he has stated that Corporate Debtor (suspended management) has requested him to register the Corporate Debtor as MSME. It shall be noted that on admission of the Company Petition, the management is suspended and RP takes over the powers and functions of the Corporate Debtor and he has to discharge his duty as per Section 25 of the IB Code. He has no authority to give direction/ permission to the

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suspended management for changing the nature of the Corporate Debtor. Under such circumstances as also on perusal of the records, it appears that RP has never objected in getting change the nature of the Corporate Debtor, on the contrary he remained silent.

6. While going through the amendment notification dated 01.06.2020, it prima facie appears prospective one, as the date of its effect is given as 01.07.2020. For the sake of convenience, the notification is reproduced herein below:

**MINISTRY OF MICRO, SMALL AND MEDIUM ENTERPRISES
NOTIFICATION**

New Delhi, the 1st June, 2020

S.O. 1702(E).—In exercise of the powers conferred by sub-section (1) read with sub-section (9) of section 7 of the 'Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006) and in supersession of the notification of the Government of India, Ministry of Small Scale Industries, dated the 29th September, 2006, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section(ii), vide S.O. 1642(E), dated the 30th September 2006 except as respects things done or omitted to be done before such supersession, the Central Government, hereby notifies the following criteria for classification of micro, small and medium enterprises, namely:—

- (i) a micro enterprise, where the investment in Plant and Machinery or Equipment does not exceed one crore rupees and turnover does not exceed five crore rupees;**
- (ii) a small enterprise, where the investment in Plant and Machinery or Equipment does not exceed ten crore rupees and turnover does not exceed fifty crore rupees;**
- (iii) a medium enterprise, where the investment in Plant and Machinery or Equipment does not exceed fifty crore rupees and turnover does not exceed two hundred and fifty crore rupees.**

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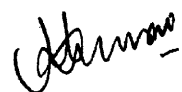
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**This notification shall come into effect from
01.07.2020.....**

On plain reading of the notification, it shows that though it is notified on 01.06.2020, however, its effect has expressly been given on and from 01.07.2020 i.e. prospectively. That itself has drawn line of its effective date.

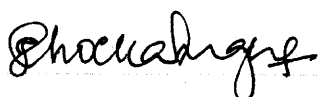
7. It is to be mentioned herein that, on the date of filing of application under section 9 of the IB Code and on the initiation of CIRP i.e. 22.01.2020, the Corporate Debtor does not fall under the criteria of classification of MSME, however, in view of amendment made vide notification dated 01.06.2020, as said herein above, the Corporate Debtor automatically assumed itself to be a MSME and trying to take the benefit of amendment in MSME criteria by giving a retrospective effect.
8. It is well established principle of interpretation that no statute can be given retrospective effect unless statute so directs either expressly or by necessary implication. Nor can a power be exercised retrospectively, unless the statute expressly so provided.
9. It is fundamental rule of construction that no statute shall be so construed to have retrospective operation unless such a construction appears very clear in the terms of the Act or arises by necessary and distinct implication. Thus, cardinal principle of construction that every statute is "prima-facie" prospective, unless it is expressly or by necessary implication made to have retrospective operation as observed by Hon'ble Supreme Court in **Keshoram Vs State of Bombay AIR 1951 SC 128**. There is presumption of prospectively articulated in the legal maxim, "*nova constitutio futuris formam imponere debet, right non praeteritis*", i.e. a new law ought to regulate what is to follow, not the past, and this presumption operates unless shown to the contrary by express provision in the statute or is otherwise discernible by necessary implication.

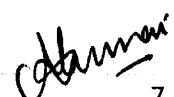




10. The general rule that all statutes other than those which are merely declaratory or which related only to matters of procedure or of evidence, are *prima facie* prospective and retrospective effect is not to be given to them unless, by express words or necessary implication.
11. It is admitted position that instant amendment came during pending action (*lis pendence*). It is also established principle that in the case of pending actions, the law is that the right of the parties is decided according to the law as it existed when the action was commenced unless a clear intention to the contrary is found in the new statute, as the *cause of action* is the demarcation line for initiating any proceeding and/or any application. In the present case, when application was filed and CIRP initiated, the Corporate Debtor was not falling in the criteria/classification of MSME, hence, the amendment benefit cannot be availed by the Corporate Debtor, when it is under CIRP by giving retrospective effect.
12. It is established principle that parties are governed by law in force at the date when a suit or proceeding is initiated, unless expressly laid down or by necessary implication inferred.
13. It is settled law that, if the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. In general, when law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute and/or any notification shows a clear intention to vary such right.

While going through the notification dated 01.06.2020 of Government of India, it is clearly spelled that, it has to come into effect from 01.07.2020. Further, if there is nothing about retrospective effect in the notification, then its effect will be from the date of its issuance, however, in this notification effective date is clearly mentioned as 01.07.2020, however, sometime it is given





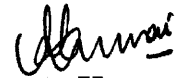
retrospective effect, but to cure the defect or would be clarificatory in nature and hence retrospective.

14. Under the facts and circumstances, as discussed herein above, the Corporate Debtor at this stage cannot be treated as MSME and cannot take the benefit of MSME, in view of amendment vide notification issued on 01.06.2020, w.e.f. 01.07.2020, by having its retrospective effect when admittedly on the date of filing application under section 9 of the IB Code Corporate Debtor does not fall under the criteria of MSME. Hence, the question of not accepting the Resolution Plan filed by erstwhile promoters' does not arise as the erstwhile promoters' will be ineligible under Section 29A of the IB Code to file the Resolution Plan.
15. Therefore, the Application is bad in the eye of law, hence, is not maintainable and stands rejected.



Chockalingam Thirunavukkarasu
Adjudicating Authority
Member(Technical)

Shreya



Manorama Kumari
Adjudicating Authority
Member(Judicial)