



INSOLVENCY & BANKRUPTCY

MSME Promoters are not disqualified u/s 29A of IBC to apply for Resolution Plan: Supreme Court

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The Hon'ble Supreme Court in its recent judgment in the case of *Hari Babu Thota v. X*^[i] has overturned the Hon'ble NCLAT's decision in *Digambar Anandrao Pingle v. Shrikant Madanlal Zavar*^[ii] and has held that, pursuant to Section 240A of the Insolvency and Bankruptcy Code, 2016 (*IBC*), the cut-off date for determining the eligibility of a Promotor of an MSME as a Resolution Applicant shall be the date of submission of the Resolution Plan and not the date of the commencement of Corporate Insolvency Resolution Process (*CIRP*).

Facts of the case

Shree Aashraya Infra-Con Limited entered CIRP proceedings on 06.04.2021 and Mr Hari Babu Thota (*Appellant*) was appointed as the Resolution Professional of the Corporate Debtor. In order to maintain the Corporate Debtor as a going concern the Resolution Professional advised to get the Corporate Debtor registered under the Micro, Small and Medium Enterprises Development Act, 2006, ('MSME Act').

Thereafter, a new Form-G was issued on 09.08.2021 pursuant to which the Promoters of the Corporate Debtor submitted their Expression of Interest and accordingly submitted a Resolution Plan. Upon receipt of the Resolution Plan and an Affidavit under Section 29-A of the IBC, the Resolution Professional placed the promotor's Resolution Plan before the CoC for approval. The CoC approved the said Plan with a 100% majority and the Appellant filed an I.A. bearing No 192 of 2022 seeking approval of the said Resolution Plan which was rejected by the Adjudicating Authority vide Order dated 28.02.2023.

The Appellant challenged the Adjudicating Authority's Order dated 28.02.2023 before the Hon'ble NCLAT vide Comp. App. (AT) (CH) (Ins.) No. 110 of 2023, however the Hon'ble NCLAT upheld the Adjudicating Authority's Order dated 02.06.2023.

The Appellant thereafter challenged the Hon'ble NCLAT's Order dated 02.06.2023 in the present case.

Issues before the Court

1. Whether the resolution applicant i.e., the promoter was disqualified under the primary conditions of Section 29A of the IBC.
2. Whether the corporate debtor not having an MSME status at the time of commencement of CIRP proceedings would disqualify the Resolution applicant under Section 29A of IBC and the benefit provisioned under Section 240A of IBC would not apply.

SC's view on Section 29A of IBC

The SC analyzed Section 29A clauses (c), (g) and (h) of IBC and clarified that it was inserted to the IBC vide Amendment Act 8 of 2018 w.e.f. 23-11-2017. The said provision was introduced to curb the attempts by the resistant promoters of insolvent companies to regain their control over the company leaving the creditors with a massive haircut. The intention of the provision is to restrict the persons to submit a resolution plan who may have an adverse effect on the CIRP.

The SC analyzed relevant clauses of Section 29A of the IBC:

- Clause (c) discusses a lapse of 1 year from the date of classification as a non-performing asset ('NPA'). The SC noted that in the instant matter there were no bank dues to attract NPA.
- Regarding clause (g), the division bench acknowledged that one preferential transaction was identified by the RP, but no order was passed by the adjudicating authority.
- The SC stated that clause (h) had no factual application.

The SC clarified that the above-mentioned clauses are specific to the promoters, and as per the said clauses the company's promoter is not disqualified to present the resolution plan.

SC's view on Section 240A of IBC

The SC analyzed the decision of the NCLAT in *Digambar Anandrao Pingle (supra)* wherein the application for MSME certificate was made after commencement of CIRP and it was stressed that such unauthorized application could not evade the ineligibility under Section 29A of IBC. Hence, Section 240A of the IBC would not attract in such cases.

While analyzing the scope of Section 240A of IBC, that was inserted vide Amendment in 2018 w.e.f. 6.06.2018. The SC clarified that clauses (c) and (h) of Section 29A apply to the promoters and exempt them from presenting a Resolution Plan, however, the same does not apply to MSMEs due to the nature of the business it carries.

The SC stated that “Under the heading ‘exemption of Micro, Small and Medium Enterprises from Section 29-A’ the discussion begins. It is referred to the ILC report of March, 2018 and its finding that Micro, Small and Medium Enterprises form the foundation of the economy and are key drivers of employment, production, economic growth, entrepreneurship and financial inclusion. The ILC report 2018 exempted these industries from Section 29-A (c) and (h)”.

It opined that “excluding such industries from disqualification under 29A (c) and (h) is because qua such industries other resolution applicants may not be forthcoming which thus would inevitably lead not to resolution but to liquidation.”

The SC stressed on the point that challenge to Section 29A of the IBC was repelled in the case of *Digambar Anandrao Pingle* (*supra*) while moving the Amendment Bill, giving the object of interpretation of Section 29A and referring to the disqualification clause under Section 29A(c) of the IBC which applied on the corporate debtors, and provided the cut off as the date of application making a bid.

Decision of the SC

The Court concluded that “While interpreting Section 240A, the reason for carving out an exception in micro, small and medium industries is set out on the date of application for making the bid as the crucial date”.

It added that “While for some other aspects the initiation of the CIRP proceedings would be the cutoff date, the same would not apply in the case of Section 240A, in view of the statement by the Minister themselves while introducing the amendment, Bill.”

The SC agreeing to the ‘notwithstanding clause’ stated that while seeking to protect MSMEs, the disqualification to promoters would not be attracted. The Court stated that the date of initiation of CIRP proceedings being the relevant date was an incorrect legal view. It added that the law laid down in *Digambar Anandrao Pingle* (*supra*) by NCLAT inconsistent with the law and that the date of submission of resolution plan must be the cutoff date.

That the resolution plan submitted in the instant case does not incur disqualification. The orders of the NCLT and NCLAT were set aside by the SC while allowing the present appeal.

[i] Civil Appeal No. 4422 of 2023, decided on 29-11-2023

[ii] 2021 SCC OnLine NCLAT 1449