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Pre Packaged Insolvency Resolution Process: Section 29A(c) and (h) Exemption for Resolution Applicant or MSME Debtor?

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The insolvency regime of India since its inception has enabled and opened gates for companies facing stress by providing choices of resolution or liquidation to help them meet ends in an organized manner. This regime has entered into its second era with a new addition in its arsenal – Pre Packaged Insolvency Resolution Process. On April 4, 2021, the President of India promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021, to introduce a Pre-Packaged Insolvency Resolution Process (**pre-pack process**) under the Insolvency and Bankruptcy Code, 2016 (**Code**). This law has been introduced to provide an efficient alternative insolvency resolution process for corporate persons classified as micro, small and medium enterprises (**MSMEs**). With the economic fallout on account of Covid-19, the Government of India has come with several policy measures to provide a cost-effective, swift and value-maximising mechanism for resolving insolvency with minimum disruption to business operations (during the process).

The pre-pack process is an additional measure with objectives enabling the MSMEs to quickly resolve their stress without having to giveaway the management to resolution professionals. While it is pertinent to understand whether the same is a natural step in evolution of insolvency regimes within the Code (as it is claimed) – to what extent it justifies the purpose is yet to be tested, another conundrum that has arisen is the eligibility of MSME (corporate persons) who may initiate the pre-pack process while submitting a base resolution plan under the new amended Insolvency and Bankruptcy Code, 2016.

The MSME corporate debtor (that falls within the meaning prescribed under Section 7(1) of the Micro, Small and Medium Enterprises Development Act, 2006) having defaulted for an amount more than Rs. 10 Lakh is eligible to make an application for initiation of a pre-pack process, subject to, such MSME corporate debtor should also be eligible to submit a resolution plan under Section 29A of the Code. An important point to note is the disqualification parameters contained in Section 29A(c) and (h) of the Code (NPA ageing and guarantee invocation criteria) which are not applicable to the resolution applicant with respect to the pre-pack process. Towards this, will it be justified to concur from the reading of new amendments

and existing provisions that disqualifications of Section 29A(c) and (h) is not applicable to MSME corporate debtors or is it a mere exception to the resolution applicant of MSME corporate debtors and not MSME corporate debtors? In which case another conundrum will be that to what extent it is justified to bind such MSME corporate debtors to meet the requirements of Section 29A(c) and (h) when they are already facing stress due to more than a year extended Covid-19 pandemic?

While Section 54A (providing for corporate debtors eligible for pre-pack process) provides no exception in mandating the eligibility under Section 29A of the Code – a pre-condition for any corporate debtor that wishes to make an application for the pre-pack process, the exemption provided under Section 240A only reads and provides for the Resolution Applicant in respect to corporate insolvency resolution process and pre-pack process of MSME. ‘Resolution Applicant’ under Section 5(25) of the Code is any person who submits a resolution plan to the resolution professional, pursuant to Section 54K of the Code unlike the MSME corporate debtors that are required to submit the base resolution plan (defined under Section 5(2A)) along with its application as per Section 54A(4)(c) of the Code. A Base Resolution Plan (defined under Section 5(2A) of the Code), as it appears is different from the Resolution Plan (defined under Section 5(2) of the Code). In all terms, it cannot be said that MSME corporate debtor filing an application under Section 54C read with 54A of the Code is exempted from (disqualification) under Section 29A(c) and (h) of Code. However, on the other side, all resolution applicants that intend to submit resolution plan in the pre-pack process of MSME corporate debtor are not required to be tested against Section 29A(c) and (h).

Whether it is justified or not is another day’s difficulty, however, the question with regard to the exemption under Section 240A for MSME corporate debtors (submitting base resolution plan along with their application for pre-pack process) needs to find its conclusive end to efficaciously implement this new evolutionary step (pre-pack process).



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