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Resolution Applicants: Qualifications & Disqualifications

ANAND ABHISHEK¹

ABSTRACT

Section 29A of the Insolvency and Bankruptcy Code (IBC), which was added to the IBC by the IBC (Amendment) Act, 2017, provides a list of disqualifications criteria for Resolution Applicants from submitting a Resolution Plan during Corporate Insolvency Resolution Process. There was a second amendment in 2018. The Aim of enacting Section 29A was to prevent those who would have a negative impact on the overall corporate resolution process from submitting a resolution plan, but this section imposes four tiers of ineligibility. This multi-tiered disqualification under Section 29A may prevent bona fide resolution applicants from applying, as well as key stakeholders from bidding for the company's revival. As a result, despite its noble goal, section 29A is a severe section that continues to be problematic. The ineligibility criteria under section 29A have cast a net so wide that even those persons who wish to positively contribute towards the revival of the corporate debtor have been barred from submitting their resolution plans. The Supreme Court has played an instrumental role in analysing the provisions and thereby clearing ambiguities from the interpretation of the provisions of section 29A through its various judgements. This article attempts to analyze the Qualifications & Disqualifications of Resolution Applicants.

Keywords: Resolution Applicants, Resolution plan, Corporate Insolvency Resolution Process, Section 29A of IBC, Resolution Professionals.

I. INTRODUCTION

A list of people who cannot be a resolution applicant is provided in Section 29A of the Insolvency and Bankruptcy Code, 2016 ("Code"). Persons who contributed to the corporate debtor's defaults through their wrongdoing or who are otherwise undesirable are prohibited from acquiring or regaining control of the corporate debtor under this provision.² The Supreme Court in *Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta*³ interpreted the scope and application of Section 29A to make it free from any ambiguities. Further, the constitutional

¹ Author is a LL.M Student at Dharmashastra National Law University, Jabalpur, M.P, India.

² Statement of Objects and Reasons of Insolvency and Bankruptcy Code (Amendment) Bill, 2017. & *Arcelormittal India Private vs Satish Kumar Gupta* (2018) Para 25

³ *Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta*, 2018 SCC OnLine SC 1733.

validity of this section was also upheld by the Supreme Court in *Swiss Ribbons Pvt. Ltd. v. Union of India*.⁴ The question that emerges, however, is what led to the introduction of section 29A to the Code.

A resolution applicant might have been any person, a creditor, a promoter, a prospective investor, an employee, or anybody else, according to the originally enacted Code.⁵ This was a major fallout in the Code. Promoters, guarantors and persons who were once a part of the ex-management were able to bid for their own assets and buy them back at meagre prices which thereby hampered the interests of the creditors. As a result, it was decided that the Code needed to have measures that would bar particular groups of persons from making resolution proposals, and section 29A was consequently inserted to the Code. However, it was believed that this provision had a highly open-ended scope and that anyone may make a resolution plan, even if they had no direct connection to the corporate debtor. Hence, some changes were recommended by the Insolvency Law Committee which were later incorporated into the section. The main aim of the Code is resolution of an ailing company. It aims to develop ways for the corporate debtor to be revived and restructured while also putting in place appropriate mechanisms to carry out the company's resolution.⁶

Prospective resolution applicants are invited to submit their resolution plans in accordance with the Code. *“The Code was amended many times, first by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 on November 23, 2017, and then by the Insolvency and Bankruptcy Code (Amendment) Act, 2018 on January 19, 2018. Section 29A, out of all the amendments, has become a conundrum for everyone. The section comprises 10 parts (i.e. clauses) that specify who is not eligible to be a resolution applicant. The tenth part is further broken into three sub-parts, each of which has its own descendants”*.⁷ In this Article we will explore in detail the qualifications and disqualifications of resolution applicant.

II. QUALIFICATIONS & DISQUALIFICATIONS OF RESOLUTION APPLICANTS

(A). Who Can be a Resolution Applicants/ Eligibility?

Section 5 (25) of IBC states that *the “resolution applicant means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional*

⁴ *Swiss Ribbons Pvt. Ltd. v. Union of India*, 2019 SCC OnLine SC 73.

⁵ Sikha Bansal & Richa Saraf, *Ineligibility Criteria u/s 29A of IBC: A net too wide?* available at: <https://vinodkothari.com/wp-content/uploads/2019/06/Ineligibility-Criteria-under-sec.-29A-of-IBC.pdf> (last visited – 26th May 2022)

⁶ *Ibid*

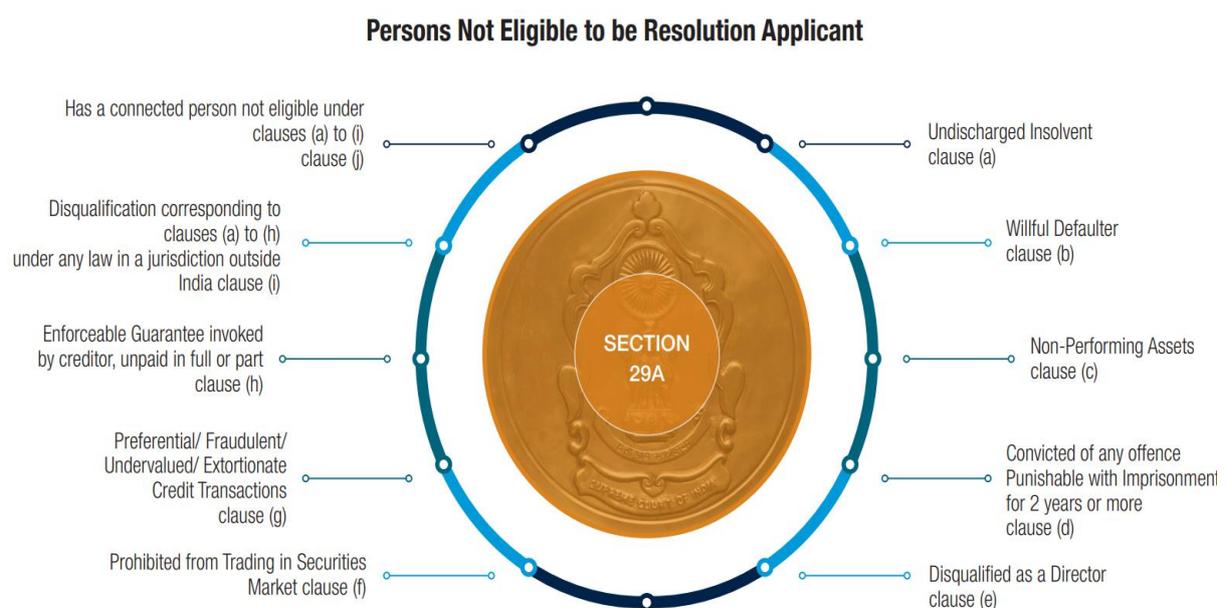
⁷ Sikha Bansal & Richa Saraf, *Ineligibility Criteria u/s 29A of IBC: A net too wide?* available at: <https://www.livelaw.in/ineligibility-criteria-u-s-29a-ibc-net-wide/?infinitespace=1> (last visited- 27th May 2022)

pursuant to the invitation made under clause (h) of sub-section (2) of Section 25”.⁸ The definition of a resolution applicant has been changed, and any such application must now be invited to provide a plan. Only when a prospective candidate meets the eligibility criteria, then an invitation is sent under section 25(2)(h), which outlines the responsibilities of a resolution professional. This is determined by the resolution professional in consultation with the creditors' committee, taking into account the nature of the corporate debtor's business.

In the meanwhile, Section 29A's eligibility requirements are quite stringent. It means that anyone who falls within one of the section's categories will be unable to submit a proposal. As a result, a potential applicant would now face two eligibility examinations. To begin with, he had to meet the resolution professional's eligibility requirements in order to be invited to submit a plan. Second, he needed to make sure that he didn't fall under any of Section 29A's ineligibility categories. A resolution applicant may submit a resolution plan to the Resolution Professional that is based on the information memorandum, according to Section 30 (1) of IBC. The resolution applicant while submitting a resolution plan must also file an affidavit confirming his/her eligibility under Section 29-A.⁹

(B). Disqualifications of Resolution Applicants

Section 29A is a stringent clause that prevents anyone on the negative list from submitting a resolution plan.



⁸ Insolvency and Bankruptcy Code, 2016 – Sec. 5 (25)

⁹ *supra note 5*

Fig- ¹⁰

Let's explore the important clauses of the Section 29A-

Clause (c): The NPA criteria - Clause (c) of Section 29A debars a person or a person acting jointly or in concert with such person who- *“(i) has an account classified as NPA ii) is a promoter of a corporate debtor the account of which has been classified as NPA iii) is in the management of a corporate debtor the account of which has been classified as NPA; iv) is in control of a corporate debtor the account of which has been classified as NPA.”*¹¹ From the date of categorization until the date of insolvency initiation, at least one year shall have passed. As a result, any company (including its promoters/persons in management or control) whose account has been classified as NPA for the previous 1 (One) year will be unable to present a resolution plan. However, the Code creates an exception, stating that such a person is eligible to submit a resolution plan if all overdue payments, including interest, and charges connected to non-performing asset accounts are paid before the resolution plan is submitted. ¹²

Clause (d): Disqualification on account of Criminal Convictions - Clause (d) states that an application will be disqualified if he or she, or any of their related persons, is imprisoned for more than two years as a result of a criminal conviction. There were claims that there had to be a true link between the alleged offence and the prospective applicant's ability to finish the corporate debtor's restructuring.¹³

Clause (j): Connected persons- Anyone who has a connection with someone who is already disqualified is also ineligible under this clause. As stated expressly in Explanation I of the phrase, these associated persons fall into three categories: *“(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)”*¹⁴

Related party - In the context of a corporate debtor, Section 5(24) defines a "related party." The definition specifies who is considered a "related party." As a result, where clause (J) explanation I relates to "persons," the definition of 5(24) might be viewed as irrelevant.

¹⁰ Alvarez & Marsal, *Due Diligence of Resolution Applicants – Section 29A*, available at: 79386-06605_di_india_due-diligence_resolution_brochure_v4digital.pdf (alvarezandmarsal.com) (last visited 28th May 2022)

¹¹ Insolvency and Bankruptcy Code, 2016 - Sec- 29A

¹² *supra note 6*

¹³ Insolvency and Bankruptcy Code, 2016 -Sec. 29A

¹⁴ *Ibid*

Furthermore, when one of these persons is a corporation, the word will be interpreted in light of section 2(76) of the Companies Act, 2013. It usually denotes "related" when it comes to natural persons.

III. JUDICIAL DEVELOPMENTS

In *ArcelorMittal India Private Limited v. Satish Kumar Gupta*¹⁵, the Supreme Court interpreted Section 29A of the IBC to determine the resolution applicants' stage of ineligibility. The Supreme Court also determined on the resolution professional's authority over resolution plans provided by resolution applicants. Supreme Court stated that the stage of ineligibility begins when the resolution applicant submits the resolution plan. Furthermore, the Supreme Court concluded that the resolution applicant cannot dispute the Resolution Professionals (RPs) rejection of the resolution plan. The Supreme Court did rule, however, that the RP does not have the authority to reject the resolution plan and that he must bring all plans to the CoC for review.¹⁶

In respect of Numetal and AMIPL's eligibility, the Supreme Court ruled that because both resolution applicants had not paid their respective NPAs prior to submitting their resolution plans, they were unable to do so under Section 29A of the Code. The Supreme Court granted the resolution applicants one more chance to re-submit their resolution plans after paying their separate NPAs, at the request of the CoC. In interpreting Section 29A of the Code, the Supreme Court reaffirmed the well-established legal concept that what cannot be done directly, cannot be done indirectly. The Supreme Court has stated that a person cannot be considered an eligible resolution applicant by adopting strategies such as declassification as a promoter without paying off its unpaid NPAs, based on both the literal interpretation and the intention of the Code.¹⁷

The case of *Standard Chartered Bank v Ruchi Soya Industries Pvt. Ltd.*¹⁸ demonstrates the broad range of ineligibility that could be used by bidders to challenge the resolution applicant's ineligibility. The committee of creditors judged Adani Wilmar to be the most eligible bidder in this matter, and a resolution plan was drafted as a result. While Ptanjali Ayurved, the bidder next to Adani Wilmar, challenged eligibility under section 29A, Ptanjali Ayurved filed a contested claim of ineligibility. The current case had a peculiar element in that the current issue

¹⁵ *Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta*, 2018 SCC OnLine SC 1733.

¹⁶ Manupatra, Vaish, Associates Advocates, available at: <https://www.manupatrafast.com/NewsletterArchives/listing/Tax%20Alert%20Vaish/2018/November%202018/Between%20the%20Lines%20November%202018.pdf> (last visited 27th May 2022)

¹⁷ *Ibid*

¹⁸ *Standard Chartered Bank v Ruchi Soya Industries Pvt. Ltd.* C.P. NO. 1371&1372/N.C.L.T./M.A.H./2017

of ineligibility was raised because the managing director of Adani Wilmar's spouse was the daughter of a defaulting promoter. Patanjali appealed to the NCLT the committee of creditors decision to sanction Adani Wilmar's proposal. The NCLT was set to rule on the case, however Adani Group withdrew their bid due to CIRP's lengthy process.¹⁹

In *Chitra Sharma v. Union of India*²⁰, the Supreme Court, specifically in connection to the case of Jaypee Infratech Ltd., cleared up any ambiguity surrounding the implementation of section 29A by ruling that it would take effect retrospectively.²¹ As per the Supreme Court, section 29A was created to facilitate corporate governance and serve the greater good. According to the court, the amendment to include section 29A in order to close the loophole is intended to apply not just prospectively but, to a limited extent, retrospectively to resolution plans that may have been submitted before to the ordinance's promulgation but were rejected. As a result, the *Wig Associates case*²² reasoning may be invalid, because the legislature made it clear that the amendment was meant to apply retrospectively.

Further, the constitutional validity of section 29A was challenged before the Supreme Court in *Swiss Ribbons Pvt. Ltd. v. Union of India*²³. The fundamental premise that the promoters had a vested right to be considered as resolution applicants had already been refuted in the case of *Arcelor Mittal India Pvt. Ltd. v. Satish Gupta*, so the Supreme Court found no merit in the claim that the rights of the former promoters had been violated by the retrospective application of section 29A. The Supreme Court opined that the ineligibility criterion mentioned under section 29A is not based on fault-based liability principle, therefore there arises no question that there should be any difference between the treatment meted out to genuine & bonafide promoters and the defaulting promoters.²⁴

The main reason for adding section 29A to the code was to allow the corporate debtor to undertake a resolution plan without interference from persons who had previously held positions of authority or management over the corporate debtor. The very basic idea behind this being that those persons who have in one way or the other contributed to the downfall of

¹⁹ LIVEMINT, *INSOLVENCY COURT DISMISSES STANCHART'S PETITION IN RUCHI SOYA CASE*, AVAILABLE AT: [HTTPS://WWW.LIVEMINT.COM/COMPANIES/NEWS/INSOLVENCY-COURT-DISMISSES-STANCHART-S-PETITION-IN-RUCHI-SOYA-CASE-1549555709214.HTML](https://www.livemint.com/companies/news/insolvency-court-dismisses-stanchart-s-petition-in-ruchi-soya-case-1549555709214.html) (LAST VISITED 24TH MAY 2022)

²⁰ *Chitra Sharma v. Union of India*, 2017 SCC Online SC 1656

²¹ Shivani Saxena, *IBC: Section 29A – The Ghost Of Retrospective Past*, available at <https://www.bqprime.com/law-and-policy/ibc-section-29a-the-ghost-of-retrospective-past> (last visited 28th May 2022)

²² *Wig Associates Pvt. Ltd.*, CP No. 1214/I&BC/NCLT/MB/MAH/2017

²³ *Swiss Ribbons Pvt. Ltd. v. Union of India*, 2019 SCC OnLine SC 73.

²⁴ Akaant Kumar Mittal, *INSOLVENCY & BANKRUPTCY CODE: LAW & PRACTICE*, (EBC publication 2021)

the corporate debtor are disqualified from being resolution applicants. However, it is not always the case that the corporate debtor's promoters had committed a default before to the CIRP's start and are now resorting to unscrupulous methods in order to purchase back the corporate debtor's assets at reduced rates. It is not usually the promoters' fault if a firm is subjected to a CIRP. There are promoters who with a bonafide intention wish to regain the control of the corporate debtor so that they are able to implement a resolution plan efficaciously. In cases where the promoters are willing to offer to the lenders a price higher than the bid of the highest bidder, there seems no ground for eliminating such a promoter from the bidding process. The lenders would be in a better position and would have to suffer a much lesser haircut.²⁵

The process of inviting resolution plans from prospective resolution applicants is quite competitive and involves a system of bids. Due to the increasing competition in the bidding process, the prospective resolution applicants are forced to make higher bids for the ailing company, as a result of which the lenders are benefitting because they are getting lesser haircuts in the debts owed to them by the ailing company. In the early days of its insertion into the Code, section 29A led to a plethora of legislations regarding its scope, application, ineligibility criteria, constitutional validity etc.

The Supreme Court played an instrumental role in analysing the provisions of and thereby clearing ambiguities from the interpretation of the provisions of section 29A. It is seen that the application of this section casts a wide net and includes within its ambit a wide range of persons who are debarred from submitting their resolution plans. Pursuant to the recommendations of the Insolvency Law Committee in its March 2018 Report and then an amendment, the scope has reduced to some extent thereby going one step closer in achieving one of the objectives of the BLRC Report of drawing a line between malfeasance and business failure.²⁶

IV. CONCLUSION & SUGGESTIONS

Section 29A stands out to be improved legislation for creditors and genuine & prospective promoters as more money are recovered by creditors vis-à-vis earlier regulations & promoters who are genuine can bid for company. In addition, there has been a decrease in non-performing assets (NPAs), increased money recovered, and the fear of losing control of the company has compelled defaulting promoters to pay the debt in full to regain control because they would be ineligible to be a resolution applicant and bid for the company if they did not pay the debt in full. In its attempt to be comprehensive, the section may have the unintended consequence of

²⁵ *Ibid*

²⁶ *Ibid*

excluding otherwise qualified applicants for minor infractions. This will have a major impact on the pool of resolution applicants and, as a result, the competitive bidding process, lowering the value of the prospective plan. Section 29A casts such a wide net that resolution plans failing is not only a possibility, but a possibility that can materialise, resulting to the corporate debtor's liquidation.

The major loophole which was there in previous legislation was that it allowed defaulters promoters to file resolution process and at discounted price company assets purchased by backdoor entry. Now it can be said that the defaulter's paradise is lost. In its place, the economy's rightful position has been regained. If we look at other aspects, Section 29A IBC is a draconian legislation as it is very harsh in nature. The point which goes against Section 29A is that it generates a presumption against all connected persons, a practise that is unlikely to be encountered in any modern legal system around the world.

Thus, the goal of enacting this section 29A was to prevent those who would have a negative impact on the overall corporate bankruptcy resolution process from submitting a resolution plan, but this section imposes multi-tiered disqualification. As a result, despite its noble goal, section 29A is a severe section that continues to be problematic. The Code is a significant advance over the prior framework but a lot more needs to be done. Any flaws, I believe, will be addressed up over time, resulting in a comprehensive code.
