

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

**IA No. 192 of 2022
In
IA No. 2623 of 2021
In
CP (IB) No. 1331/(MB) 2017**

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

Mr. Vipin Agarwal
Promoter of the Corporate Debtor
Having address at: 201/202, Aryan
Anchal, Road No. 8, Chembur,
Mumbai- 400 071

.....Applicant

Vs.

Mr. Sunil Kumar Agrawal,
The Resolution Professional of Vistar
Metal Industries Private Limited,
Having address at 401, 402 & 403, Coral
Classic CHS Ltd., Road No. 20,
Ambedkar Garden, Chembur (East),
Mumbai- 400 071

..... Respondent

In the matter of

Satyaprakash Agarwal & Ors.

... Financial Creditor

Vs.

Vistar Metal Industries Private
Limited

... Corporate Debtor

Order delivered on: 06.01.2023

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Applicant : Ms. Jyoti Singh i/b AJA Legal & Associates
For the Respondent : PCA Ayush Rajani

ORDER

Per: Shyam Babu Gautam, Member Technical

1. This is an Application filed by the Applicant, Mr. Vipin Agarwal, seeking intervention in I.A. No. 2623 of 2021 filed by the Respondent Resolution Professional (RP) for the initiation of Liquidation of the Corporate Debtor and praying for the following reliefs:

“a) Dismiss the Interlocutory Application No. 2623 of 2021 filed by the New Resolution Professional of the initiation of the liquidation of the Corporate Debtor.

b) To issue direction to the New Resolution Professional to conduct a fresh valuation of the Corporate Debtor as per the provisions of the Code.

c) To permit the Applicant to file a resolution plan being promoter of the MSME unit for its resolution.

d) Pending the hearing and disposal of the present application to stay the hearing and adjudication on the IA No. 2623 of 2021 filed by the Respondent for the liquidation of the Corporate Debtor.

e) Issue such other order(s) and direction(s) as the Hon'ble Adjudicating Authority may deem fit.”

2. The Corporate Debtor was admitted into Corporate Insolvency Resolution Process (CIRP) on **14th October 2019** and a certain Mr. Atul Jain was appointed as the Interim Resolution Professional (IRP) post which the Committee of Creditors (CoC) was constituted, who was later confirmed as the RP. Subsequently, the 1st CoC Meeting was held on 24th December 2019 wherein two registered valuers were appointed in to assess the Fair Value and Liquidation Value of the Corporate Debtor. After the national lockdown effectuated by the Covid-19 pandemic, the present Respondent was appointed as the new RP on 2nd August 2021. The erstwhile RP had received three resolution plans and these finally came to be rejected by the CoC in the **15th CoC Meeting held on 4th October 2021** on the grounds that the resolution plans were below the liquidation value. Thereafter, the CoC resolved to initiate Liquidation of the Corporate Debtor in the **16th CoC Meeting held on 23rd October 2021** pursuant to which the Respondent filed I.A. No. 2623 of 2021 under Section 33 of the Code.

3. The Applicant submits that the Corporate Debtor is categorised as a “**Medium**” enterprise under The Micro, Small and Medium Enterprises Development Act, 2006” (hereinafter called “MSME Act”) and has annexed the **Udyam Registration Certificate dated 16th September 2021** (hereinafter referred to as “MSME registration certificate”) to this Application to evidence this fact. The Applicant contends that being the suspended Director of the Corporate Debtor, he is entitled to submit a Resolution Plan and is willing to do so after a fresh valuation is conducted by the Respondent. Despite this, no opportunity was provided to the Applicant to propose any resolution

plan. In addition to this, the Applicant also argues that the Liquidation value based on which the Resolution plans were rejected by the CoC in October 2021 was determined in January 2020 and therefore the same is now no longer relevant as it does not reflect the actual value of the Corporate Debtor.

4. Further, the Applicant submits that during the national lockdown due to the pandemic, various instances of theft at the Corporate Debtor's factory were reported and this has led to erosion of the value of the Corporate Debtor's assets leading to decrease in the value of the Resolution Plans received. The Applicant points out that the Respondent acknowledged the occurrence of thefts and approached the local police to increase vigilance but still failed to file a FIR. The Applicant also accuses the Respondent for being instrumental in disconnecting electricity on the premises of the Corporate Debtor and failing to exert any efforts for the renewal of certain licenses that had expired.
5. The Respondent filed a **Reply dated 22nd February 2022** to this Application wherein all the allegations levelled by the Applicant were denied *in toto*. The Respondent questions the authority of the Applicant to file this Application as the Corporate Debtor is, at present, under the control of the Respondent who acts only as per the instructions of the CoC. The Respondent argues that despite being a member of the CoC all along, the Applicant has failed to propose any resolution plan. The Applicant instead acquired the MSME Registration Certificate at a very belated stage without any intimation or authorisation of the Respondent merely to create a back-door entry under the garb of

MSME to avoid ineligibility under Section 29A of the Code. Further, the Respondent contends that there is no requirement under the Code for any re-valuation of assets once valuation is undertaken by registered valuers approved by the CoC.

6. Regarding the disconnection of electricity, the Respondent submits that huge expenses were being incurred for the upkeep of the manufacturing plant which was not in operation and the electricity was disconnected only to curtail the expenses of the CIRP. The Respondent argues that the Applicant has no locus since the Respondent is acting as the RP of the Corporate Debtor and is merely attempting to override the CoC's commercial wisdom. The CoC has resolved to initiate Liquidation proceedings against the Corporate Debtor only after considering the viability of the Resolution plans following the due procedure laid down in the Code. The Applicant filed a **Rejoinder dated 6th April 2022** to the said Reply and reiterated that the Respondent has not carried out the CIRP in a proper manner and has denied the Applicant the opportunity to propose a Resolution Plan.

FINDINGS

7. We have heard the Counsel appearing for the Applicant and the Counsel for the Respondent at length. On perusal of the documents annexed to this Application, it is evident that the issue for consideration before us is whether the Applicant has a right to propose a resolution plan. To deal with this issue, the following facts are relevant. It is seen that the Corporate Debtor is duly registered under the MSME Act and is categorised as "Medium" as per the Udyam Registration Certificate

with effect from 16th September 2021. **Section 240-A** of the Code lays down that the provisions of clauses (c) and (h) of Section 29-A shall not apply to the Resolution applicant in respect of CIRP of any micro, small and medium enterprises. This means that the Code expressly excludes the promoters and guarantors of MSMEs from the disqualifications prescribed under Section 29-A of the Code.

8. In the instant case, since the Corporate Debtor holds the MSME registration certificate and the Applicant is not barred by the disqualifications mentioned under Section 29A, the Applicant possesses the right to propose a Resolution plan. The Code specifically excludes the promoters of MSMEs from the disqualifications under Section 29A in order to afford MSMEs a plausible shot at revival and not condemn it to a fate of liquidation. In the case of *Swiss Ribbons Pvt. Ltd. vs. Union of India (2019) 4 SCC 17*, the Hon'ble Supreme Court observed the following:

“79. The ILC Report of 2018 exempted these industries from Section 29A(c) and 29A(h) of the Code, their rationale for doing so being contained in paragraph 27.4 of the Report, which reads as follows:

—27.4 Regarding the first issue, the Code is clear that default of INR one lakh or above triggers the right of a financial creditor or an operational creditor to file for insolvency. Thus, the financial creditor or operational creditors of MSMEs may take it to insolvency under the Code. However, given that MSMEs are the bedrock of the Indian economy, and the intent is not to push them into liquidation and affect the livelihood of employees and

workers of MSMEs, the Committee sought it fit to explicitly grant exemptions to corporate debtors which are MSMEs by permitting a promoter who is not a wilful defaulter, to bid for the MSME in insolvency. The rationale for this relaxation is that a business of an MSME attracts interest primarily from a promoter of an MSME and may not be of interest to other resolution applicants.”

9. In addition, we find merit in the argument of the Applicant that the valuation of the Corporate Debtor conducted in January 2020 does not represent its actual value at present. Several factors like the instances of theft in the premises and the shutting down of business operations could have affected the market value of the Corporate Debtor with the passage of time and the same needs to be determined afresh in order to enable the CoC to make an informed decision. Therefore, it is only fair to allow the re-valuation of the assets of the Corporate Debtor subject to payment of such costs by the Applicant.

10. Hence, we are of the opinion that the Respondent has erred in rejecting the request of the Applicant to propose a Resolution plan and that the CoC has made the decision to liquidate the Corporate Debtor in haste. The Respondent is directed to consider the Resolution plan that may be proposed by the Applicant after appointing independent registered valuers to conduct a re-valuation of the assets of the Corporate Debtor for the purpose of determining its actual value at present. It is directed that the costs incurred for the re-valuation shall be borne in full by the Applicant. We further direct that I.A. No. 2623 of 2021 filed by the

Respondent seeking initiation of liquidation proceedings against the Corporate Debtor shall be kept in abeyance.

11. In view of the foregoing reasons, we find it fit to allow this Application. With the above observations, I.A. No. 192 of 2022 is accordingly **allowed** and disposed of.

Sd/-

SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

Sd/-

JUSTICE P. N. DESHMUKH
(MEMBER JUDICIAL)