THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
AT NEW DELHI
C.A. 2683 (PB) / 2019
IN
Company Petition No. (IB)-197 (PB)/2017

In the matter of:

Mr. Venkatesan Sankaranarayan

...Applicant/Erstwhile Resolution Professional

Versus

Kridhan Infrastructure Private Limited & ors.

Respondents

AND

In the matter of:

Tecpro Systems Limited

...Corporate Debtor

Under Section 33 (3) of the Insolvency and Bankruptcy Code, 2016 for liquidation of the corporate debtor

Judgment delivered on: ***16.01.2020***

Coram:
SH. B.S.V. PRAKASH KUMAR, HON'BLE PRESIDENT

SH. S. K. MOHAPATRA, HON'BLE MEMBER (TECHNICAL)

PRESENT :

For the Applicant: Mr . Prashanto Chandra Sen , Sr . Advocate
Mr . Ashwini Kumar Singh, Advocate
Mr . Shivank Pratap Singh, Advocate

For Respondent: Mr. Rakesh Kumar Bajaj, Advocate
Mr. Rajesh Chand Sharma, Advocate

ORDER

S. K. Mohapatra, Member

1. This is an application filed by the Resolution Professional under Section 60 (5) read with Section 33 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the "Code") with the following prayers:

a. pass an order for annulment of the Resolution Plan approved vide order dated 15.05.2019 passed in C.A. No. 503 (PB)/ 2019 in C.P. No. (IB)-197 (PB)/2017;

b. pass an order for forfeiture of the Performance Security of Rs. 5 Crore provided by the Resolution Applicant;

c. Pass an order for liquidation of the Corporate Debtor under Section 33 (1) of the Insolvency and Bankruptcy Code, 2016;

d. Pass an order for the discharge of the erstwhile Resolution Professional for the purposes of Liquidation;

e. Pass an order for the appointment of Mr. Ramchandran Subramanian, Registration Number:

IBBI/IPA-001/IP-P01440/2018-2019 / 12136 as the Liquidator for the Corporate Debtor.

f. pass an order directing that the Bank Guarantees submitted by the Corporate Debtor should not be encashed.

g. Pass any other order or reliefs as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case.

2. The facts in brief necessary for disposal of the present application are that one of the Financial Creditors, namely, Edelweiss Asset Reconstruction Company Limited had preferred an application under Section 7 of the Code for initiation of corporate resolution process against M/s Tecpro Systems Limited ("Corporate Debtor"). The application was admitted on 7th August, 2017 imposing moratorium under Section 14 of the Code and the applicant, Mr. Venkatesan Sankaranarayan was appointed as the Interim Resolution Professional. In the first Committee of Creditors meeting held on 13.09.2017 the applicant Interim Resolution Professional was appointed as the Resolution Professional.

3. Respondent No. 1 M/s Kridhan Infrastructures Private Limited had submitted an updated Resolution Plan in respect of Corporate Debtor, which was approved by the Committee of Creditors in their 15th CoC meeting held on 08.03.2019 with majority vote of 89.92%. Subsequently the Adjudicating Authority also approved the resolution Plan under Section 31 of the Code vide order dated 15.05.2019.

4. It has been alleged that there has been inordinate delay in implementation of the Resolution Plan, as the successful resolution applicant, M/s Kridhan Infrastructures Private Limited has miserably failed to infuse equity funds as per the terms of the Resolution Plan. Besides the successful resolution applicant has not taken over the control of management even after passage of long about 8 months from the date of approval of the resolution plan. It is alleged that the secretarial compliance documents/ returns have not been filed with the RoC. There has been non-compliance and non-implementation of the approved resolution plan.

5. It is submitted that after due deliberations and pursuant to its meeting held on 11th November 2019 and being satisfied of the non-compliance in relation to

implementation of Resolution Plan by Resolution Applicant, the erstwhile CoC members have asked the Resolution Professional to put the following resolutions for vote which was passed with requisite majority of 99.28% voting shares.

"Resolution for Liquidation of Corporate Debtor:

RESOLVED THAT due to inordinate delay in implementation of the Resolution Plan of Techpro Systems Limited ("Corporate Debtor") by Kridhan Infrastructures Private Limited, the successful Resolution Applicant ("RA") and non-compliance thereby, it is not feasible or viable to grant any further extensions or expect implementation of the said Resolution Plan and consequently liquidation proceedings of the Corporate Debtor shall be initiated in terms of the applicable provisions of law.

RESOLVED FURTHER THAT pursuant to Regulation 36B(4A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persona) Regulations, 2016 the Performance Guarantee of Rs. 5 Crores submitted by Kridhan

Infrastructures Private Limited be forfeited and appropriated as per terms of the same.

RESOLVED FURTHER THAT the erstwhile Resolution Professional be and is hereby authorised to take necessary steps for filing application before the Adjudicating Authority for annulment of the successful Resolution Plan and for an application for liquidation of the Corporate Debtor under Section 33 of the Insolvency and Bankruptcy Code, 2016 and for any other proceedings related or incidental to the matter.

Resolution for appointment of Liquidator:

"RESOLVED THAT subject to the order of the Adjudicating Authority under Section 34 of the Insolvency and Bankruptcy Code, 2016, Mr. Ramachandran Subramanian, Registration Number:- IBBI /IPA- 001/ IP-P01440/ 2018-2019 /12136 shall act as the liquidator during the liquidation of the Corporate Debtor.

RESOLVED FURTHER THAT pursuant to Section 34(8) of the Insolvency and Bankruptcy Code, 2016,

Regulation 39D of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the fee payable to the Liquidator and support team (EY Restructuring LLP) shall be as approved by the erstwhile CoC as follows:

		Months	
Fees as a % of Receipts from	0-12	12-24	More than 24
Sale of Fixed Assets	1.00% of the amount realized	0.75% of the amount realized	0.50% of the amount realized
Return of live BGs	0.50% of the amount returned		

		Months	
Fees as a % of Receipts from	0-24	24-60	More than 60
Arbitration proceedings/ claims/projects recovery	1.25% of the amount realized	1.00% of the amount realized	0.75% of the amount realized

Note:

. *OPE, GST and other taxes as applicable, is not included in the above fee proposal and will be billed in addition to the above.*

. *Fee also does not include cost of any External Advisors such as Legal, Valuation, Bid Process Advisory, etc. basis the provisions of the Code.*

. *Fee also does not include employee salaries (Corporate Office & Project Sites) which are required for maintaining Going Concern status of the Company.*

Resolution for approval of liquidation costs:

RESOLVED THAT Regulation 2A of IBBI (Liquidation Process) Regulations, it is hereby approved to contribute the excess of the liquidation costs over the liquid assets of the corporate debtor, as estimated by the liquidator, in proportion to the financial debts owed to the lenders by the Corporate Debtor, and the contributions shall be deposited in a designated escrow account to be opened and maintained in a scheduled bank,

within seven days of the passing of the liquidation order as given below:

Particulars (in INR)	Estimated for Liquidation Process
Liquidators & Support team	To be approved by CoC
OPE for Liquidator and team (against actuals)	13,00,000
RP's Legal Counsel	20,62,500
IT Services Provider	4,09,500
Statutory Audit Fees	12,00,000
Liquidation Process costs*	11,00,00
Others	1,50,000
Sub-Total (A)	62,22,000
Salaries, admin overheads and statutory dues	59,06,394
Admin Overheads	34,64,000
Fees for continuing arbitration proceedings	1,00,00,000
Sub-Total (B)	1,93,70,364
Total (A+B)	2,55,92,394

Liquidation Process costs includes fees for liquidation valuers, public announcements costs, EOI costs, MCA Filing fees etc.

Resolution for RP to continue till further order the Adjudicating Authority

RESOLVED THAT the erstwhile RP Mr. Venkatesan Sankaranarayan, to act as the Resolution Professional from the date of filing of the liquidation application with the Adjudicating Authority until further orders/ directors, as may be, received from Adjudicating Authority."

6. During hearing on 18.12 2019 an opportunity was afforded to respondent No. 1 to 3 to file reply within one week thereof. However, neither any reply was filed nor it could be shown as to how the approved resolution plan could at all be implemented.

7. Admittedly the resolution applicant has failed to adhere to any of their timelines for equity infusion even after a period of about 8 months since approval of the resolution plan. There is force in the contention that the respondents

have repeatedly failed to honour their own commitments and there was delay in infusion of equity, upfront payment and taking control of the management of the Corporate Debtor, which has threatened the going concern status of the corporate debtor severely.

8. In the facts the erstwhile CoC in its meeting held on 11.11.2019 has passed a resolution for liquidation of the Corporate Debtor with overwhelming majority of 99.28% voting share.

9. It is pertinent to refer here the provisions of sub-section (3) of Section 33 of the Insolvency and Bankruptcy Code, 2016 which envisages as follows:

> *"(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1)."*

10. Hon'ble NCLAT in the case of *Yavar Dhala Vs JM Financial Asset Reconstruction Company Ltd. & Ors. in* Company Appeal (AT) (Ins) no. 13 of 2019 decided on 08.03.2019 has observed that on failure of the Resolution Applicant to implement the terms of the resolution plan, liquidation has to follow. The relevant findings of the Hon'ble Appellate Tribunal runs as under:

> *"3. In the situation where a Resolution Applicant succeeds as Corporate Debtor but if fails to comply its assurance in terms of the resolution plan, what step is to be taken has been already been laid down in Sub-section (3) of Section 33 of the I&B Code, which reads as follows:-*
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> > *"33. (3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as*

referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).”

4. In view of the specific provision made under the I&B Code, we are of the view that the Adjudicating Authority had no option but to pass order of liquidation and could not have resorted to revival of the Corporate Debtor by taking fresh resolution plans.”

11. Adherence to statutory requirement has to be in toto. When the language of the Code is clear and explicit the Adjudicating Authority must give effect to it whatever may be the consequences.

12. As a sequel to the aforesaid discussions and in view of non-implementation of the approved resolution plan by Resolution Applicant; Liquidation has to follow in terms of the provisions of Section 33 (3) of the Code.

13. There is also a prayer in the application that the performance guarantee of Rs. 5 Crore furnished by the successful resolution applicant may be forfeited in terms of Regulation 36B (4A) of CIRP Regulations. The successful resolution applicant M/s Kridhan Infrastructures Private

Limited has submitted a performance guarantee of Rupees Five Crores in the corporate debtor's Escrow Account on 13.06.2019.

14. Regulation 36B (4A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides as follows:

> *"(4A) The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule."*

15. Regulation 36B (4A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 clearly provides that performance security shall stand forfeited if the resolution

applicant fails to implement the approved resolution plan in accordance with the terms of the plan and its implementation schedule. Therefore, as the respondent resolution applicant has failed to implement the approved resolution plan, the performance guarantee of Rs. 5 Crore furnished by the respondent resolution applicant stands forfeited in terms of Regulation 36B (4A) of CIRP Regulations.

16. There is an additional prayer for restraining the encashment of the bank guarantees executed by the corporate debtor. However, the concerned banks and the recipients of the performance guarantees have not been made party. This prayer, therefore, cannot be considered at the back of the recipients of the bank guarantees without giving opportunity of hearing to them. The liquidator, however, is given liberty to file proper application on the self-same issue, if so advised.

17. In the result the company application is partly allowed by ordering liquidation of the corporate debtor, namely Tecpro Systems Limited in the manner laid down in the

Chapter III of Part II of the Insolvency and Bankruptcy Code, 2016 along with following directions:

a. As proposed by CoC, Mr. Ramchandran Subramanian, Registration Number: IBBI/IPA-001/IP-P01440/2018-2019 / 12136, is appointed as Liquidator in terms of Section 34(1) of the Code;

b. Mr. Ramchandran Subramanian is directed to issue Public Announcement stating that the corporate debtor is in liquidation, in terms of Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016;

c. The Registry is directed to communicate this Order to the Registrar of Companies, NCT of Delhi & Haryana and to the Insolvency and Bankruptcy Board of India;

d. Fresh Moratorium in terms of Section 33(5) of the Insolvency and Bankruptcy Code shall commence;

e. The Liquidator shall explore the possibilities to continue the business of the corporate debtor as a going concern during the liquidation process.

f. The Liquidator is directed to proceed with the process of liquidation in the manner laid down in Chapter III of Part II of the Insolvency and Bankruptcy Code, 2016 and in accordance with the relevant regulations.

g. The liquidator shall investigate the financial affairs of the corporate debtor in accordance with provisions of Section 35 (l) of the Code.

h. The liquidator shall also follow up the pending company applications, if any, for its disposal during the process of liquidation.

i. The Liquidator shall submit a Preliminary Report to the Adjudicating Authority within seventy-five days from the

liquidation commencement date as per Regulation 13 of the Insolvency and Bankruptcy (Liquidation Process) Regulations, 2016.

j. The performance guarantee of Rs. 5 Crore furnished by the respondent resolution applicant stands forfeited in terms of Regulation 36B (4A) of CIRP Regulations.

k. C.A. 2683 (PB) /2019 filed in IB- 197 (PB)/ 2017 is disposed of in the aforesaid terms.

Let copy of this order be sent to the parties including the Liquidator.

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(B.S.V. PRAKASH KUMAR)
PRESIDENT

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(S.K. MOHAPATRA)
MEMBER (TECHNICAL)

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