IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

Coram: MR. AJAY KUMAR VATSAVAYI, HON'BLE JUDICIAL MEMBER
MR. RAGHU NAYYAR, HON'BLE TECHNICAL MEMBER

IA No. 221/JPR/2020
In
CP No. 166/9/JPR/2019

UNDER SECTION 9 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

IN THE MATTER OF

Sahil Agarwal ...**Operational Creditor**

VERSUS

Khati Design Private Limited ...**Corporate Debtor**

AND IN THE MATTER OF

IA No. 221/JPR/2020

Satyendra Prasad Khorania,
Resolution Professional of Khati Design Private Limited
Office at: 402, 4th Floor, OK Plus DP Metro,
Opp. Pillar No. 94, New Sanganer Road,
Jaipur-302019, Rajasthan

...**APPLICANT**

Versus

1. **Shabeeh Ahmed**
   14, Jai Singh Nagar Shiv Vatika,
   Jai Singhpura Shekhawatan,
   Jaipur- 302027

2. Alon Molay
5, Laxman Singh House, Barwara Colony,
Ajmer Road, Jaipur- 302001

For the Applicant: Mr. Amol Vyas, Adv.

Order Pronounced On: 18.02.2021

ORDER

Per: Shri Raghu Nayyar, Technical Member

1. This Application bearing IA No. 221/JPR/2020 is filed by the Resolution Professional for Khati Design Private Ltd ('Applicant' / 'RP') under Section 33 and Section 34 of the Insolvency and Bankruptcy Code, 2016 ('Code') for passing an order of Liquidation against Khati Design Private Ltd ('Corporate Debtor'). It is seen that the Applicant had impleaded the directors of the Corporate Debtor as parties in the instant IA. As the Company was under CIRP, the said directors have no role to play and their inclusion in the array of parties is irrelevant and inconsequential. The instant IA is considered accordingly.
2. The Adjudicating Authority vide order dated 27.09.2019 had admitted the application filed by Sahil Agarwal under Section 9 of the Code for initiation of Corporate Insolvency Resolution Process ('CIRP') of Corporate Debtor and as a consequence thereof appointed Mr. Satyendra Prasad Khorania as Interim Resolution Professional ('IRP').

3. In compliance with provisions of the Code, the IRP constituted the Committee of Creditors ('CoC'). The 1st meeting of CoC was held on 01.11.2019, wherein the CoC unanimously appointed the IRP as the Resolution Professional ('RP') and the same was confirmed by this Adjudicating Authority vide order dated 08.11.2019. It is also seen that the RP had appointed two registered valuers to determine fair and liquidation values in accordance with Regulation 35 of the CIRP Regulations, 2016.
4. It is submitted that the RP had initially effected publication of Form G on 18.11.2019 and invited Expression of Interest ('EOI') for submitting resolution plan for the Corporate Debtor and two EOIs were received, however no resolution plan was received. In the 3rd CoC meeting held on 21.05.2020, the RP proposed to re-issue and re-publish Form G and extend the date of submission of EOI; however, the CoC with 100% voting rejected the same and resolved to liquidate the Corporate Debtor. Copy of the minutes of the 3rd meeting of CoC is annexed as Annexure 4 of the Application.
5. We have carefully heard and considered the arguments of the learned counsel for the RP and have also perused the records. Taking into consideration the above facts in relation to the affairs of the Corporate Debtor, the provisions of Section 33 of IBC, 2016 are as follows: -

"33. Initiation of liquidation. –

(1) Where the Adjudicating Authority, -
(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast-track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30;
or
(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein,
it shall -
(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;
(ii) issue a public announcement stating that the corporate debtor is in liquidation;
and
(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) where the resolution professional at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the adjudicating authority of the decision of the committee of creditor approved by not less than sixty-six percent of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clause (i), (ii) and (iii) of clause (b) of Sub-Section (1)".

6. The Hon'ble National Company Law Appellate Tribunal ('NCLAT'), in *Praveen Kumar Nanda Kumar Vs. VSL Securities Pvt. Ltd.* in CA No. 1/2020 in CA No. 308/2000, dated 09.06.2020, observed as under: -

"Likewise, the decision of the COC recommending liquidation of the corporate debtor after proper evaluation of the assets and liabilities of corporate debtor with no Resolution Plan forthcoming would be a business decision falling within the domain of commercial wisdom of the COC which is not amenable to judicial review."

However, it is to be seen whether the relevant application is filed within stipulated time lines and as per applicable procedure.

7. **Prescribed period for filing application** - In the present case, the application under Section 9 of the Code was admitted on 27.09.2019 and the present application is filed by the RP on 20.08.2020. Accordingly, the date for completion of CIRP was 25.03.2020.

8. In view of emerging situation of COVID-19 pandemic, the Hon'ble Supreme Court of India in *Suo Motu Writ Petition (Civil) No(s). 3/2020 in Re: cognizance for extension of Limitation*, vide order dated 23.03.2020, passed the following order: -

> *"This Court has taken Suo Motu cognizance of the situation arising out of the challenge faced by the country on account of Covid-19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/ appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State).*
>
> *To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.*
>
> *We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities.*

This order may be brought to the notice of all High Courts for being communicated to all subordinate Courts/Tribunals within their respective jurisdiction.
Issue notice to all the Registrars General of the High Courts, returnable in four weeks."

9. The Hon'ble NCLAT in *Suo Moto-Company Appeal (AT) (Insolvency) No. 01 of 2020* vide order dated 30.03.2020, observed as under: -

"Upon requests for urgent listing of cases having been made telephonically to Registrar of this Appellate Tribunal from various persons, who were unable to physically file the same on account of complete lockdown declared by Government with effect from 25th March, 2020, we take suo moto cognizance of the unprecedented situation arising out of spread of COVID19 virus declared a pandemic. Having regard to the hardships being faced by various stakeholders as also the legal fraternity, which go beyond filing of Appeals/ cases, which has already been taken care of by the Hon'ble Apex Court by extending the period of limitation with effect from 15th March, 2020 till further order/s in terms of order dated 23rd March, 2020 in Suo Motu Writ Petition (Civil) No(s).03/2020, inasmuch as certain steps required to be taken by various Authorities under Insolvency and Bankruptcy Code, 2016 or to comply with various provisions and to adhere to the prescribed timelines for taking the 'Resolution Process' to its logical conclusion in order to obviate and mitigate such hardships, this Appellate Tribunal in exercise of powers conferred by Rule 11 of National Company Law Appellate Tribunal Rules, 2016 r/w the decision of this Appellate Tribunal rendered in "Quinn Logistics India Pvt. Ltd. vs. Mack Soft Tech Pvt. Ltd. in Company Appeal (AT) (Insolvency) No.185 of 2018" decided on 8th May, 2018 do hereby order as follows: -
(1) That the period of lockdown ordered by the Central Government and the State Governments including the period as may be extended either in whole or part of the country, where the registered office of the Corporate Debtor may be located, shall be excluded for the purpose of counting of the period for 'Resolution Process under Section 12 of the Insolvency and Bankruptcy Code.

> *2016, in all cases where 'Corporate Insolvency Resolution Process' has been initiated and pending before any Bench of the National Company Law Tribunal or in Appeal before this Appellate Tribunal."*

10. Thereafter, the Insolvency and Bankruptcy Board of India ('IBBI'), inserted Regulation 40C to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, vide notification dated 29.03.2020 and the same is as under:-

> "***40C. Special provision relating to time-line***
> *Notwithstanding the time-lines contained in these regulations, but subject to the provisions in the Code, the period of lockdown imposed by the Central Government in the wake of COVID-19 outbreak shall not be counted for the purposes of the time-line for any activity that could not be completed due to such lockdown, in relation to a corporate insolvency resolution process."*

11. Similarly, the IBBI vide notification dated 20.04.2020, inserted Regulation 47 A to the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 and the said regulation reads as under: -

> "***Exclusion of period of lockdown***
> *47A. Subject to the provisions of the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purpose of computation of the timeline for any task that could not be completed due to such lockdown, in relation to any liquidation process."*

12.In the circumstances, despite considering exclusion till 30.06.2020, and even in exceptional circumstances further exclusion of CIRP period till 31.07.2020, the instant Application and approval for filing the same by the CoC is beyond the CIRP period. There is no narration of, or prayer for, further exclusion or extension in the instant or any other application(s). In view thereof the Application under consideration is taken up under Section 33(1). Irrespective of the applicable sub-section under Section 33, this leads to liquidation of the Corporate Debtor.

13.**Appointment of Liquidator and fee to be paid–** Section 34(1) of the Code provides that where the Adjudicating Authority passes an order for liquidation of the Corporate Debtor under Section 33, the resolution professional appointed for the corporate insolvency resolution process shall, subject to submission of written consent act as the Liquidator for the purpose of liquidation. The relevant provisions of Section 34(1) of the Code are as follows: -

"(1) Where the Adjudicating Authority passes an order for liquidation of the corporate debtor under Section 33, the resolution professional appointed for the corporate insolvency resolution process under Chapter II shall, subject to submission of written consent by the resolution professional to the Adjudicating Authority in specified form, shall act as the liquidator for the purpose of liquidation unless replaced by the Adjudicating Authority under sub-section (4)."

14.The present RP Mr. Satyendra Prasad Khorania is eligible to be appointed as Liquidator. The CoC had resolved to appoint the RP as the

Liquidator. However, it is noted that liquidation proceedings herein, albeit not at the instance of CoC, due to expiry of CIR period, are automatically initiated due to prescription of statute. We do not find any reason to replace the existing RP. Mr. Satyendra Prasad Khorania, Resolution Professional with IBBI Registration No. IBBI/IPA-002/IP-N00002/2016-17/10002 has filed his consent in Form -AA dated 21.05.2020 (Annexure A-5). The credentials of the proposed Liquidator have been checked from IBBI website (www.ibbi.gov.in) and nothing adverse is found on record. Thus, Mr. Satyendra Prasad Khorania is appointed as the Liquidator.

15. It is noted that status of the CoC members is rather uncertain after expiry of the CIR period. However, the Liquidator has to deal with the constituent members in their capacity as creditors. It is also seen that Regulation 39B, 39C and 39D in the CIRP Regulations, 2016 have been inserted by Notification No. IBBI/2019-20/GN/REG/048 dated 25.07.2019. Relevant aspects in this respect are examined hereunder.

16. **Liquidation Cost (Regulation 39B of CIRP Regulations, 2016)** – The COC in its 4th meeting held on 01.07.2020 has not decided the estimated liquidation cost and decided that the liquidation costs will be taken on actual basis which will be approved by the stakeholders committee formed during the liquidation of the Corporate Debtor. The Liquidator is, therefore, directed to take necessary action under Regulation 2A of

the IBBI (Liquidation Process) Regulations, 2016 regarding contributions to liquidation costs.

17. **Assessment of Sale as a going concern (Regulation 39C of CIRP Regulations, 2016)** – The RP apprised the COC in its 4th meeting about Regulation 39C of CIRP Regulation, 2016. The members of CoC discussed and rejected the resolution to sell the Corporate Debtor as a going concern, as first option, or sell the business(s) of the Corporate Debtor as a going concern, as second option, before exploring other options as per Regulation 32 & 32A of IBBI (Liquidation Process) Regulations, 2016 and Regulation 39C of CIRP Regulations, if an order of liquidation is passed by the Adjudicating Authority. The RP explained that the Corporate Debtor has no plant and machinery for production and to run the unit. The unit has already been closed and it is not a going concern. The CoC with 100% voting share discussed that it is not possible to sell it as a going concern and that resolution was not passed by them.

18. **Fees of the Liquidator (Regulation 39D of CIRP Regulations, 2016)-** The CoC in its 5th meeting while passing a resolution for the fees of the Liquidator as per Regulation 39D of CIRP Regulations, the representatives of Bank of Baroda stated that the fees of Liquidator shall be in following percentage of the amount realized and distributed:

    a. 3% in the first six months of the Liquidation order,

b. 2% after six months but before 12 months of the Liquidation order and

c. 1% after 12 months of the Liquidation order;

wherein 50% of fees shall be paid on realization and remaining 50% shall be paid on distribution of the liquidation proceeds. The representatives of Bank of Baroda informed that they have decided not to enforce the security interest and will relinquish the security interest at the time of liquidation. Further, the representative of Tata Capital Financial Services Limited informed that they might enforce the security interest at the time of liquidation. The resolution that in case the secured financial creditor opts to not relinquish its security interest then the remuneration of the Liquidator be Rs. 1,00,000/- p.m. until dissolution of the Corporate Debtor was rejected unanimously by the members of the CoC.

19. In view of the satisfaction of the conditions provided under Section 33(1) of the Code, the Corporate Debtor, Khati Design Private Limited is directed to be liquidated in the manner as laid down in Chapter III of the Code. The contextual directions inter-alia include: -

(i) As per Section 33(5) of the Code and subject to Section 52 of the Code, no suit or other legal proceedings shall be instituted by or against the Corporate Debtor;

Provided that a suit or other legal proceedings may be instituted by the Liquidator on behalf of the Corporate Debtor, with the prior approval of the Adjudicating Authority; and

(ii) The provisions of sub-section (5) of Section 33 of the Code shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator; and

(iii) This order of liquidation under Section 33 of the Code shall be deemed to be a notice of discharge to the officers, employees and workmen of the Corporate Debtor, except when the business of the Corporate Debtor is continued during the liquidation process by the Liquidator; and

(iv) All the powers of the Board of Directors, key managerial personnel and the partners of the Corporate Debtor, as the case may be, shall cease to have effect and shall be vested in the Liquidator; and

(v) The personnel of the Corporate Debtor shall extend all assistance and cooperation to the Liquidator as may be required by him in managing the affairs of the Corporate Debtor and provisions of Section 19 of the Code shall apply in relation to liquidation process as they apply in relation to CIR process with the substitution of references to the Interim Resolution Professional for references to the Liquidator; and

(vi) The Liquidator shall publish public announcement in accordance with Regulation 12 of the IBBI (Liquidation Process) Regulations, 2016 and in Form B of Schedule II of these Regulations within five days from receipt of this order calling upon the stake holders to submit their claims as on liquidation commencement date and provide the last date for submission of claim which shall be 30 days from the liquidation commencement date; and

(vii) In accordance with Regulation 13 of the IBBI (Liquidation Process) Regulations, 2016, the Liquidator shall file his preliminary report within 75 days and shall file regular progress reports as per Regulation 15.

20.**Pending Applications, if any, and its / their effect-** It is seen that following IAs filed by RP before the Adjudicating Authority are pending:

Sr. No.	IA NO.	SECTION	PRAYER
1	IA No. 406/JPR/2019	Under Section 19(2) of Code	To direct the Suspended Directors of the Corporate Debtor to provide all documents in record and also to cooperate with the RP.
2	IA No. 132/JPR/2020	Under Section 43 & 66 of Code	• To declare certain transactions as preferential transaction and also to

			direct the respondent to reverse back such transactions. • To declare certain transactions as fraudulent transactions and also direct the Respondents to reverse such transactions.

Since the above stated pending **IA No. 406/JPR/2019 and IA No. 132/JPR/2020** have bearing on the issues in liquidation proceedings, they are directed to be listed along with the CP No. (IB)- 166/9/JPR/2019 when the matter is next placed before this Adjudicating Authority. If so advised, the Liquidator may move appropriate applications for prosecution of the said applications by a suitable person / entity instead of the RP and the Liquidator is not precluded from carrying on the said proceedings.

21. It is seen that IA No. 110/JPR/2020 was filed by the RP to report the minutes of 2nd meeting of CoC. The same was last listed on 06.03.2020 but could not be taken up further and is pending. Further, the RP has filed IA Nos. 140/JPR/2020, 156/JPR/2020 and 205/JPR/2020 to report the minutes of 3rd, 4th and 5th meetings of the CoC, respectively. The items of the said meetings of CoC and aspects related thereto have been considered in this Order. The same are not required for any further reference. Thus, IA Nos. 110/JPR/2020, 140/JPR/2020, 156/JPR/2020

and 205/JPR/2020 are also disposed of along with this order in IA No. 221/JPR/2020.

22.In view of the foregoing, IA No. 221/JPR/2020 is disposed of. Copy of this order be supplied to the counsel for the Liquidator as well as to the Registrar of Companies, Jaipur, forthwith. The Registry is also directed to send a copy of this order to the Liquidator at his e-mail address.

Sd

Mr. RAGHU NAYYAR,
MEMBER (TECHNICAL)

Sd

Mr. AJAY KUMAR VATSAVAYI,
MEMBER (JUDICIAL)