

IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH,
CUTTACK

IA (IB) No. 42/CB/2022
Arising out of
TP No. 30/CTB/2019
Connected with
CP (IB) No. 1323/KB/2018

(CP (CB) (IB) No.1323/KB/2018 on the file of NCLT- Kolkata Bench)

In the matter of

Application Under Section 30(6) for approval of Resolution Plan under Section 31(1) of the Insolvency and Bankruptcy Code, 2016

And

TP No. 30/CTB/2019

In the matter of:

Bank of India, having its registered office at "Star House", G-Block, Plot No. C-5, Bandra Kurla Complex, Bandra (East), Mumbai-400 051, India.

... Financial Creditor

Versus

Maa Durga Rice Processing & Exports Pvt. Ltd, having its Registered Office at Kairapari, Kotsahi, (Tangi) Cuttack, Odisha-754 022, India.

... Corporate Debtor

And

IA(IB) No. 42/CB/2022

In the matter of:

Kamalesh Kumar Singhania, Resolution Professional, in respect of Maa Durga Rice Processing & Exports Pvt Ltd, having his office at Bajrang kunj, Room No.412 & 413,2B, Grant Lane, 4th Floor, Kolkata-700 012.

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... Applicant

For the Applicant

Mr. Pranay Agarwal, Advocate
Mr. Kamalesh Kumar Singhania, RP

Order Reserved on: 25.03.2022.
Order Pronounced on: 05.04.2022.

Coram:

Shri P. Mohan Raj	:	Member (Judicial)
Shri Satya Ranjan Prasad	:	Member (Technical)

ORDER

Per P. Mohan Raj, Member, (Judicial)

This court convened via video conference.

1. The present Application has been filed by Mr., Kamalesh Kumar Singhania, the Resolution Professional ('RP'), in the matter of M/s **Maa Durga Rice Processing & Exports Pvt. Ltd.** undergoing Corporate Insolvency Resolution Process ('CIRP') for the approval of Resolution Plan under Section 30(6) of Insolvency & Bankruptcy Code, 2016 ('IBC' or 'the Code') read with Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 ('CIRP Regulations') by Adjudicating Authority as approved by Committee of Creditors ('CoC').

3. That the Corporate Insolvency Resolution Process of the corporate debtor commenced by an order of this Adjudicating Authority dated Company Petition TP No.30/CTB/2019 and Mr. Kamalesh Kumar Singhania, as Interim Resolution Professional by this Tribunal. The applicant Mr. Kamalesh Kumar

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Singhania was then confirmed as Resolution professional by committee of creditors (CoC) in their Fourth meeting of CoC held on dated 24.12.2019 as per **the provisions of the IBC, 2016.**

4. The Resolution Professional appointed 2 sets of valuers as required under Regulation 27. During the course of the insolvency resolution process, there were nineteen meetings of Committee of Creditors held.

5. The Resolution Professional published the Form G on 05.03.2020 in *English* newspaper 'Business standard' and on 07.03.2020 Vernacular language news daily 'Pratidin'. Thereafter the Resolution Professional received two Expressions of Interest from M/s Prudent ARC Limited and SREI Multiple Asset Investment trust. Thereafter the no Resolution plan was received.

6. Thereafter one resolution plan was received from Ms. Lora Mitra Rath dated 18.09.2020 later a revised Resolution plan was received from her dated 19.01.2022 and placed before the 14th COC held on 15.10.2020. The Committee deliberated on the resolution plan in 19th COC meeting held on 19.01.2022 and approved with 100% voting share in e voting held on 21.01.2022-22.01.2022.

7. The resolution applicant Mrs. Lora Mitra Rath was director of CD who submitted the resolution plan under section 240A of the Code as now CD falling under the MSME as per amended definition MSME as it submitted an affidavit dated 18.10.2021 under Section 29A confirming its eligibility to submit a resolution plan as its turnover is less than 250.00 crores.

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The petition was heard and reserved for orders on 24.04.2022.

When we found that there are no materials to ascertain that the corporate debtor is MSME the petition was listed on 10.03.2022 for clarification. The following specific query was put to the petitioner's counsel to clarify:

(1) Whether in the absence any registration certificate issued under the Micro, Small and Medium Enterprises Development Act 2016, the corporate debtor can consider as MSME?

8. To answer the query on the petitioner side stated that the corporate debtor was registered as SSI in the year 2004, in support of this contention produced the copy of registration certificate issued by General Manager District Industrial Centre, Cuttack, bearing Registration No.211207906 dated 14.06.2004. The counsel for petitioner argued that in view of existence of permanent Registration SSI certificate, as per notification S.O. No.2052 (E), dated 30.6.2017, issued by the Ministry of MSME, Government of India, it is pleaded that in Note (i) of the notification of the MSME it is mentioned that the 'Enterprises that have filed Small Scale Industries Registration shall not be required to file UAM (Udyog Aadhar Memorandum which is also called the MSME Certificate) but may file it, if they so desires. According to petitioner counsel there is no necessity to obtain MSME certificate to claim that the corporate debtor is MSME, when the corporate debtor already holding SSI certificate.

9. In fact, this defence is not pleaded in the petition; the SSI certificate also not filed along with the resolution plan. After posted for clarification then only SSI

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certificate is produced and taken this novel defence to support the petition. It is not known whether the SSI certificate was placed before the COC meeting while plan was placed before the COC for their approval. Further the petitioner counsel relies upon notification S.O.2052(E) dated 30.06.2017 but the said notification was superseded by Notification S.O.2119(E) dated 26.06.2020.

The Point for determination is:

Whether the Resolution applicant is eligible to submit the Resolution Plan in pursuance of the Govt. of India Gazette Notification S.O.2119 (E) dated 26.06.2020?

10. On the petitioner side not filed MSME certificate to show that the corporate debtor comes under the category of MSME and also not furnished details under which head of Section 7 of The Micro, Small and Medium Enterprises Development Act 2006, the corporate debtor is MSME. There are certain criteria for classifying the enterprises as micro, small and medium enterprises and specifies the form and procedure for filing the memorandum (hereafter in this notification to be known as —Udyam Registration), with effect from the 1st day of July, 2020, namely: --particulars of investment value in plant and Machinery or Equipment and exact turn over value of the corporate debtor are not furnished. These two elements are vital to determine the fact that whether the corporate debtor is MSME or not.

11. In this case CIRP was ordered on 04.09.2019. By Notification S.O.2119(E) dated 26.06.2020 which came into effect from 01.07.2020, the criteria

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for classification of the enterprises as micro, small and medium were amended and specified the procedure for filing of memorandum for registration of the enterprises. Thus, even according to petitioner the corporate debtor become MSME during the pendency of CIRP proceeding. The question is whether the corporate debtor becomes MSME after the CIRP order, then the director of such corporate debtor can file resolution plan is answered positively by Hon'ble NCLAT in the case **Saravana Global Holdings Ltd. Vs. Bafna Pharmaceuticals Limited and others** (CA(AT)(Insolvency) No.,203 of 2019 decided on 4.7.2019). the relevant portion of the order reads thus:

21. The Parliament with specific intention amended the provisions of the 'I&B Code' by allowing the Promoters of 'MSME' to file 'Resolution Plan'. The intention of the legislature shows that the Promoters of 'MSME' should be encouraged to pay back the amount with the satisfaction of the 'Committee of Creditors' to regain the control of the 'Corporate Debtor' and entrepreneurship by filing 'Resolution Plan' which is viable, feasible and fulfils other criteria as laid down by the 'Insolvency and Bankruptcy Board of India'.

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12. When the resolution applicant seeks direction of Adjudicating Authority to direct the Respondent/Resolution professional to register Corporate Debtor as an MSME in the light of Gazette Notification No. S. O 2119 (E) dated June 26th 2020. The Kochi bench ordered in K. Satheesh Babu Rajesh-VS- Mr. George Varkey, Resolution Professional. (IBC) No. 64/KOB/2021 In IBA No.52/KOB/2019 Date of decision: 20th April, 2021. The Bench ordered as prayed with prior condition to produce MSME certificate, it runs as follows:

(ii) If the applicant submits the EOI/RP in his individual capacity, the Resolution Professional shall register the Corporate Debtor as an MSME, provided he produces the certificate of Registration as an MSME under the "Udhayam Registration" of the Ministry of Micro Small and Medium Enterprises.

13. The Resolution professional or Adjudicating Authority are not competent to determine whether the corporate debtor is comes under MSME or not. In this regard it is held in Amit Gupta vs Yogesh Gupta, Resolution Professional/ Respondent Appeal (AT) (Ins) No.903 of 2019 NCLAT- Delhi held as follows:

The Resolution Professional cannot be going into investigations and enquiries and findings

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whether or not a Corporate Debtor fall under the classifications of MSME and Adjudicating Authority is also not expected to make such investigations, enquiries on such evidence or give findings on such issues, which may not be accurate without assistance of an opposite side or Government Counsel bringing forth which or the other Notification etc. applies. Under Sections of MSME Act, even if getting Memorandum Certificated for a given enterprise may be optional, if advantage is to be taken of MSME Act, the Applicant must take pains to get the Memorandum Certificate to seek benefits under IBC.

14. The above citations insist the necessity of MSME certificate to file resolution plan, in the cases where the Resolution applicant claims benefit under the MSME, even if it is optional to register under The Micro, Small and Medium Enterprises Development Act 2006.

15. On the petitioner side produced the SSI certificate issued under section 11B of The Industries (Development and Regulation) Act, 1951. The said certificate was issued prior to the advent of The Micro, Small and Medium Enterprises Development Act 2006. Section 7 of the Act classify the Enterprises

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into three categories as Micro, Small and Medium according to the nature of business or service carrying on and on the basis of investments made on plant, Machinery and equipment and on the basis of turn over. To determine the category of enterprises the above particulars are must. In the petition no particulars have been divulged to ascertain whether the corporate debtor is MSME after the Government of India notification dated 26.06.2020. In the plan at page 105 minutes of 10th COC dated 03.07.2020 mentioned about the plan submitted by the Director of corporate debtor and he claims exemption from provisions of section 29A of code since after the amendment company falls under the new definition of MSME as its turnover is less than 250 crores. Apart from this there is no material to establish that the corporate debtor comes under MSME. From the turn over amount mentioned therein it is presumed that the petitioner claims the corporate debtor is Medium Enterprises as provided in section 7(1) (a) (iii) of The Micro, Small and Medium Enterprises Development Act 2006. The said amended section runs as follows:

(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.

16. Even though in the petition annexure the turn over amount is vaguely noted as less than 250 crores, but there is no reference about the amount pertaining

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to investment in plant and machinery. In the absence of any particulars about the component of investments in Plant and machinery it cannot be considered the corporate debtor is medium enterprises covers under The Micro, Small and Medium Enterprises Development Act 2006.

17. Section 7 of The Micro, Small and Medium Enterprises Development Act 2006, classify the enterprises into three categories such as micro, small and medium. Section 8 of the Act says, that if any person wants to establish that enterprises is micro, or small they may file memorandum. But as per section 8(1) (c) of the Act the medium enterprises engaged in the manufacture or production of goods shall file the memorandum. From the SSI registration certificate produced by the petitioner discloses the amount invested in plant and machinery is Rs.33.40/- crores, in the circumstances as per section 8(b) of The Micro, Small and Medium Enterprises Development Act 2006, it appears that the corporate debtor shall file memorandum to obtain MSME certificate and it is not an optional.

18. The Government of India by notification S.O. 2052(E) dated 30.06.2017 given certain guidance to file memorandum through email. In the said notification at the end in the foot note it is mentioned under the caption Note:

(i) Enterprises that have filed EM-II or SSI registration, shall not be required to file UAM but may file it, if they so desire.

19. According to the petitioner as per the said foot note the corporate debtor is not required to file memorandum and it is only an optional. This contention of the petitioner side is not acceptable because there is no any indication

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to the effect that Enterprises obtained SSI Registration certificate under section 11B of The Industries (Development and Regulation) Act, 1951. not required to file UAM memorandum. The similar plea was taken in T. Johnson vs St. Johnson freight system Ltd NCLAT-Delhi CA(AT)(INS) No.1402 of 2019 dated 04.03.2020 but the Appellate Authority not considered the said plea and dismissed the Appeal. Apart from that the notification relies on the petitioner side was superseded by Notification S.O.2119(E) dated 26.06.2020, hence the submission made on the petitioner side is turned down as unsustainable.

20. As per paragraph 7 of present notification S.O.2119(E) dated 26.06.2020 all the enterprises need to be registered, so the SSI Registration certificate issued under Industries (Development and Regulation) Act,1951 dated 14.06.2004 is not a valid document to determine/prove the status of the Applicant as MSME. On the Applicant side not shown any inclination to apply for MSME certificate and produce before this authority to proceed with the plan, but their stand is the SSI certificate dated 14.06.2004 is enough to avail the benefit declared by Government of India in the Notification dated 26.06.2020. This stand of the applicant is not acceptable.

21. In the circumstances since on the petitioner side failed to prove that the corporate debtor is MSME in view of Government of India Notification dated 26.06.2020, as such the Resolution applicant director of corporate debtor is not entitling to file the resolution plan in view of the bar provided under section 29A IBC. The COC approved the plan with 100% voting, here the principle of

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commercial wisdom does not apply because, the person who is disqualified under section 29A(C) IBC 2016 has submitted the plan the same cannot be considered.

22. In the result Resolution Plan is Rejected, in consequence as provided under section 33(b)(i) of IBC 2016 M/s Maa Durga Processing & Exports Pvt Ltd corporate debtor is ordered to be liquidated.

23. The Resolution professional Mr. Kamallesh Kumar Singhania has failed to verify the eligibility criteria of the Resolution Applicant to submit the plan which contravened Section 29A (c) of IBC, resulted in rejection of the plan hence as provided in section 34(4)(a) of IBC 2016 resolution professional is discharged.

24. From the list of panels of Liquidator sent by IBBI for the NCLT, Odisha Mr. Sunil Kumar Agarwal (Registration No. IBBI/IPA-001/IP-P02430/2021-2022/13735 and Email-Id: casunil1979@gmail.com, having office at at/Po-Bairasar, Via-Tarbha. District-Balangir, Odisha, Pin-767016, Village-Bairasar, Via-Tarbha, District-Bolangir, Odisha, Pin-767016, NA, Balangir, Orissa ,767016 is appointed as Liquidator.

25. The Liquidator is directed to forthwith take into his custody all the assets, Properties, sophisticated equipment tools implement, machineries, effects and actionable claims of the corporate debtor and take necessary steps to ensure preservation, protection security and maintenance of those properties as provided under section 35(1)(b) & (d) of IBC 2016.

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26. The Liquidator is directed to adhere to Section 33(1) (ii) & (iii) and discharge his powers and duties as specified under Section 35 to 41 of IBC,2016 and meticulously adhere to the Rules and Regulations issued by IBBI in this regard from time to time.

27. Public Notice as contemplated under section 33(1) of the Code shall be issued in one morning English daily and in one morning regional language newspapers.

28. All the powers of the Board of Directors of the Corporate Debtor and of its key managerial personnel, successful resolution applicant, shall cease to exist in accordance with section 34(2) of the Code. These powers shall henceforth vest in the Liquidator. The personnel of the Corporate Debtor shall extend all assistance and cooperation to the Liquidator as may be required by him in the Liquidation process of the Corporate Debtor.

29. On initiation of the Liquidation process but subject to section 52 of the Code, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor, save and except the liberty to the liquidator to institute a suit or other legal proceeding on behalf of the Corporate Debtor with prior approval of this Adjudicating Authority, as provided in section 33(5) of the Code read with its proviso.

30. In accordance with section 33(7) of the Code, this liquidation order shall be deemed to be a notice of discharge to the officers, employees and work

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men of the Corporate Debtor, except to the extent of the business of the Corporate Debtor continued during the liquidation process by the liquidator.

31. In terms of Section 33(1) (b) (iii), the Liquidator shall file a copy of this Order with the Registrar of Companies, Odisha, Cuttack within whose jurisdiction the Corporate Debtor is registered. Additionally, the Registry shall also forward a copy of this Order to the Registrar of Companies, Odisha, Cuttack.

32. As per Regulation 13 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016, the liquidator shall submit a preliminary report to the Adjudicating Authority within 75 days from the liquidation commencement date providing various details/information as mentioned in the said regulation.

33. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps,

34. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.



Satya Ranjan Prasad
Member (Technical)



P. Mohan Raj
Member (Judicial)

Signed on this the 5th of April, 2022.

Kaushal