

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT- III**

IA No -3024(ND)/2022 in IB 717/2019

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

IN THE MATTER OF:

Harbans Singh & Ors

...Applicants

Versus

Shri Devender Singh & Anr

Devender Singh

Interim Resolution Professional,

Sidhartha Build Home Private Limited,

D-54, 1st Floor, Defence Colony New Delhi 110024

.....Respondent No.1

Sidharth Chauhan

Managing Director,(Power Suspended)

Tower-D, Pinnacle, DLF Phase 5, Galleria DLF-IV, Gurgaon -

122009

...Respondent No. 2

AND IN THE MATTER OF

Oriental Bank Of Commerce

(Now Punjab National Bank)

...Financial Creditor

Versus

Sidhartha Buildhome Private Limited

...Corporate Debtor

Delivered on:25.11.2022

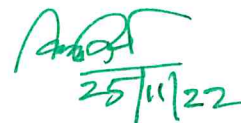
Coram:

**SHRI BACHU VENKAT BALARAM DAS
MEMBER (JUDICIAL)**

**DR. BINOD KUMAR SINHA
MEMBER (TECHNICAL)**

For the Applicant: Sandeep Bajaj, Soyaib Qureshi along with Devansh Jain, Dilsheen
Kaur, Namata Sharama Prashant Katara, Advocates

For the Respondent: Alok Dhir, Varsah Baneerjee, Kanishk Khetan, Advocates

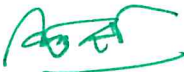



ORDER

Per- Bachu Venkat Balaram Das (Judicial)

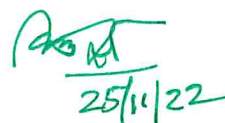
1. The Present Application has been filed by the Home Buyers and Financial Creditors of the Corporate Debtor under Section 60 (5) of the Insolvency & Bankruptcy Code, 2016 seeking declaration that Mr. Siddharth Chauhan, being a promoter of the Corporate Debtor is ineligible to present the Resolution Plan and to not call for voting on the Resolution Plan presented by the promoter of the Corporate Debtor.
2. It is submitted by the Applicant that the present application is being preferred by the Applicants since despite the Promoter/Suspended Director being ineligible under section 29-A of the Insolvency and Bankruptcy Code, 2016 (hereinafter "the Code"), the Resolution Plan proposed by the Promoter/Suspended Director is being tabled for discussion by the Resolution Professional. The present application is being filed by Applicants, who are Home buyers and financial creditors within the meaning of the said term under the Code. The Applicants have invested their life savings in the project which was being promoted by the Corporate Debtor. The present application is therefore being filed seeking a prayer from this Learned Adjudicating Authority to declare Respondent No.2 i.e. Mr. Sidharth Chauhan, the Promoter and suspended Director of the Corporate Debtor ineligible in terms of sub-clause (c), (h) and (g) of Section 29A of the Code, since the account of the Corporate Debtor has been declared as Non-performing Asset by the Financial Creditor during the time when the Respondent No.2 was in the management of the Corporate debtor. The Respondent No.2 is also ineligible under sub clause (g) of Section 29A since the Corporate Debtor has undertaken preferential, undervalued, and fraudulent transactions as reported in the Transaction Audit Report dated 02.08.2021 during the period when the Respondent No.2 was in the management of the Corporate Debtor and was the Promoter. As despite the aforesaid, the Resolution Professional has proceeded to permit Respondent No.2 to present a Resolution Plan and a tentative date of 30.06.2022 has been notified to discuss the Resolution Plans which includes the Resolution Plan being presented by Respondent No.2. It has also come to the knowledge of the

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Applicants that while the Corporate Debtor was not registered as a MSME prior to the initiation of the Corporate Insolvency Resolution Process and even thereafter, an MSME certificate has been obtained apparently by the related parties of the Corporate Debtor without any authorization or permission granted or consent or approval taken from the Committee of Creditors. This clearly has been done with a view to get over the bar of section 29 (A) (e) and (h), which is impermissible in terms of the Judgments of the Hon'ble National Company Law Appellate Tribunal, in the case of T.Johnson of St John Freight Systems Limited v. St John Freight Systems Limited, decided on 04.03.2020, and Adjudicating Authority, (NCLT, Guwahati Bench), in the case of Bank of India v. Maxim Infrastructure & Real Estate Limited and more recently in the case of Harkirat Singh Bedi v Oriental Bank of Commerce, dated 12.01.2021, passed by Hon'ble National Company Law Appellate Tribunal, New Delhi. Further, the said Judgments have clarified that any certificate issued during the Corporate Insolvency Resolution Period is invalid in law. This aspect has already been informed to the Resolution Professional, however, no response has been received.

3. It is vehemently argued by Ld. Counsel appearing for the Applicant that MSME certificate has been obtained in complete secrecy without informing the COC.
4. No consent of the COC was sought and no reasons have been informed by the RP till date for undertaking the registration of the CD as an MSME. It is pertinent to note that 10 COC meetings were conducted from the date of issuance of the MSME certificate till 28.06.2022 i.e. the first occasion when the Applicants were informed of the MSME certificate. However, in none of the meetings the MSME registration was intimated to the Applicants. It is submitted that the MSME certificate has been obtained by one person namely Mr. Sarjeet who is purportedly the employee of the CD as stated by the Respondent No.1 and no consent of COC was sought to delegate the authority of RP in accordance with Section 28(h) of IBC for obtaining the MSME Certificate. It is further submitted that in its Reply, the Respondent No.1 had stated that the MSME registration had been obtained through said Mr. Sarjeet. However, during the course of the Arguments, it has been argued on behalf of Respondent No.1 that such registration was obtained by the Resolution



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Professional himself by using the Email ID of said Mr. Sarjeet which is contrary to his own pleadings.

5. It is submitted that Hon'ble NCLAT has held in its Judgment /order dated 09.7.2021 passed in CA(AT)(INS)-43-43A of 2021 titled as "Digambar Anandrao Pingle vs. Shrikant Madanlal Zawar & Ors." that the MSME certificate obtained during the CIRP is required to be ignored and the promoter cannot suppress it from the Resolution Professional in order to get over the ineligibility under Section 29A of IBC.

The relevant extract of the decision is reproduced as under :

"14. There is yet another factor which is relevant and we find that the Appellant has obtained Annexure-A-3 – an MSME Certificate for which application had been made on 5th March, 2019. Clearly, CIRP with regard to the Corporate Debtor started on 19th July, 2018 and on 5th March, 2019 the Corporate Debtor was under the management of IRP/RP. The Appellant has not shown that the application for MSME was made through the IRP/RP. The Learned Counsel for Respondent No. 5 is claiming that there was no consent of the IRP/RP. When the Corporate Debtor was not under the management of the Appellant, such unauthorized application could not have been made and the claim of the Appellant that the Corporate Debtor is MSME would require to be ignored. Appellant cannot take advantage of his wrongful act. Keeping in view Judgment in the matter of 'Arun Kumar Jagatramka vs Jindal Steel and Power Ltd.' – 2021 SCC Online SC 220, back door entries cannot be allowed. After CIRP was initiated former Promoter/ Director cannot suppress from IRP/RP and apply for MSME Certificate and tide over ineligibility under Section 29A of the IBC. 15. Admittedly, M.A. No. 3020/2019 regarding Section 43, 66, 65 of IBC is still pending and is not decided one way or the other. The observation in context of Section 29A appears to have been made to demonstrate how sufficient chance was given to the Appellant though he appeared to be undeserving, and was now dragging proceedings."

6. **REPLY OF RESOLUTION PROFESSIONAL:**

Mr. Devender Singh, Respondent No.1/RP of Sidhardhta Build-home Private Limited, the Corporate Debtor has filed a reply affidavit to the present Application.

7. It is submitted by the Resolution Professional that in order to maintain the Corporate Debtor as a going concern, he applied for registration of the Corporate Debtor under the Udyam Scheme under Micro Small & Medium Enterprise Development Act, 2006 (hereinafter, "MSME") through the

Finance & Accounts Manager of the Corporate Debtor, Mr. Sarjeet Kumar. Copy of the acknowledgement of filing of the Application Form for MSME Registration is annexed and marked as Annexure R-I. The Corporate Debtor accordingly was registered as a “small” enterprise under the MSME Act on 23.11.2021.

8. Ld. Counsel appearing for the Resolution Professional submitted at the outset that the present Application filed by 6 Home Buyers, claiming to be the Creditors in a class of Home Buyers (out of 750 Nos. of Home Buyers of the Corporate Debtor) is not maintainable in view of the Judgment of Hon’ble Supreme Court in Jaypee Kensington Boulevard Apartments Welfare Association & Ors vs. NBCC (India) Limited & Ors 2021 SCC on line SC 253, wherein Hon’ble Supreme Court has elaborately dealt with rights of individual Home buyer to approach this Hon’ble Court.

The Hon’ble Supreme Court has held as under :

“421. *Taking up other aspects of the rival submissions and having examined the scheme of the Code in relation to a plan of insolvency resolution, we are clearly of the view that the propositions of some of the associations and individual homebuyers to claim themselves as 'dissenting homebuyers' and thereby, 'dissenting financial creditors' do not stand in conformity with the scheme of the Code and the manner of voting on a plan of resolution by the Committee of Creditors.*

425. *In the face of clear language of sub-section (34) of Section 254 of the Code read with the law declared by this Court in Pioneer Urban (supra), the suggestion on behalf of the dissatisfied homebuyers that the said provision was only intended to iron out the logistical issues and technical difficulties is required to be rejected altogether. The said provision, as held by this Court, is to iron out the creases that might have been felt in the proper working of Section 25A; and it is made explicit that the allottees, even if not a homogeneous group, they could vote only either to approve the resolution plan or to disapprove the same. Divergence of the views within their own class may exist but, when coming to the vote in the Committee of Creditors, their vote would be that of a class.*

428. *In the present case, on one hand, it has consistently been submitted by the stakeholders, particularly the homebuyers, that liquidation of JII. should be eschewed, but on the other hand, some of*

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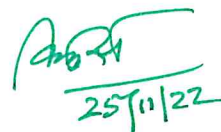
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the associations and homebuyers have attempted to find faults with the resolution plan to which their majority, who voted, took the decision for approval. There is no scope for any homebuyer suggesting himself to be a dissenting financial creditor merely because he was not with majority within the class. His dissatisfaction does not partake the legal character of a dissenting financial creditor.

430. *For what has been discussed hereinabove, the suggestions that there was no cent percent approval of the resolution plan, or that there was no consensus amongst homebuyers, or that the plan of Suraksha Realty was considered better, are required to be rejected. It is not the case that the AR of homebuyers has not voted in accordance with the decision taken by a vote of more than 50% of the voting share of homebuyers who did cast their vote. In the given set of facts, we have no hesitation in thoroughly disapproving the unnecessary imputations made by one set of homebuyers against the AR that he made any incorrect statement before the CoC. That being the position, and the authorised representative having voted in accordance with the instructions given to him from the class of financial creditors i.e., homebuyers, every individual falling in this class remains bound by his vote and any association or homebuyer of JIL cannot be acceded the locus to stand differently and to project its/his own viewpoint or grievance by way of objections or by way of appeal. All such objections and appeals are required to be rejected on this ground alone.*

435. *To sum up this part of discussion, in our view, after approval of the resolution plan of NBCC by CoC, where homebuyers as a class assented to the plan, an individual homebuyer or association cannot maintain any challenge to the resolution plan nor could be treated as carrying any legal grievance.*

442. *For what has been discussed above, we hold that the homebuyers as a class having assented to the resolution plan of NBCC, any individual homebuyer or any association of homebuyers cannot maintain a challenge to the resolution plan and cannot be treated as a dissenting financial creditor or an aggrieved person; the question of violation of the provisions of the Real Estate (Regulation and Development) Act, 2016 does not arise; the resolution plan in question is not violative of the mandatory requirements of the CIRP Regulations; and when the resolution plan comprehensively deals with all the assets and liabilities of the corporate debtor, no housing project could be segregated merely for the reason that the same has been completed or is nearing completion."*



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9. It is also submitted that Resolution Professional has duly complied with all the relevant provisions of the Code and the Regulations made therein in conducting the CIRP of the Corporate Debtor. The RP has submitted that on 06.8.2021, the 7th COC meeting was held where three Resolution Plans received from (1) Prabhatam Investment (P) Limited and (2) Consortium of Sandeep Gupta & Shalini Gupta, Aadi Propbuild (P) Limited and (3) Engineering Projects India Limited were discussed and which were placed in the 7th COC Meeting held on 06.8.2021 and in the 8th Meeting of COC which was held on 17.8.2021, the compliance status of the Resolution Plans was placed before the COC. Thereafter in the 9th COC Meeting held on 18.9.2021, the Resolution Applicants were invited to present their respective Resolution Plans. The COC discussed and allowed the Resolution Applicants to submit their addendum to the Plans.
10. We have heard the arguments advanced by Ld. Counsels appearing for both the parties and carefully perused the documents available on record.
11. Ld. Counsel for the Applicant, has submitted that the present Application has been filed by the Applicant, who are the Home Buyers and Financial Creditors of the class of the Corporate Debtor being aggrieved by the action of the promoter of the Corporate Debtor i.e. Siddharth Chauhan in submitting a Resolution Plan on the grounds that the said Siddharth Chauhan, is ineligible to present a Resolution Plan since he is disqualified under Section 29A of the IBC.
12. The Applicants have sought a direction to direct the Resolution Professional to not consider the Resolution Plan submitted by the promoter of the Corporate Debtor - Siddharth Chauhan.
13. The first objection raised by the Applicant qua the Respondent No.2 is that the Respondent No. 2 has unlawfully obtained a certificate of Registration of the Corporate Debtor as a Micro Small Medium Enterprises (MSME) after initiation of the Corporate Insolvency Resolution Process of the Corporate Debtor.
14. It is submitted by Ld. Counsel that CIRP was initiated on 04.3.2021 and during the CIRP period, R-2 obtained a MSME certificate on 23.11.2021 through one Mr. Sarjeet who is purportedly an employee of the Corporate Debtor without bringing it to the notice of the Committee of Creditors.



15. Ld. Counsel relied upon an order dated 9th July, 2021 passed in CA(AT)(INS)-43-43A of 2021 titled as “Digambar Anandrao Pingle vs. Shrikant Madanlal Zawar & Ors.” passed by Hon’ble NCLAT wherein it has been held that MSME certificate obtained during the CIRP is required to be ignored.

The relevant paragraph of the said Judgment is reproduced below :

14. There is yet another factor which is relevant and we find that the Appellant has obtained Annexure-A-3 an MSME Certificate for which application had been made on 5th March, 2019. Clearly, CIRP with regard to the Corporate Debtor started on 19th July, 2018 and on 5th March, 2019 the Corporate Debtor was under the management of IRP/RP. The Appellant has not shown that the application for MSME was made through the IRP/RP. The Learned Counsel for Respondent No. 5 is claiming that there was no consent of the IRP/RP. When the Corporate Debtor TRUE COPY 15 9 Company Appeal (AT) (Insolvency) No. 43-43A of 2021 was not under the management of the Appellant, such unauthorized application could not have been made and the claim of the Appellant that the Corporate Debtor is MSME would require to be ignored. Appellant cannot take advantage of his wrongful act. Keeping in view Judgment in the matter of Arun Kumar Jagatramka vs Jindal Steel and Power Ltd. 2021 SCC Online SC 220, back door entries cannot be allowed. After CIRP was initiated former Promoter/ Director cannot suppress from IRP/RP and apply for MSME Certificate and tide over ineligibility under Section 29A of the IBC.

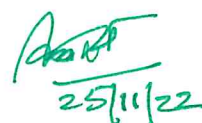
15. Admittedly, M.A. No. 3020/2019 regarding Section 43, 66, 65 of IBC is still pending and is not decided one way or the other. The observation in context of Section 29A appears to have been made to demonstrate how sufficient chance was given to the Appellant though he appeared to be undeserving, and was now dragging proceedings”.

16. Ld. Counsel also submitted that the Corporate Debtor was incorporated in the year 1995 and it never sought registration as MSME. Further, in the Expression of Interest (EOI) issued by the IRP/RP pursuant to the order by this Adjudicating Authority initiating the CIR Process, it was expressly stated that the provisions pertaining to CIRP of the MSME would not be applicable since the Corporate Debtor is not MSME.

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17. Ld. Counsel appearing for the Resolution Professional submitted that the MSME certificate was obtained in order to maintain the Corporate Debtor as a going concern.
18. Having heard Ld. Counsel for the parties on the issue of MSME certificate, we hold that the issue stands concluded by the Judgment of the Hon'ble NCLAT's order dated 9th July, 2021 passed in CA(AT)(INS)-43-43A of 2021 titled as "Digambar Anandrao Pingle vs. Shrikant Madanlal Zawar & Ors." (supra).
19. It is also submitted by the Applicant that Respondent No.2 i.e. Mr. Siddharth Chauhan, the Promoter and suspended Director of the Corporate Debtor is ineligible in terms of sub-clause c), (h) and (g) of Section 29A of the Code, since the account of the Corporate Debtor has been declared as non-performing asset by the Financial Creditor at the time when the Respondent No.2 was in the management of the Corporate Debtor. Respondent No.2 is also ineligible under sub-clause (g) of Section 29A since the Corporate Debtor has undertaken preferential, under-valued and fraudulent transactions as reported in the Transaction Audit Report dated 02.8.2021 during the period when the Respondent No.2 was in the management of the Corporate Debtor and was its Promoter. In this regard, the Resolution Professional has also filed an application before this Adjudicating Authority for avoidance of the preferential, under-valued and fraudulent transactions which are pending and are not decided one way or the other.
20. Ld. Counsel for the Applicant has submitted that the Corporate Debtor was declared as non-performing asset. It is also submitted by the Applicant that several F.I.Rs and criminal complaints have been filed against Respondent-2. Respondent-2 preferred a Bail Application before Hon'ble High Court seeking anticipatory Bail which was rejected and observation was made by Hon'ble High Court that Respondent-2 has misappropriated and siphoned of the funds of Home Buyers and Banks.
21. The above submissions have not been rebutted by the Respondent in the reply affidavit.
22. In view of the foregoing points and analysis of the facts and circumstances of the case, the instant IA is hereby allowed. The RP is directed not to place the resolution plan filed by the suspended director/promoter before the CoC. All other plans which are found to be compliant to the provisions of I&B Code



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and Regulations thereunder shall only be considered by the CoC in their next meeting. The interim order dated 04.07.2022 is modified accordingly.

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SHRI BACHU VENKAT BALARAM DAS
MEMBER (JUDICIAL)

-sd-

DR. BINOD KUMAR SINHA
MEMBER (TECHNICAL)