

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 1489 of 2023
& I.A. No. 5342 of 2023**

[Arising out of Order dated 18.08.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-I in IA No. 2828 of 2021 in CP (IB) No. 4360/MB/C-I/2018]

In the matter of:

**Vishram Narayan Panchpor
(Resolution Professional of Blue Frog Media Private
Limited)**

....Appellant

Vs.

**Committee of Creditors
(Blue Frog Media Pvt. Ltd.) & Anr.**

...Respondents

For Appellant: Mr. Anuj Tiwari, Mr. Aditya Shukla and Mr. Rahul Kumar, Advocates.

For Respondents: Mr. Kunal Godhwani, Advocate

**JUDGMENT
(11th January, 2024)**

Ashok Bhushan, J.

This Appeal has been filed challenging the order dated 18.08.2023 passed by the Adjudicating Authority (National Company Law Tribunal) Mumbai Bench-I in IA No.2828 of 2021. The Adjudicating Authority by the impugned order has rejected IA No. 2828 of 2021 which was filed by the Resolution Professional for approval of the Resolution Plan submitted by Mr. Mahesh Mathai- Successful Resolution Applicant on the ground that Mr. Mahesh Mathai- Successful Resolution Applicant is not eligible to submit a Resolution Plan under Section 29 A of the Code.

2. Brief facts of the case necessary to be noticed for deciding this Appeal are:-

2.1. Corporate Debtor- 'M/s. Blue Frog Media Private Limited' through its Managing Director filed an Application under Section 10 of the Code which was admitted on 19.05.2021 by the Adjudicating Authority. Form G was published in response to which Resolution Plan was submitted by Mr. Mahesh Mathai, Ex-Director of the Corporate Debtor. Committee of Creditors (CoC) on 08.11.2021 by 91.86% vote share has approved the Resolution Plan submitted by the Respondent No.2- Successful Resolution Applicant. On 13.11.2021, Appellant filed an application IA No. 2828 of 2021 under Section 30(6) of the Code seeking approval of the Resolution Plan. The Adjudicating Authority heard the matter and reserved it for orders on 07.06.2023. On 21.07.2023, the Adjudicating Authority sought certain clarifications and Additional Affidavit was filed by the Appellant in compliance with the direction dated 21.07.2023. The Adjudicating Authority by impugned order rejected IA No. 2828 of 2021 holding that the Respondent No.2- Successful Resolution Applicant is not eligible under Section 29A. Mr. Mahesh Mathai was one of the Directors in the Company who resigned on 01.03.2018.

2.2. The Adjudicating Authority by the impugned order observed that the question to be examined is as to whether Successful Resolution Applicant meets the eligibility criteria under Section 29A. The Adjudicating Authority after considering the submissions of the parties took the view that Section 29A restricts those persons from submitting a Resolution Plan who could have an adverse effect on the entire CIRP. It was held that Mr. Mahesh being a

former promoter/director of the Company is not eligible to submit a Resolution Plan.

3. Learned Counsel for the Resolution Professional challenging the order impugned submits that the Adjudicating Authority committed error in holding Successful Resolution Applicant as ineligible whereas promoters/ex management are not ineligible to submit a Resolution Plan unless they are ineligible under any of the clauses as provided in Section 29A. It is submitted that the Successful Resolution Applicant is not covered by any of the clauses under which ineligibility is attached to promoter/ex-management. Section 29A does not make ineligible *ipso facto* all promoters and directors. Ineligibility is attached if they are ineligible under any of the clauses under Section 29A. It is submitted that the Adjudicating Authority has referred to Section 29A(c) which is not attracted. Counsel for the Appellant in support of his submission placed reliance on the judgment of Hon'ble Supreme Court in ***"Hari Babu Thota vs. Shree Aashraya Infra-Con Ltd.- 2023 SCC OnLine SC 1642"***. It is submitted that the Adjudicating Authority has misinterpreted Section 29A in holding that Respondent No.2 was ineligible whereas none of the conditions under Section 29A are attracted and Section 29A *per se* does not make directors/ promoters ineligible. It is submitted that the none of the Banks, nationalised or commercial banks are creditors of the Corporate Debtor, hence, there is no question of applicability of Section 29A (c).

4. Learned Counsel appearing for the Successful Resolution Applicant supported the submissions of the Appellant.

5. Learned Counsel for the Committee of Creditors (CoC) submitted that the CoC having already approved the Resolution Plan, the Successful Resolution Applicant was never held to be ineligible.

6. We have considered the submissions of the Counsel for the parties and perused the record.

7. The only question to be answered in this Appeal is as to whether Respondent No.2 is ineligible under Section 29A to submit a Resolution Plan. The Resolution Plan submitted by the Respondent No.2 has been approved by the CoC with 91.86% vote share. Application was also filed by the Resolution Professional for approval of the Resolution Plan which has been rejected by impugned order holding that the Respondent No.2 is not eligible in submitting a Resolution Plan. In pursuance of the order passed by the Adjudicating Authority asking for clarification, Additional Affidavit was filed by the Resolution Professional where it was stated that the Successful Resolution Applicant was director of the Corporate Debtor from 20.07.2006 to 01.03.2018. Copy of Form DIR-12 and Resignation Letter was annexed along with Additional Affidavit. Financials of the Corporate Debtor for F.Y. 2018-2019 and 2019-2020 were also annexed along with the Additional Affidavit. Resolution Plan was submitted by the Respondent No.2 on 28.10.2021 which is clear from Form H filed by the Resolution Professional as Annexure A-11 to the Appeal. On the date when Resolution Plan was submitted, Respondent No.2 was no more Director of the Corporate Debtor and the eligibility has to be looked into on the date when plan was submitted. However, we proceed to examine as to whether ex-promoter/directors are not eligible to submit a

Resolution Plan under Section 29A if no disqualification is attached in any of the clauses under Section 29A.

8. Section 29 A of the IBC is as follows:-

“29A. Persons not eligible to be resolution applicant. - A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

(a) is an undischarged insolvent;

(b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);

(c) [at the time of submission of the resolution plan has an account,] or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) [or the guidelines of a financial sector regulator issued under any other law for the time being in force,] and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to nonperforming asset accounts before submission of resolution plan:

Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.- For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares ² [or completion of such transactions as may be prescribed], prior to the insolvency commencement date.

Explanation II.— For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;]

[(d) has been convicted for any offence punishable with imprisonment –

- (i) for two years or more under any Act specified under the Twelfth Schedule; or*
- (ii) for seven years or more under any law for the time being in force:*

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I];

(e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013):

[Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;]

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:

[Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;]

(h) has executed [a guarantee] in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code 3 [and such guarantee has been invoked by the creditor and

remains unpaid in full or part; (i) [is] subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or (j) has a connected person not eligible under clauses (a) to (i).

Explanation 5 [I]. — For the purposes of this clause, the expression "connected person" means—

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

[Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor: Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares [or completion of such transactions as may be prescribed], prior to the insolvency commencement date;]

[Explanation II—For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:—

(a) a scheduled bank;

(b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;

(c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999);

(d) an asset reconstruction company register with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(e) an Alternate Investment Fund registered with Securities and Exchange Board of India;

(f) such categories of persons as may be notified by the Central Government.”

9. The Adjudicating Authority in its order has referred to Section 29A (c). Section 29A (c) is attracted when at the time of submission of the plan, the person has an account or an account of a Corporate Debtor under the management or control of such person or of whom such person is a promoter, is classified as non-performing assets. Present is a case where as per submission of the Appellant, no bank is creditor of the Corporate Debtor.

Form-H mentions the name of creditors of the Corporate Debtor and all creditors are only individual. Present is not a case even there is any suggestion or material that account of Respondent No.2 or the Corporate Debtor is NPA on the date of submission of the Resolution Plan, therefore, there is no question of applicability of Section 29A(c).

10. Section 29A has been inserted by Act 8 of 2018 declaring certain persons who are not eligible to submit a Resolution Plan. A plain reading of Section indicates that a person shall not be eligible to submit a plan if such person, or any other person acting jointly or in concert with such person is covered by any of the clauses mentioned from (a) to (g). Present is not a case where it is pleaded or alleged that any of the clauses (a) to (g) are attracted with respect to Respondent No.2. The Adjudicating Authority has declared the Respondent No.2 is ineligible only on the ground that he was former promoter/director and has contributed to the downfall of the Company. The reasons given by the Adjudicating Authority in paragraph 29 are as follows:-

“29. Therefore, we are of the view that Mr. Mahesh Mathai is not eligible to submit a Resolution Plan as he was a former promotor/director of the company and has contributed to the downfall of the company. Further, it appears from his shareholding pattern that he was always involved in the company, in fact after his resignation and whilst the company was under financial distress, his shareholding went up from 4,36,757 equity shares to 5,13,458 shares equity shares in the year 2019-2020. The said Resolution Plan cannot be allowed as it is in violation of rationale behind insertion of Section 29A, which

was to protect the interest of creditors, from persons who have contributed to the mismanagement and defaults committed by the Corporate Debtor.”

11. Thus, the question to be answered is as to whether a mere fact that the person submitting a Resolution Plan has been promoter or director makes ineligible to submit a Resolution Plan.

12. The Hon'ble Supreme Court had occasion to consider Section 29A in reference to promoters of the Corporate Debtor in '*Hari Babu Thota*' (supra). In the above case, a plan proposed by the promoter was approved by the Committee of Creditors and the application was filed by the Resolution Professional for approval of the plan which was dismissed on the ground that the promoters could not have presented the plan. The Appeal was filed by the Resolution Professional challenging the order of the Adjudicating Authority. One of the questions which was considered in the case was as to whether Resolution Applicant who was promoter was disqualified under Section 29A. The Hon'ble Supreme Court in the above case has held that there is no *per se* disqualification under Section 29A. In the above case, MSME certificate was issued after commencement of the CIRP, hence, Section 240A was not relied by the Adjudicating Authority. The Hon'ble Supreme Court after considering the ILC Report 2018 and Section 240A laid down following in paragraphs 23 to 25:-

“23. Thus, even on this count, the plan submitted in question will not incur the disqualification. We may

also note that the aforesaid intent is reflected in the statutory provision itself that in Section 29A (c) which begins with "at the time of submission of the resolution plan".

24. It is also pointed out that even if it was an NPA, the defect can be cured as set out in proviso (1) before submission of the plan, making the submission of the plan the crucial date.

25. We are thus, setting aside the impugned orders of the NCLT dated 28.02.2023 and NCLAT dated 02.06.2023 and allow the appeal leaving parties to bear their own costs."

13. The present is not a case where any of the clauses of Section 29A are being pressed for ineligibility of Respondent No.2. Ineligibility is being held only on the ground that Respondent No.2 was promoter of the Corporate Debtor till 2018 when he resigned. The view taken by the Adjudicating Authority is not as per the true and correct interpretation of Section 29A. Section 29A does not make *per se* promoters and directors ineligible to submit a plan unless they are ineligible under clauses (a) to (g). Since in the present case, it is not the case that any of the clauses (a) to (g) are attracted on Respondent No.2, the mere fact that Respondent No.2 was promoter and director shall not make him ineligible to submit a Resolution Plan.

14. We, thus, are of the view that the Adjudicating Authority committed error in holding that the Respondent No.2 is ineligible to submit a Resolution Plan. The rejection of IA No.2828 of 2021 is thus, unsustainable.

15. In view of the foregoing discussions and our conclusions, we set aside the order of the Adjudicating Authority dated 18.08.2023 and revive IA No.2828 of 2021 in CP (IB) No.4360/MB/C-I/2018 before the Adjudicating Authority which may be heard and decided afresh in accordance with the law. Resolution Plan having been approved on 08.11.2021, the Adjudicating Authority shall endeavour to dispose of the application at an early date.

16. The Appeal is disposed of accordingly.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

New Delhi
Anjali