

INDIA'S FIRST MAGAZINE ON LEGAL AND CORPORATE AFFAIRS

L E X

WITNESS

Volume 14 Issue 5 | March 2024

₹ 100 US \$10 UK £6



A LEGACY BEYOND BORDERS

Remembering Fali Sam Nariman

10th January 1929 - 21st February 2024

MSME Certificate cannot be Obtained after Commencement of CIRP against the Corporate Debtor

■ **Rahul Tyagi & Nikita Capoor**

By way of the present Article, we analyse the judgment in the matter titled Hi-Tech Resource Management Ltd. Vs Overnite Express Ltd¹, passed by the National Company Law Tribunal, New Delhi ("Hon'ble NCLT"), wherein the Hon'ble NCLT opined that the Act which cannot be done directly by the Suspended Directors cannot be done indirectly by taking advantage of Section 240 A of Insolvency and Bankruptcy Code, 2016.

BRIEF FACTS

CIRP was initiated against M/s Overnite Express ("Corporate Debtor") vide its order dated 02.03.2020 passed by the Hon'ble NCLT. Pursuant to the same, the Resolution Plan was presented/ submitted by one of the members of Suspended Board of Directors under Section 240A of the IBC, claiming that the Corporate Debtor is a Micro Small Medium Enterprise ("MSME") as defined under the MSME Act, 2006. The MSME registration was obtained on 12.11.2021 during the CIRP of the Corporate Debtor.

Deutsche Bank, AG ("Applicant"),

being the Secured Creditor of the Corporate Debtor objected to the Resolution Plan stating that such application must be rejected as on admission of the application by Hon'ble NCLT, the powers of the Directors are suspended and cannot register the Corporate Debtor as MSME. It was the submission of the Applicant that the Suspended Directors are fraudulently trying to take advantage available to a MSME under Section 240 A of the IBC.

ISSUES INVOLVED

Whether an MSME Certificate obtained after the commencement of CIRP is valid for making a defaulter Promoter/ Suspended Board of Directors of the Corporate Debtor eligible to submit a Resolution Plan under Section 240 A of the IBC.

WHY DOES MSME REGISTRATION DATE MATTERS?

Section 29A of IBC prohibits the Promoter and Suspended Management of Corporate Debtor from submitting a Resolution Plan for the same.

On commencement of the CIRP of a Corporate Debtor, the powers of its Board of Directors stands suspended by virtue of Section 17(1)(a) and (b) of IBC



D-55, Defence Colony
New Delhi - 110 024
Tel: 91 (11) 42410000
Fax: 91 (11) 42410091
E: expertspeak@dhirassociates.com



and can be exercised by the Resolution Professional (“RP”) only. Thus, if an MSME Certification is obtained by a Promoter/ Suspended Director of a Corporate Debtor undergoing CIRP, the same will be ultra vires.

The Hon’ble NCLT emphasized on the intent of Section 29A of IBC which has been examined by the Apex Court in the matter of Arun Kumar Jagatramka vs Jindal Steel and Power Ltd. & Anr.² wherein it was opined that the Parliament rectified a loophole in the Act which allowed backdoor entry to erstwhile management in the CIRP.

CAN A NOTIFICATION BE APPLIED RETROSPECTIVELY?

The Hon’ble NCLT, Ahmedabad Bench in the case of POSCO India vs. Dhaval³ Jitendrakumar Mistry, vide its order

dated 06.01.2021, has reiterated that it is a well - established principle of interpretation that no statute can be given retrospective effect unless statute so directs either expressly or by necessary implication.

SUBMISSIONS BY THE SRA

The Successful Resolution Applicant relied upon the matter of Govind Prasad Todi v Satyanarayan Gudetti and Ors.⁴ wherein the Resolution Plan submitted by Promoters, who obtained MSME certificate much after initiation of CIRP, was considered. The Hon’ble NCLT distinguished the referred judgement of Govind Prasad Todi stating that in that case, the Hon’ble NCLT had directed the Suspended Director to submit a Resolution Plan. In the facts of the present case, there were neither applications preferred by the ex-director

seeking permission to file Resolution Plan nor this Adjudicating Authority passed any direction to the Committee of Creditors (“CoC”) to consider such plan.

CAN A MSME CERTIFICATION BE OBTAINED POST –INITIATION OF CIRP?

The Hon’ble NCLT went on to establish that RP/CoC members can obtain MSME certificate after commencement of CIRP only when it is for the purpose of availing business advantages available under the MSME Act, 2006 which is in the overall interest of maximizing the value of assets of the Corporate Debtor under CIRP.

JUDGMENT

While upholding the judgment in Harkirat Singh Bedi vs The Oriental Bank of Commerce & Anr.⁵, the Hon’ble NCLT



held that an MSME Certificate obtained by promoter(s)/ ex-director(s) post commencement of the CIRP is invalid and it will not make them eligible to submit a Resolution Plan by taking benefit of Section 240A of IBC.

The Hon'ble NCLT held that under Section 28 of the IBC there is no provision where approval of CoC can be taken by RP to obtain MSME Certificate and Section 25 of the IBC does not empower the RP or the CoC to enable back door entry of the defaulting promoters into Corporate Debtor. Further, it was held that neither the promoters / ex-directors nor the RP/CoC are empowered under IBC to obtain an MSME certification post-commencement of CIRP.

The Hon'ble NCLT rejected the Resolution Plan submitted by the member of the Suspended Board of Directors of the Corporate Debtor and ordered the Liquidation of the Corporate Debtor with immediate effect.

The IBC was promulgated to ensure faster resolution of the defaulting accounts with Creditor in possession, as compared to the earlier laws wherein the Defaulting Borrower i.e. the Directors remained in control of the Corporate Debtor and delayed the resolution by initiating various frivolous litigations. This judgment further ensures that the remedy as provided under Section 240A of IBC are not misused by the Suspended Director of the Defaulting Borrower to do an act indirectly which they are barred from doing directly. [W](#)

¹CP (IB)-2240/(ND)/2019, Judgment dated 18.09.2023

²Civil Appeal No. 9664 of 2019

³MANU/ND/0774/2021

⁴C.P. 1125 of 2023

⁵Company Appeal (AT)(Ins.) No.40 of 2020



Rahul Tyagi is a Partner with the firm and is an expert in handling complex commercial litigation matters. He has wide experience and expertise in handling banking and finance matters, matters pertaining to the insolvency and restructuring litigation (including but not limited to securitisation related and debts recovery related matters), arbitration and constitutional matters.



Nikita Kapoor is a Senior Associate with the firm and practices in banking and finance laws, securitization related matters, recovery of debts and defamation suits. She is regularly appearing in Banking matters before various DRT and DRATs. She has been consistently involved in matters pertaining to civil disputes, arbitration and commercial disputes.