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NATIONAL COMPANY LAW TRIBUNAL
SINGLE BENCH
CHENNAI

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ATTENDANCE CUM ORDER SHEET OF THE HEARING OF CHENNAI BENCH, CHENNAI
NATIONAL COMPANY LAW TRIBUNAL, HELD AT 10.30 AM ON 31.08.2018

PRESENT: SHRI Ch. MOHD SHARIEF TARIQ, MEMBER - JUDICIAL

APPLICATION NUMBER : MA/208/IB/2018
PETITION NUMBER : CP/511/IB/2017
NAME OF THE APPLICANT : AJAY AGARWAL & 1
NAME OF THE RESPONDENT : V.NAGARAJAN (IN THE MATTER OF ASHOK
MAGNETICS LTD)
UNDER SECTION : 60

S.No.	NAME (IN CAPITAL)	DESIGNATION	SIGNATURE
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	M.L. Ganesan	For SBI, CBI RB	
	Jayashri B. Deha	For Ajay Agarwal	
	J. MANIVANNAN	FOR RP	



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**IN THE NATIONAL COMPANY LAW TRIBUNAL
SINGLE BENCH, CHENNAI**

MA/208/IB/2018
in
CP/551/IB/2017

In the matter of Section 60 of the Insolvency and
Bankruptcy Code, 2016

And

In the matter of

Mr. Ajay Agarwal & Anr. ... Prospective Resolution Applicants

Versus

Mr. V. Nagarajan ... Resolution Professional

Order delivered on 31st of August, 2018

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CH. MOHD SHARIEF TARIQ, MEMBER (J)

For Applicant(s) : *Mr. Jayesh B. Dolia, Counsel.*

For Resolution Professional : *Mr. T.K.Bhaskar,
Mr.J. Manivannan, Counsels.*

For CoCs : *Mr. M.L.Ganesh, Counsel.*

ORDER

Per: CH. MOHD SHARIEF TARIQ, MEMBER (J):

1. Under consideration is an Application filed by two
prospective Resolution Applicants i.e., erstwhile

Promoters of the Corporate Debtor viz., M/s. Ashok Magnetics Limited, with the prayer as follows:-

“That this Hon’ble Tribunal may be pleased to direct the Resolution Professional to permit the submission of Resolution Plan within a time frame and the same to be considered by the Resolution Professional and Committee of Creditors on merits in the interest of all stakeholders of the Corporate Debtor.”

2. The brief facts of the case are that Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor viz., M/s. Ashok Magnetics Limited, was initiated vide Order dated 04.09.2017 in CP/551/(IB)/2017 filed by one of the Financial Creditors of the Corporate Debtor. The said Order was challenged before the Hon’ble Appellate Authority, but the appeal was dismissed on 13.12.2017.

3. The CIRP period of initial 180 days expired on 03.03.2018 and was extended by 90 days that ended on 01.06.2018.

4. It has been submitted that the Applicants vide Letter dated 04.04.2018 had made a request to the Resolution Professional to give an opportunity to submit a Resolution Plan for revival of the Corporate Debtor. The Resolution Professional vide reply dated 05.04.2018, without considering the legal implications of prospective enforcement of the amendment of the Code, declined the request of the Applicants citing Section 29A of the I&B Code, 2016, as a reason for disqualification.

5. The Applicants have submitted that the said decision of the Resolution Professional is erroneous and against the law. It goes without saying that any amendment is deemed to be prospective unless and until the same is expressly stated as retrospective.

6. The Applicants have further submitted that being the Promoters of the Corporate Debtor, they have personal interests in the affairs of the Corporate Debtor

and it should be considered paramount as the Applicants are seeking the revival of the Company.

7. The Applicants have submitted that the Corporate Debtor has potentials for revival, and as of now, no Resolution Plan has been approved by the Committee of Creditors (CoCs). In such circumstances, the Resolution Professional and CoCs are required to consider all viable Resolution Plans for the revival of the Corporate Debtor, if presented by the prospective Resolution Applicants.

8. The Applicants submits that Section 29A of the I&B Code, 2016 was enforced with effect from **23.11.2017** which bared the Promoter of the Corporate Debtor from submitting a Resolution Plan. However, an exception has been made in Section 29A of the Code, by passing the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, by introducing Section **240A** of the Code, which provides as follows;- ✓

*“the provisions of clause (c) and (h) of Section 29A shall **not** apply to the resolution applicant in respect of corporate insolvency resolution process of any micro, small and medium enterprises.”*

9. The Ordinance has been enforced w.e.f. 06.06.2018 that makes the Micro, Small and Medium Enterprises’ (MSME) Promoters’ eligible to submit Resolution Plan.

10. The Applicants have submitted that the Corporate Debtor is a going concern with a **“Permanent Registration Certificate”** as a Small Scale unit dated **02.04.1998**. As per the submissions of the Applicants, the Corporate Debtor falls within the purview of Micro, Small & Medium Enterprises Development Act, 2006, and the Applicants are eligible to submit Resolution Plan without the application of Section 29A of the Code.

11. The Applicants submit that the Corporate Debtor has undergone CIR Process due to various external factors such as demonetization, financial crunch,

economic meltdown, poor demand, scarcity of funds, political instability in state etc. Therefore, it is submitted that a fair opportunity must be given to submit a Resolution Plan which should be considered by the Resolution Professional without pre-conceivable mind and same to be placed before the CoCs, who must consider the same on merits.

12. It is submitted that such a process will not prejudice any party concerned. However, if no time is granted allowing the Resolution Professional and CoCs to review the revised Resolution Plan, the same will cause great prejudice as the Corporate Debtor may lose the financial opportunity for revival of its business, which is the sole object of the CIRP.

13. The Applicants submit that Rule 11 of the NCLT Rules, 2016 provides inherent powers to the Tribunal to allow the Application in the prevailing circumstances with a specific direction to the Resolution Professional to

permit the Applicants to submit the Resolution Plan, which may be presented before the CoCs for its consideration.

14. In preliminary counter, the Resolution Professional has submitted that the present Application is liable to be dismissed as it is tantamount to violation of Sections 29A and 30 (4) of the I&B Code, 2016.

15. The Resolution Professional has submitted that Section 29A of the Code explicitly prescribes that an entity that is connected to the promoters or the management of the Company going through insolvency process is ineligible to bid for the stressed firm and the provisions will be applicable even where such ineligible candidates have already submitted resolution plan (a recent ordinance has amplified the bar by expressly excluding “related parties” and kin of promoters). The Resolution Professional further submitted that Section 30 (4) of the I&B Code clearly provides as under:-

“Provided that the Committee of Creditors shall not approve a resolution plan submitted before the commencement of the Insolvency & Bankruptcy Code (Amendment Ordinance) 2017 (ORD. 7 of 2017), where the Resolution Applicant is ineligible under Section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it.”

16. It has been submitted by the Resolution Professional that the statement of objects and reasons to the I&B Code (Amendment) Ordinance, 2017, and proviso to section 30 (4) of the Code, 2016, make it clear that the provisions inserted, vide the Ordinance, in particular, Section 29A of the Code, was to make it applicable in all cases (except where the plans are already approved by NCLT) including the ones where insolvency resolution proceedings has already been initiated. It is further submitted that applying Section 29A of the Code prospectively, runs contrary to the spirit of the amendment. “The prohibition is absolute and is meant to prevent abuse. There cannot

be a distinction between directors disqualified before November 23, 2017, and after.”

17. The Resolution Professional has also filed an additional counter affidavit stating therein that the Corporate Debtor is not a MSME company as per the definition existed at the time of admitting the Petition under the provisions of the I&B Code, 2016 or at the time of inviting the ‘Expression of Interest’ for the purpose of the Resolution Plan of the Corporate Debtor.

18. The Resolution Professional has submitted that the Government of India has enacted the Micro, Small and Medium Enterprises Development Act, 2006. Under Section 7 of the said Act, two types of classifications have been made to identify the Micro, Small and Medium Enterprises e.g., i) those which are engaged in manufacturer or production of goods; ii) those which are engaged in providing or rendering of services. The broad

outlines of classification for first category of such enterprises are as under;-

- *A Micro enterprise is an enterprise where investment in plant and machinery does not exceeds Rs. 25 lakh;*
- *A small enterprise is an enterprise where the investment in plant and machinery is more than Rs. 25 Lakh but does not exceeds Rs. 5 crore;*
- *A medium enterprise is an enterprise where the investment in plant and machinery is more than Rs. 5 crore but does not exceed Rs. 10 crore.*

The broad outlines of classification for second category of such enterprises are as under;-

- *A micro enterprise is an enterprise, where the investment in equipment does not exceed Rs. 10 lakh;*

- *A small enterprise is an enterprise, where the investment in equipment is more than Rs. 10 Lakh but does not exceeds Rs. 2 Crore;*
- *A medium enterprise is an enterprise, where the investment in equipment is more than Rs. 2 crore but does not exceeds Rs. 5 Crore;*

Based on the above mentioned parameters, the Resolution Professional has submitted that the Corporate Debtor's investment in plant and machinery and other equipment is more than Rs. 10 Crores even long back as on 01.04.2015 which is evidenced by its own balance sheet/fixed asset schedule annexed to the Balance Sheet as on 31.03.2016, which is enclosed with the additional counter affidavit. The original cost of plant and machinery alone exceeds Rs.10 Crores and hence, once the company had gone out of the MSME definition/classification, even by subsequent

deletion/depreciation to the assets of the company, it can never become a MSME Company, and prayed to dismiss the Application as not maintainable.

19. Before forming any opinion, it is necessary to make reference to the provisions of the Section 8 of 'The Micro, Small and Medium Enterprises Development Act, 2006'

"8. Memorandum of micro, small and medium enterprises.—

(1) Any person who intends to establish,—

(a) a micro or small enterprise, may, at his discretion, or

(b) a medium enterprise engaged in providing or rendering of services may, at his discretion; or

(c) a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):

Provided that any person who, before the commencement of this Act, established—

(a) a small scale industry and obtained a registration certificate, may, at his discretion; and

(b) an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and, in pursuance of the notification of the Government of India in the erstwhile Ministry of Industry (Department of Industrial Development) number S.O.477(E) dated the 25th July, 1991 filed an Industrial Entrepreneur's Memorandum,

shall within one hundred and eighty days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act.

(2) The form of the memorandum, the procedure of its filing and other matters incidental thereto shall be such as may be notified by the Central Government after obtaining the recommendations of the Advisory Committee in this behalf.


(3) The authority with which the memorandum shall be filed by a medium enterprise shall be such as may be specified by notification, by the Central Government.


(4) The State Government shall, by notification, specify the authority with which a micro or small enterprise may file the memorandum.

(5) The authorities specified under sub-sections (3) and (4) shall follow, for the purposes of this section, the procedure notified by the Central Government under sub-section (2).” (Emphasis supplied).

20. From the language used in the provisions of Section 8 of the above mentioned Act, it becomes clear that a small scale industry that has obtained registration certificate, may, at its discretion within 180 days from the commencement of the Act, shall file the memorandum in accordance with the provisions of the Act. The provision is giving discretion to the small scale industry to file the memorandum within the time prescribed. However, the provisions of the Act do not provide for cancellation of the ‘Permanent Registration Certificate’ issued to any enterprise prior to the commencement of the Act. But, for contravening the provision of Section 8(1) of the Act,

penalty has been provided under Section 27 of the Act which prescribes a fine of Rs.1,000 for the first conviction and Rs. 10,000 for second or subsequent conviction.

21. The perusal of the '*Permanent Registration Certificate*' issued by government of Pondicherry, Directorate of Industries, bearing No. 590306083 dated 02.04.1998, provides that the registration is liable to revocation or cancellation in the event of any misuse~~s~~ or  unauthorized diversion as determined by the Industries Commissioner/Director. Therefore, condition for revocation or cancellation of the certificate is its misuse or unauthorized diversion which may be determined by the Industries Commissioner/Director.


22. The Resolution Professional neither placed on record any evidence of misuse or unauthorized diversion of the Permanent Registration Certificate possessed by the Corporate Debtor nor shown that any action has been taken by the competent authorities i.e., Industries 


Commissioner/Director, against the Corporate Debtor for cancellation of the certificate.

23. The Resolution Professional has made a reference to the Balance Sheet/fixed assets schedule annexed to the balance sheet as on 31.03.2016 which shows that the original cost of plant and machinery of the Corporate Debtor exceeds Rs.10 Crores. Now, the question arises that in case, the cost of the plant and machinery of a small scale enterprise exceeds the limit prescribed, then, the permanent registration certificate issued to it will automatically get nullified?

24. The Micro, Small and Medium Enterprises Development Act, 2006, does not contain any provision for automatic cancellation of the Permanent Registration Certificate on exceeding the prescribed limit of its plant and machinery. Therefore, the Permanent Registration Certificate as mentioned above issued to the enterprise is valid in the eyes of law and the rights attached thereto

are available to the Corporate Debtor and its promoters, of which the enterprise cannot be deprived of, unless the Permanent Registration Certificate is revoked or cancelled in accordance with law. Thus, the answer of the question formulated hereinabove is found in negative.

25. It is also on record that, till date, no Resolution Plan has been approved by the CoCs for the Corporate Debtor, and the provisions of Section 240A of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 that were brought into force on 06.06.2018 provide the right to the promoters of the Corporate Debtor (MSME) to submit the Resolution Plan, as the bar under the provision of Section 29A is not attracted in ^{the} case of MSME. 

26. In the light of the facts and circumstances mentioned above and the legal provisions stated, the Application of the Applicants is allowed with the direction to the Resolution Professional to entertain the Resolution Plan, if any, filed by the Applicants, within 7 working 

days from the date the copy of this order is received, which he may after satisfying that the same is in compliance with the provisions of the I&B Code, 2016, present before the CoCs and thereafter within a period of one week, the CoCs shall consider the same on merits. It may be made clear that in the event the Resolution Plan is rejected, the CoCs shall provide the detailed reasons therefor.

27. The order is pronounced in open court.


(CH. MOHD. SHARIEF TARIQ)
MEMBER (JUDICIAL)

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