

**NATIONAL COMPANY LAW TRIBUNAL
AT HYDERABAD**

I.A. NO. 1431/HDB/2023

IN

C.P. (IB) NO. 149/7/HDB/2022

In the matter of:

M/s. Swan LNG Private Limited,

Having its registered office at Ground floor,
9th Avenue, Behind Rajpath Club, S. G Highway,
Ahmedabad-380059

... Applicant

And

1. Mr. Krishna Komaravolu

Resolution Professional of Mantovani Di Dharti Pvt Ltd.
H.no 7-2-214, Flat No 409
Vamsirishna Apartment
Dharam Karam Road
Ameerpet, Hyderabad 500016
Email-irp.mddpl@gmail.com

**2. Committee of Creditors
of Mantovani Di Dharti Pvt Ltd.**

H.No 6-3-1113/2, 2nd Floor,
DDIL Bhavan, B S Maktha,
Begumpet, Hyderabad,
Telangana-500016.

3. Mr. Akumalla Rajendra

R/o Plot No.148, Ravi Colony, Opp. RTC Colony,
Thirumalgherry, Secunderabad – 500015
Email: khs.2005@gmail.com

4. Mrs. Akumalla Vijaya Lakshmi

R/o Plot No.148, Ravi Colony, Opp. RTC Colony,
Thirumalgherry, Secunderabad – 500015
Email: khs.2005@gmail.com

5. Ramalingam Constructions Company Pvt Ltd,

Having its Registered office at
NR Tower, No. 175/2, South State Bank Nagar,
Chettipalayam, Erode,
Tamil Nadu –638002

...Respondents

Dated: 08.12.2023

Coram:

Dr. N. Venkata Ramakrishna Badarinath, Hon'ble Member Judicial
Shri Charan Singh, Hon'ble Member Technical

Appearance:

For Applicant: Shri S. Niranjan Reddy, Senior Advocate
assisted by Ms. D. Hamsini, Advocate

For Respondents: Shri S. Ravi, Senior Advocate assisted by Shri P.
Ramesh Babu, Advocate for R-1
Shri M.S. Prasad, Senior Advocate for Shri VVSN
Raju, Advocate for R-2
Shri G.Bhupesh, Advocate for R-3, 4 & 5

PER: BENCH

ORDER

1. This Application is filed under Section 60 (5) of IBC, 2016 by M/s Swan LNG Private Limited which is an Operational Creditor of Mantovani di Dharti Pvt Ltd (Corporate Debtor), seeking the following reliefs
 - (a) To declare that Respondent Nos. 3, 4 and 5 are barred under Section 29A of the Code and therefore are ineligible to submit any resolution plan.
 - (b) To declare the actions of the COC in approving the Resolution Plan submitted by the consortium of Respondent Nos. 3, 4 and 5 as illegal, arbitrary, unjust in law and contrary to provisions of Insolvency and Bankruptcy Code, 2016 and consequently reject the Resolution Plan of Respondent Nos. 3, 4 and 5.
 - (c) Directions to Respondent No 1 to provide the Applicant with the copies of all the Resolution Plans received by the Respondent No. 1 from the Prospective Resolution Applicants.
 - (d) Grant any interim or ad-interim relief or such other reliefs as this Hon'ble Tribunal may deem fit in the circumstances of this case.

- 2.1 The averments in the Application are that the Corporate Debtor secured two EPC projects i.e. Breakwater Construction and Dredging from the Applicant but failed to complete the projects in accordance with the terms and conditions.
- 2.2 In the meantime, this Tribunal admitted CP No. 149/7/HDB/2022 under Section 7 of the Code and ordered commencement of Corporate Insolvency Resolution Process against Corporate Debtor i.e. Mantovani Di Dharti Pvt Ltd by order dated 11.11.2022 by appointing an Interim Resolution Professional who was later confirmed as Resolution Professional.
- 2.3 Pursuant to public notice made by the Resolution Professional inviting claims from the creditors, the Applicant herein submitted its claim to the Respondent No.1/Resolution Professional. However, the same was rejected by the Resolution Professional. Aggrieved by the decision of the Resolution Professional in rejecting the claim of the Applicant, IA No.599/2023 was moved by the Applicant herein and this Tribunal passed the following orders:-

“We are satisfied that the Applicant has made out a prima facie, case, and the balance of convenience also lies in favour of the Applicant. Hence, we hereby direct the Resolution Professional to send due notice of the proposed meeting of the CoC to be held on 14.04.2023 and in respect of all meetings in future, to

the applicant, until further orders of this Adjudicating Authority.”

- 2.4 Consequently, the Applicant was allowed by this Tribunal to participate in the CoC meetings of the Corporate Debtor. The Applicant states that it had significant interest in the Corporate Insolvency Resolution Process of the Corporate Debtor by virtue of the magnitude of the claim of the applicant against the Corporate Debtor.
- 2.5 It is further stated that pursuant to the EOI dated 07.01.2023 issued by Respondent No.1, four resolution plans were received. However, since none of proposals contained in the said plans were found satisfactory by the CoC of the Corporate Debtor, the 1st Respondent/Resolution Professional issued a fresh Form G dated May 03, 2023 inter alia inviting EOI from Prospective Resolution Applicants (“PRA”). In response to the said public announcement, the Resolution Professional had received EOIs from Five PRAs. Thereafter, the Applicant, in the capacity of CoC member, received an email dated May 20, 2023 wherein the Respondent No. 1 has provided the provisional list of “eligible” PRAs in terms of Regulation 36A(10) of IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016. The list contained the following applicants:

1. Meka Infrastructure Private Limited,
 2. Ramalingam Constructions Private Limited,
 3. Akumulla Rajendra and Alur Vijaylaxmi,
 4. Adani Port and Special Economic Zone Limited, and
 5. Backbone Projects Limited
- 2.6. The Resolution Professional received 3 (three) resolution plans respectively from Backbone Projects Limited, Meka Infrastructure Private Limited and consortium of Respondent Nos. 3, 4 and 5.
- 2.7 The applicant alleges that it was not intimated about the 7th CoC held on 15.07.2023 (adjourned meeting of 14th July, 2023), because of which the Applicant could not attend the adjourned meeting. However, the Applicant was belatedly served with the copy of the minutes of the 7th CoC meeting and in the said minute, it has been *inter alia* recorded that:-
- “Mr. Rajendra Akumalla and Mrs. Alur Vijayalakshmi submitted their Eol application and RCCL submitted separate Eol application. Accordingly, the Resolution Professional considered them as separate Resolution Applicants at the time of issuing final list of Resolution Applicants as required under Regulation 36A (12) of CIRP Regulations, 2016. Both the Resolution Applicants satisfied the eligibility criteria mandated by the CoC.*

However, both the Resolution Applicants have now submitted a Resolution Plan as a Consortium. On prima face verification, the Consortium is meeting the eligibility criteria and net worth required as a Consortium mandated by CoC.”

- 2.8 It is stated that the representative of Applicant i.e. Shri MVPH Rao raised objections regarding the eligibility of the members of the Consortium of Respondent Nos. 3, 4 and 5 when the resolution plan submitted by the consortium was placed before the 9th CoC held on 24.07.2023. The Applicant was then informed that the said issue had already been deliberated upon in the 8th CoC meeting held on July 25, 2023 in which meeting the Applicant had raised a similar objection with regard to the eligibility of Consortium, The Applicant stated that however the same was not recorded in Minutes of meeting of the 8th COC and the COC verbally informed the applicant that the it has a right to accept the resolution applications. Further the Applicant was informed by the 1st Respondent vide an email dated August 6, 2023 that the matter regarding acceptance of the resolution plan of the consortium was discussed in the adjourned meeting of the 7th COC held on July 15, 2023. However, according to the Applicant no such deliberation whatsoever with regards to the eligibility of the Respondents forming the Consortium, was made by the Respondent No. 1

and Respondent No. 2 in the 8th CoC Meeting held on 17th July , 2023 and adjourned 8th CoC Meeting held on July 18, 2023.

2.9 The Applicant has at para 14 of the Application cited reasons as to why the Respondents forming part of the consortium are ineligible to submit the resolution plan in terms of Section 29 A of the grounds, which are as under:-

- a. The Corporate Debtor is a registered MSME. The Respondent Nos. 3 and 4 are the members of the suspended board of directors of the corporate debtor.
- b. As per Section 240A of the Code, clauses 29A(c) and (h) of the code shall not apply to the resolution applicants in respect of CIRP of any MSME. As such, clauses 29A(c) and (h) of the code do not apply to Respondent Nos. 3 and 4 herein. It is however stated that all the other disqualifications provided under Section 29A of the code are equally applicable to the Respondent Nos. 3 and 4.
- c. The Respondent Nos. 3 and 4 are disqualified to file a resolution plan in terms of section 29A(e) of the Code. Section 29A(e) of the Code, *inter alia*, provides as follows:-

“A person shall not be eligible to submit resolution plan, if such person, or any other person acting jointly or in concert with such person-

e) is disqualified to act as a director under the Companies Act, 2013”

- d. It is stated that the Respondent Nos. 3 and 4 are the directors in a company namely Dharti Dredging and Infrastructure Limited (in CIRP), being an Associate company of the Corporate Debtor. The said Company had failed to file its Financial Statements or annual returns for three consecutive financial years, and last of its financial statements was filed on 31st March, 2018. As such, in terms of the relevant provisions of the Companies Act, 2013, the directors of the said Company including the respondent nos. 3 and 4 stand disqualified to act as directors by operation of law.
- e. Since, Respondent Nos. 3 and 4 are disqualified to act as a director as per the provisions of the Companies Act 2013, Respondent Nos. 3 and 4 become ineligible to submit a Resolution Plan as per Section 29A(e) of the Code.
- f. A similar situation with respect to the resolution plan submitted by the respondent no. 3 during the Corporate Insolvency Resolution Process with respect to Dharti Dredging and Infrastructure Ltd. Respondent No.3 who is a lead member of the Consortium of the respondents in the instant case, had also submitted a resolution plan in Dharti Dredging and Infrastructure Ltd, in consortium with Mr. Rakeshkumar Jhunjhunwala, and SKH Impex Private Limited. The said

Resolution plan was, however, rejected by the Resolution Professional of Dharti Dredging and Infrastructure Ltd. *inter alia*, on the ground that the same is not in compliance with the provisions of Section 29A of the code as the Respondent no.3 had not filed financial statement for a continuous period of three years of Dharti Dredging and Infrastructure Ltd. and thereby disqualified to be a director by the competent authority under the Companies Act. Assailing the rejection of his resolution plan, the Respondent No. 3 filed an Interlocutory Application bearing IA No.407 of 2023 in CP (IB)No.329/7/HBD/2020 before this Tribunal, this Tribunal vide order dated 20th July, 2023, had, *inter alia*, held as follows:-

“Therefore, having carefully examined the reasons that are given by the Resolution Professional for rejecting the resolution plan of the applicant, and in the light of our discussion and the case law, we are fully convinced that the grounds of rejection are tenable and sustainable under law.”

- g. That Mr. Akumulla Rajendra, Respondent No. 3 herein, is part of the consortium in the instant case who has submitted a resolution plan in relation to the Corporate Debtor. Since he has been disqualified from submitting a resolution plan by this Tribunal in respect to another company, he is ineligible to submit a resolution plan in the case of Corporate Debtor as well, as per Section 29A (e) of the Insolvency and Bankruptcy

Code (IBC), 2016 and other relevant provisions outlined in the IBC.

- h. That Respondent No 3 is a lead member of the consortium who has submitted a Resolution Plan in relation to the Corporate Debtor. Given that the Respondent No.3 is disqualified from submitting any Resolution plan, the consortium itself loses its eligibility to submit the Resolution Plan.
- i. That the said order dated 20th July, 2023 is squarely applicable in the instant case, and once the directors are disqualified under the provisions of the Companies Act, 2013, they are not eligible to file resolution plan with respect to any Company in CIRP. As such, it is clear that the respondent nos. 3 and 4 are ineligible under the provisions of the Code to submit a resolution plan.

The respondents no. 5 is ineligible to file a resolution plan under Section 29A of the Code.

2.10 That the respondent no. 5 who is a part of the Consortium is also ineligible to file a resolution plan in terms of section 29A(j) read with clause (e) of the Code. Section 29A(e) and (j) of the Code, *inter alia*, provides as follows:-

“A person shall not be eligible to submit resolution plan, if such person, or any other person acting jointly or in concert with such person-

e) is disqualified to act as a director under the Companies Act, 2013

...

*(j) has a connected person not eligible under clauses (a) to (i).
Explanation — For the purposes of this clause, the expression
"connected person" means—*

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii)”

2.11 It is submitted that two of the directors of respondent no. 5 namely Nachimuthu Ramalingam and Nachimuthu Ramalingam Tamilselvi are disqualified to act as directors in accordance with the provisions of the Companies Act, 2013.

2.12 The said two directors are also directors in other group companies of the respondent no. 5, which has been struck off for non-filing of financial statement or annual returns for three consecutive financial years. Mr. Nachimuthu Ramalingam and Mr. Nachimuthu Ramalingam Tamilselvi are the directors in a group company named Ramalingam Engineering Private Limited which was struck off in 2016. Copy of the Company Master Data of Ramalingam Engineering

Private limited is annexed hereto and marked as **Annexure P-9**.

Mr. Nachimuthu Ramalingam Tamilselvi is also a director in Supreme Sago Industries Erode Private Limited which is also struck off by the Registrar of Companies in 2017. Further it as per the provisions of the Companies Act 2013, Mr. Nachimuthu Ramalingam and Mr. Nachimuthu Ramalingam Tamilselvi are disqualified to act as directors.

2.13 Since, Mr. Nachimuthu Ramalingam and Mr. Nachimuthu Ramalingam Tamilselvi are disqualified to act as directors as per the provisions of the Companies Act 2013, Mr. Nachimuthu Ramalingam and Mr. Nachimuthu Ramalingam Tamilselvi become ineligible to submit a Resolution Plan as per Section 29A(e) of the Code.

2.14 The Applicant by relying in terms of Section 29A(j) of the Code, submits that a person shall not be eligible to submit a Resolution Plan if they have a “connected person” who is not eligible to submit a resolution plan. Connected person would include any person who is a promoter or in control or in management of the resolution applicant and would also include a person who would be in control or management of the Corporate Debtor during the implementation of the Resolution Plan.

2.15 Thus, Mr. Nachimuthu Ramalingam and Mr. Nachimuthu Ramalingam Tamilselvi are the connected persons of the Respondent No. 5 Company, and in the management and control of Respondent No. 5 Company by virtue of their directorship. Hence, by virtue of Section 29A (j), the Respondent No. 5 Company also become ineligible to submit a Resolution Plan in accordance with the provisions of the code.

2.16 According to the Applicant all the three respondents i.e. R-3, 4 and 5 are ineligible to submit a plan under Section 29A of the Code and further submits that when a resolution plan is submitted by a consortium then all the members of the consortium are required to qualify in terms of Section 29A of the Code and even if one member fails to meet such qualifications then the consortium itself becomes ineligible.

2.17 It is stated that the Resolution Professional has failed to conduct due diligence in order to check if the PRAs complied with the provisions of the Section 29A of the Code and Regulation 36A(8) of the IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016 and has wrongly declared the Respondent Nos. 3, 4 and 5 as 'eligible'. According to the Applicant, the Resolution Professional ought not to have included Respondent nos. 3, 4 and 5 in the provisional list of PRAs in the first place and have illegally and unlawfully

permitted the consortium to not only submit and present its resolution plan but also have approved it to participate in the challenge process conducted on July 31, 2023 wherein the Consortium was declared as the Highest bidder, which is in gross contravention of the provisions of the Code.

2.18 It is stated that despite Applicant raising query time and again on the eligibility of the Consortium, the Respondent no 1 continued to act in a manner which is illegal, unlawful and in gross contravention of the provisions of the Code. The Applicant further submits that despite requesting the Resolution Professional to share the copy of the Resolution Plan received by him which according to the Applicant is entitled as laid down by the Hon'ble Supreme court in *Vijay Kumar Jain v Standard Chartered Bank & Ors* in Civil Appeal No 8430 of 2018, the request was not acceded to by R-1 citing reason that the Applicant is not an operational creditor, though R-1 has been considering the applicant as an operational creditor and has also recorded the same in all CoC meetings.

3. Counter has been filed by the Resolution Professional/Respondent No.1 herein and contended as follows:-

- 3.1 That intimation regarding the Adjourned 7th COC meeting held on 15.07.2023 was given to the Applicant and the representative of the Applicant had expressed his inability to attend the same through whatsapp message. The VC link of the meeting was shared by the Resolution Professional/R-1 to the Applicant .
- 3.2 The eligibility of Consortium was deliberated upon the adjourned 7th meeting held on 15.07.2023 and the minutes of the meeting and the legal opinion obtained by the RP on the eligibility of the consortium was shared with the Applicant on 31.07.2023.
- 3.3 The challenge mechanism process was conducted in the presence of the Applicant and the consortium was declared as H1 bidder on 01.08.2023.
- 3.4 The request for re-examining the eligibility of the Consortium was not considered by Resolution Professional as in the instant case, the DIN status of the Directors is Active and are not disqualified under Section 164 of the Companies Act to attract ineligibility of Section 29A of the Code.
4. Counter is filed by Respondent No.2 rebutting the averments made in the application and contended as under:-
 - 4.1 That after due scrutiny by the Resolution Professional and after conducting the challenge mechanism process, has confirmed

the eligibility of Respondents 3, 4 & 5 to submit the Resolution Plan, which was approved by R-2 being the sole member of the CoC.

- 4.2 R-2 alleges that the instant application is filed by the Applicant as an afterthought after a passage of substantial period of time. According to R-2/CoC, the Applicant is aware of the submission of the Resolution Plan by the R-1.
- 4.3 With regard to the allegation of the Applicant that Respondents 3,4 & 5 are ineligible to file the plan, the 2nd Respondent submits that the disqualification of the Directors falls under the ambit of ROC and that the DIN of the directors are active and it took decision to approve the plan in its commercial wisdom.
- 4.4 It is stated that the Consortium has offered more amount than compared to other PRAs and the COC considering the feasibility and viability of the Resolution Plan, has approved the same in its commercial wisdom. Therefore, the Applicant has no locus standi to challenge the commercial wisdom of the COC.
5. A common counter is filed by Respondents 3, 4 & 5 contending as under:-
 - 5.1 It is contended that this Tribunal had not rejected IA 407/2023 filed by Respondents 3 & 4 challenging rejection of their resolution plan submitted for another company i.e. M/s Dharti

Dredging and Infrastructure Company on the ground of alleged disqualification of Directorship of Respondents 3 & 4. The appeal against the said order passed by this Tribunal in IA 407/2023 is pending before Hon'ble NCLAT and has not attained finality.

- 5.2. Adverting to the averments made by the Applicant, it is submitted that the DINs of the Directors of R-5 Company are still active and are not disqualified under the provisions of the Companies Act, 2013 as such R-5 is eligible to place the Resolution Plan. It is further stated that it is not Respondent No.5 independently placed the Resolution Plan. Respondent No.3, 4 and 5 have associated together, formed a consortium and placed the resolution plan which was declared as H-1 Bidder. Further the Applicant had not opted to challenge either the Provisional List of PRAs communicated to it by R-1 vide email dated 20.05.2023 or the final list.
- 5.3. Respondent Nos 3,4 & 5 have denied the allegation of the Applicant that the former are acting hand in glove with each other and the Applicant failed to demonstrate how the consortium is disqualified or ineligible under Section 29A of IBC, 2016. Therefore the present application filed by the Applicant is devoid of merits, not maintainable and liable to be dismissed.

6. Rejoinder is filed by the Applicant to the counter filed by Respondent No.1/Resolution reiterating the averments made in the application and denies the contention of R-1 that the application is devoid of merits or has been filed to frustrate the CIRP, and further dispute the contention that COC was within its rights or powers in approving the resolution plan submitted by the consortium. The Applicant further dispute the contention of the R-1 that proper notice for the adjourned 7th CoC was served upon them. Since no notice was served, the Applicant could not attend the COC meeting and failed to understand the background and/or circumstances under which the said meeting was adjourned and could not attend the adjourned 7th CoC meeting held on 15.07.2023. It is contended that the Applicant was unaware of the legal opinion taken as such the sanctity of the said legal opinion is in question and further stated that whether or not the Respondents 3,4 & 5 qualified under Section 29A of the Code was never a subject matter of query in the said legal opinion. It is further alleged that the said legal opinion has been given under the presumption that the resolution applicants are individually qualified based on the criteria laid down by the COC under Section 25(2)(h) and not otherwise statutorily disqualified under the provisions of the Code.

- 6.1 The Applicant has further emphasized the order passed by this Tribunal in IA 407/2023 in CP (IB) No. 329/7/HDB/2020 rejecting the resolution plan submitted by R-3 and one of the reasons being disqualification of R-3 under Section 29A of the Code.
- 6.2 The Applicant denies and disputes all the other contentions raised by R-1 and prayed the Tribunal to allow the reliefs sought in the application.
7. On perusal of all the documents and oral submissions from both the sides, the point which arises for our consideration is:-
“Whether the Consortium of Respondents 3, 4 & 5 who are declared as Successful Resolution Applicant are barred under Section 29A of the Code?”
8. We have gone through the written submissions and other documents filed by both the sides and heard Shri S. Niranjan Reddy, Ld. Senior Counsel assisted by Ms. D. Hamsini, Ld. Counsel for the Applicant and Shri S. Ravi, Senior Advocate assisted by Shri P. Ramesh Babu, Ld. Counsel for Respondent , Shri M.S. Prasad, Ld. Senior Counsel assisted by Ld. Counsel for Shri VVSN Raju, Advocate for R-2, Shri G.Bhupesh, Ld. Counsel for R-3, 4 & 5

9. Our observations and findings are as under:-

POINT:

“Whether the Consortium of Respondents 3, 4 & 5 who are declared as Successful Resolution Applicant are barred under Section 29A of the Code?

9.1. This Application is filed by the Operational Creditor of the Corporate Debtor with a prayer that Consortium of Respondents No. 3, 4 & 5 (in brief “Consortium”) who have been declared as Successful Resolution Applicant be declared as ineligible to submit any resolution plan as they are barred under Section 29A of the Code. Consequently, reject the resolution plan as submitted by the Consortium.

9.2 Ld. Counsel for the Applicant submitting that Respondents 3 & 4 are disqualified to file a resolution plan in terms of Section 29A (e) of the Code as they are disqualified to act as a Director under Section 164 (2) of the Companies Act, 2013. Section 29A(e) of the Code and Section 164(2) of the Companies Act, 2013 are reproduced below: -

29A. Person not eligible to be resolution applicant. –

A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

(e) is disqualified to act as a director under the Companies Act, 2013;

[Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I];

Explanation 1 is reproduced below:-

- (i) any person who is the promoter or in the management or control of the resolution applicant; or**
- (ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or**
- (iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii)**

164 (2) of the Companies Act,2013

No person who is or has been a director of a company which—

(a) has not filed financial statements or annual returns for any continuous period of three financial years ; or

(b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debenture on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.

9.3 The Ld. Counsel further submits that Respondent 3 & 4 are Directors in a Company named M/s Dharti Dredging and Infrastructure Limited (in CIRP) and financial statements and Annual Returns of the said Company are not filed for three consecutive financial years. The last financial statements were filed on 31.03.2018. As such, in terms of the relevant provisions of the Companies Act,2013, the Directors of the said

Company which include Respondent 3 & 4 stands disqualified to act as Director by operation of law and therefore, in terms of Section 29A(e) of the Code, they are not ineligible to submit a resolution plan.

- 9.4 The Ld. Counsel for Respondents countered the submissions made by the Ld. Counsel for the Applicant and submitted that Director Identification Number (DIN) of Respondents 3 & 4 are active and they are not dis-qualified by the appropriate authority under the provisions of Companies Act, 2013.
- 9.5 The Ld. Counsel for the Respondents further submits that if a Company fails to file financial statements and Annual Returns for 03 years in a row, the Registrar of Companies has the authority to deactivate the DIN for the default and disqualify the directors by de-activating their DIN and Directors in that case will be ineligible for appointment or re-appointment as Directors for a period of 05 years. But no such action has been taken by the concerned authorities i.e. ROC against the Respondents 3 & 4 and their DINs are quite active. Therefore, Section 164(2) is not attracted and consequently Section 29A(e) will also not be applicable in case of Respondents 3 & 4. The Ld. Counsel for the Applicant also raised a point that on the same ground resolution plan submitted by Respondent No.3 in

other group company namely Dharti Dredging and Infrastructure Ltd was rejected by the Resolution Professional and assailing the rejection of the Resolution Plan, the Respondent No.3 filed IA No. 407/2023 before this Tribunal and this Tribunal by its order dated 20.07.2023 held that the grounds for rejection by the Resolution professional are tenable and sustainable under law. Ld. Counsel for the Applicant pleaded that for the same reason the Resolution Plan submitted by Respondent No.3 cannot be accepted.

9.6 To counter the arguments, the Ld. Counsel for the Respondent submitted that this Tribunal has not disallowed the IA No. 407/2023 for the reasons of Applicant's statutory disqualification under Section 29 A of the Code but it was not disallowed for the following reasons:-

- (i) It is a conditional plan and also seeking release of third party guarantees and Section 31(1) does not permit the Hon'ble Tribunal to approve such a resolution plan.
- (ii) The assets referred to in the plan does not belong to the applicant as the same are the assets of the promoters already given as personal guarantees and the personal insolvency proceedings initiated by the lenders are pending against them; besides some other assets belong to third

parties; moreover, the information memorandum does not indicate these assets as that of the Corporate Debtor.

(iii) The Hon'ble Tribunal's interference with the CoC's commercial wisdom to be at barest minimum.

9.7 Ld. Counsel for the Resolution Professional placed his reliance on the Hon'ble Supreme Court in M.K. Rajagopalan Vs Periasamy Palani Gounder and Ors (MANU/SC/0517/2023), wherein it is held that unless a specific order disqualifying the resolution applicant as Director because of any default under Section 164(2) (b) of the Companies Act, 2013 came into existence, it could not have been taken by way of any process of assumption that the Appellant-resolution applicant was disqualified to act as a director and thereby, was ineligible to submit a resolution plan. When the DIN status of the Appellant was active compliant, he could not have been treated as ineligible. The relevant portion of the said order of the Hon'ble Apex Court is reproduced hereunder;-

“Point C1 – Effect of Section 164(2)(b) Companies Act

43. A long length of argument has been advanced by the contesting parties as regards impact of Section 164(2)(b) of the Companies Act because of the alleged default of the company named International Aviation Academy Private Limited of which, the resolution applicant is a director. It has been argued that the said company collected share application money pending allotment and did not refund the same; and consequently, in terms of Section 164(2)(b) of the Companies Act, this default would disqualify the resolution applicant from acting as a director and thereby, would render him ineligible

to submit a resolution plan. We find it difficult to accept the submissions aforesaid and the propositions against the resolution applicant on this score.

43.1. Even if there had been any possibility of the resolution applicant incurring such a disqualification in terms of Section 164(2)(b) of the Companies Act, because of alleged default of another company, in which he is a director, to refund the share application money, the same would essentially be a matter of consideration of the registrar of companies. Unless a categorical finding was recorded in the competent forum as regards any such default and unless specific order disqualifying the resolution applicant as director because of such default came into existence, it could not have been taken by way of any process of assumption that the appellant-resolution applicant was disqualified to act as a director and thereby, was ineligible to submit a resolution plan. It has rightly been pointed out that when DIN status of the appellant was “active compliant”, he could not have been treated as ineligible.

43.2. Again, it has been too far-stretched on the part of the Appellate Tribunal to refer to the Rule 2(1)(c) of the Companies (Acceptance of Deposits) Rules, 2014 and then to make a declaration as if the resolution applicant was disqualified in terms of Section 164(2)(b) of the Companies Act. Although, we do not agree with the submissions on behalf of appellant that such an issue of eligibility could not have been raised before NCLAT for the first time because the question of eligibility of the resolution applicant goes to the root of the matter but, we do agree with the other part of the submission in this regard that there is no concept of deemed disqualification under Section 164(2)(b) of the Companies Act. 43.3. Hence, in our view, the Appellate Tribunal had not been right in holding the resolution applicant ineligible by virtue of Section 164(2)(b) of the Companies Act. Point C1 is answered accordingly.”

At Para 67

“..... Similarly, the Appellate Tribunal has not been right in holding the resolution applicant ineligible to submit a resolution plan with reference to Section 164(2)(b) of the Companies Act, 2013 (as held in point C1)”

9.8 It is further submitted that DIN status is active as on 11.09.2023 and is annexed as Annexure-6 to the Counter.

Our reasoning: -

10.1 We have gone through our order in IA No. 407/2023 and find that para 35 of the order clearly says that the plan was not in conformity with Clause 4.7 of RFRP, hence not eligible to place before the COC. In para 36 also we found that ineligibility in terms of Section 29 of the Code was one of the reasons for rejection of resolution plan of the Applicant but there were other reasons also like plan being a conditional plan and not in conformity with the relevant provisions of the Code and the Regulations. Therefore, the submissions made by the Ld. Sr. Counsel for the Applicant that R-3 since was declared as ineligible by the order of this Tribunal in IA 407/2023, is unacceptable to the extent that we have not given any specific comment or decided about the ineligibility of Respondent no.3 in terms of Section 29A of the Code in the said IA but our order was pertaining to rejection of resolution plan as such.

10.2 On perusal of the ruling supra by Hon'ble Apex Court, relied upon by the Respondent, it is quite clear that we cannot assume that the Resolution Applicant is disqualified to act as a Director and thereby making him ineligible to submit resolution plan if DIN status of the Applicant is active. In view of the above facts and placing reliance on the order of the Hon'ble Apex Court in M.K.

Rajagopalan Vs Periasamy Palani Gounder and Ors, we decide that Respondent no.3 and 4 cannot be treated as ineligible for submitting a resolution plan as their DINs are active as per Counsel of the Respondent and this fact has not been contended by the other party.

10.3 Ld. Counsel for the Applicant submits that Respondent No.5 is also ineligible to file a resolution plan in terms of Section 29A (e) and (j) of the Code as two of the Directors of Respondent No.5 namely Nachimuthu Ramalingam and Nachimuthu Ramalingam Tamilselvi are disqualified to act as Directors. Ld. Counsel further submits that because the said two Directors are Directors in a group company named Ramalingam Engineering Private Limited which was struck off in 2016 for non-filing of Financial Statements or Annual Returns for three consecutive financial years. Since Nachimuthu Ramalingam and Nachimuthu Ramalingam Tamilselvi are disqualified to act as Directors, they became ineligible to submit the resolution plan as per Section 29A(e) of the Code. Respondent No.5 Company being connected person to the above said two Directors and so became ineligible to submit the resolution plan in accordance with the provisions of the Code.

10.4 Ld. Counsel for the Respondent/Consortium countered the argument and submitted that declaration of disqualification of

the Directors under the Companies Act, 2013 falls under the jurisdiction of the ROC and as on date the DIN of these Directors is active which implies that the Directors are not disqualified under Section 164 of the Companies Act, 2013, thereby ineligibility of Section 29A is not attracted to them.

10.5 Ld. Counsel for the R-2 (COC) further submitted that Ramalingam Constructions Company Private Limited, which is a separate legal entity is a consortium of Resolution Applicants and not individual Directors of the said Company are part of consortium of Resolution Applicant. Since Corporate entity is a compliant and active company and not disqualified by any authority under the provisions of the Companies Act, 2013, the Respondent No.5 is very much eligible to submit the Resolution Plan as a part of the consortium.

10.6 We have perused and analysed the submissions made by both the Ld. Counsels and find that keeping in view the order passed by the Hon'ble Supreme Court of India, in case referred above and also keeping in view the fact that Corporate Entity which is a member of consortium is not disqualified. Further if we read Section 29A(e) with explanation I (Clause iii) supra, we find that Section 29A(e) shall not apply in relation to a connected person which is the Holding Company, Subsidiary Company, Associate

Company or related party of a person referred to in clauses (i) and (ii).

10.7 Therefore, in the above backdrop and placing reliance on the judgement of Hon'ble Supreme Court of India, we hold that Respondent No.5 is eligible to submit the Resolution Plan.

10.8 Therefore, in view of the above facts, submissions and case laws, the point raised is decided that Consortium of Respondent No. 3,4 & 5 is eligible to submit resolution plan under Section 29A of the Code.

10.9 The Ld. Counsel for the Applicant in his oral submission also submitted that since the Applicant was not included in the COC since beginning the whole process of approval of the resolution plan should be re-run to give it a chance to provide its inputs. The Ld. Counsel for the Resolution Professional vehemently opposed the submission and made reference to relevant Sections of the Code highlighting that COC consist only of financial creditors and Operational Creditor is not a Member of COC. It was submitted, the applicant being an Operational Creditor is not a Member of COC as per Section 21(2), read with Section 24(4) of IBC, 2016 and he has no role in approval of the resolution plan. Section 24(4) further has a provision "provided that the absence of any such director, partner or representative of operational creditors, as the case may be,

shall not invalidate proceedings of such meeting, which clearly says that absence of representative of Operational Creditor will not invalidate the proceedings of COC meetings.

10.10 The other oral submission made by the Id. Counsel for the Applicant is that, he was not provided with a copy of the resolution plan. The Counsel for the Resolution Professional submitted that applicant is not eligible to receive copy of the resolution plan in terms of Section 30 (3) of IBC, 2016. We perused Section 30(3) of IBC,2016 in this regard and find that the above section provides that the Resolution Professional shall present to the Committee of Creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2). Therefore, we hold that submissions of applicant to re-run the whole process on account of it not being provided a copy of the resolution plan and/or not allowed to attend the COC meetings since beginning is not tenable.

10.11 In view of the point as decided above, the IA is liable to be dismissed. Accordingly, IA is dismissed and accordingly disposed of.

(Charan Singh)
Member (Technical)

(Dr. N. Venkata Ramakrishna Badarinath)
Member (Judicial)

binnu