

IN THE NATIONAL COMPANY LAW TRIBUNAL  
CUTTACK BENCH  
CUTTACK

MA No.32/CTB/2020  
IN  
TP No. 01/CTB/2020  
CP (IB) No. 1283/MB/2017

In the matter of IBC Code, 2016

And

Miscellaneous Application under Section 60(5) read with Section 74 (3) of the  
Insolvency and Bankruptcy Code, 2016;

And

In the matter of:

State Bank of India, a body corporate constituted by and under the State Bank of  
India Act, 1955 with its head office at madame Cama Road, Nariman Point,  
Mumbai, Maharashtra 400 021 and having its branch office at Stressed Assets  
Management Branch State Bank Building, First Floor, Plot No. 01, Area hills,  
Bhopal – 462 011, Madhya Pradesh;

... **Applicant**

-Versus-

1. Tricounty Premier Hearing Services LLC, having its registered office at 707 Oaks  
Shores Road, Leesburg, Florida 34748 USA and 1004 North 14<sup>th</sup> Street, STE 109  
Leesburg, Florida 34748;

... **Respondent No. 1**

2. Mr. Parvesh Khirbat, Director of Respondent No. 1, having his place of  
Residence at 707 Oaks Shores RD Leesburg, Florida;

... **Respondent No. 2**

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IN

In the matter of:

Axis Bank, a body corporate constituted by and under the Banking Companies with its head office at Wadia International Centre, PB Marg, Worli, Mumbai.

... **Financial Creditor**

And

BSR Diagnostic Limited, a public company incorporated under the laws of India with its registered office at 15-Commercial Complex, Nehru Nagar (East) Bhilai-490 020;

... **Corporate Debtor**

**Appearances** (via video conference):

For the Applicant

Mr. Joy Saha, Sr" Adv"  
Mr. J. Mukherjee, Adv"  
Mr. Abhishek Sharma, Adv.

For the Respondent

Mr. S. K. Acharya, Adv.

Order Reserved on: 28.02.2022.

Order Pronounced on: 09.03.2022.

**Coram:**

Shri P. Mohan Raj	:	Member (Judicial)
Shri Satya Ranjan Prasad	:	Member (Technical)

**ORDER**

*Per P. Mohan Raj, Member, (Judicial)*

1. This Application is filed by Applicant State Bank of India one of the members of COC praying to pass an order of liquidation of the corporate debtor under section 33(1) of IBC and pass penal order under section 74(3) of IBC against the successful resolution applicant & its director.

Averments made in the petition in brief:

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2. The Axis Bank filed the petition under section 7 of Insolvency and Bankruptcy Code 2016 before NCLT-Mumbai Bench in CP. No. (IB) 1283 (MB)/2017 against the corporate debtor BSR Diagnostic Limited the same was admitted on 29.07.2017 and Mr. Sundaresh Bhat was appointed as the interim Resolution professional. The resolution professional filed an application MA.No.649 of 2018 on 27.05.2018 for liquidation of corporate debtor when the resolution plan submitted by the respondent failed to get requisite number of votes in COC meeting held on 26.05.2018. On 19.07.2018 the 1<sup>st</sup> respondent filed an application MA.No.736 of 2018 and suspended promoters/directors of corporate debtors filed application MA.No.737 of 2018 opposing the liquidation application filed by the Resolution professional. The respondent filed revised plan on 23.08.2018 increasing the quantum payable to the secured creditors from Rs.38 crore to Rs.45 crore, the said enhanced offer amount was acceptable to the petitioner. Then as per the order of Tribunal dated 12.10.2018 the Resolution professional placed the revised resolution plan before COC for consideration the same was accepted by COC by 99.4758% votes. The resolution professional filed an application on 14.11.2018 in MA.No.1352 of 2018 for approval of revised resolution plan and another MA No.1351 of 2018 to withdraw the liquidation application MA.No.649 of 2018. The Tribunal on 22.01.2019 approved the revised resolution plan, appointed monitoring committee and allowed MA.No.1352 of 2018 and dismissed the MA.No.649 of 2018. In pursuant to the approved plan the respondent taken over the control of corporate debtor from the resolution professional on 06.02.2019. As per the approved plan the respondent agreed to pay

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upfront cash amount of Rs.12 corers within sixty days from the date of approval of plan but he failed to comply this condition. That despite taking control of corporate debtor the 1<sup>st</sup> respondent failed to fulfil its commitments and deliberately neglected to honour the timelines of approved plan. The monitoring agency also filed periodical reports about the default of the respondent in complying the payment condition set out in the approved resolution plan. The respondent failed to fulfil its obligation therefore the applicant files this application for ordering the initiation of liquidation proceeding against the corporate debtor, and praying to punish the respondents under section 74(3) of IBC 2016 for the wilful contravention of approved resolution Plan.

Averments made in the reply in brief:

3. The 1<sup>st</sup> respondent successful resolution applicant is incorporated in Leesburg, Florida, USA and is one of leading hearing aids distributors in Florida. M/S Tri Country Private limited is an Indian subsidiary/associate concern of the respondent having its registered office at Mumbai. The respondent has not been able to render payments to various creditors as per the provisions of the approved resolution plan due to reasons beyond its control. The respondent has paid the entire CIRP Costs in full and paid the entire dues of employees and workmen of the corporate debtor. The respondent could not get financial partner to support and could not arrange funds due to inevitable incident causing the delay in payments to the creditors. Many payments were made to the financial and operational creditors of the corporate debtor. The respondent has filed I.A.No.58/CTB/2020 for revision of the timelines for payment to various creditors. The respondent had

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been trying to overcome unanticipated flaws in the process so far which includes (I) 3 months delay in getting the approval of plan by Hon'ble Tribunal, (ii) arising obligation of almost entire payments of Rs.50.00 crore within 60-70 days of the time(iii) unavailability of funds through the financial partner (iv)unexpected expenses of overhauling of the equipment's to ensure the operation of corporate debtor on going. The respondent has shown their bono fide intention by appropriating Rs.12 crores to the creditors after this application for liquidation is filed. The penal proceeding under section 74(3) is not maintainable before this Tribunal and prayed for the dismissal of the petition. On the respondents side several additional affidavits are filed but the contents of them are not germane to dispose of this application.

4. On the Erstwhile Resolution professional side filed the written submission supporting the claim of the applicant and declined to give consent to appoint him as Liquidator in the event of petition is allowed.

The Point for consideration is:

Whether the liquidation order to be passed against the corporate debtor

PointNo.1

5. The respondent submitted his resolution plan and got the approval of Tribunal on 23.03.2019. The prime allegation levelled against the respondent is that it failed to honour the time schedule payment made in the approved resolution plan, it is also alleged because of delay caused by the respondent the liquidation value of the corporate debtor also considerably reduced. As per the approved plan the respondent has to make the payment of Rs.45 crores towards the secured

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financial debt in the following manner viz: A sum of Rs.12 crores within sixty days from the date of approval of resolution plan. A sum of Rs.26 crores on before 31.03.2019. A sum of Rs.3 crores by 31.03.2020 with 8% interest and Rs.4 crores by 31.03.2021 with 8% interest. Admittedly the respondent not complied the payment condition as set out in the approved plan. The erstwhile Resolution profession also given details of default committed by the respondent in his periodical report as a member of monitoring committee. This petition is filed on 17.09.2019, after that thrice this Tribunal granted time extension to make the payments as agreed in the resolution plan.

6. The respondent filed CA No.58/CTB/2020 seeking time extension of six months i.e., up to 31.10.2021 to complete implementation of the Resolution plan. This Tribunal after hearing all the parties concern on 12.04.2021 granted time extension till 07.06.2021. While granting time extension this Tribunal ordered out of Rs.30 crore the respondent shall pay Rs.20 crore on or before 07.06.2021 to show their bono fide, but respondent failed to comply the said specific condition. Again on 20.09.2021 while disposing CA No.58/CTB/2020 of 2021 this Tribunal observed that the conduct of the respondent/successful resolution applicant is completely lacking bono fides and successful resolution applicant has grossly failed in meeting its commitment in respect of implementation of the Resolution Plan however as a last opportunity granted time extension till 31.10.2021.

7. The respondent again filed an application I.A.No.115/CB/2021 seeking time extension for compliance till 30.11.2021, but this Tribunal declined to

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grant time extension in consequence the said application was dismissed on 24.11.2021.

8. The respondent preferred an appeal against the order of this Tribunal Passed in I.A.No.115/CB/2021 dated 24.11.2021 before the NCLAT in Company Appeal (AT)(Insolvency) No.1038 of 2021. The Hon'ble NCLAT by order dated 20.01.2021 allowed the said appeal and granted 30 days' time to pay Rs.30 crores to financial Creditors till 20.02.2022. Further the Hon'ble NCLAT also observed in the order that if the respondent herein fails to pay the said amount it is open to proceed with the liquidation of corporate debtor. The respondent failed to comply the order of the NCLAT, has not paid any amount till this date.

9. The respondent ought to have been paid Rs.45 crores on or before 31.03.2021 and a sum of Rs.3 crores with 8% interest on or before 31.03.2020. However, the same has not been done. Till the date only around Rs.15 crore was paid by the resolution Applicant. Even though the respondent attributed certain reasons for non-compliance of Resolution Plan such as sharp writing down of the trade receivables on the balance sheet of corporate debtor, Non-cooperation of the creditors, Issues pertaining to the various centres of the Corporate debtor, Non-cooperation of financial partners, Non-cooperation of Resolution professional, Delay in opening separate Bank account etc; but all these aspects were considered by this Tribunal and passed a detailed order in I.A.No.58 of 2021 on 20.09.2021 so it is unnecessary again to discuss the very same points. The default is patent, in earlier disposed applications CA No.58/CTB/2020 and in I.A.No.115/CB/2021 it was clearly held that the act of the respondent is not bono fide. On the petitioner

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side stated that the Respondent/Resolution Applicant is enriching from equipment of the corporate debtor without implementation of the Resolution Plan. This petition is pending from 17.09.2019 for more than two years, pending this application thrice time extension was granted and even after the said extended period the Resolution Applicant could not comply the conditions hence without any other option this Tribunal is constrained to accept the plea of the petitioner and inclined to pass an order the liquidation of corporate debtor.

10. This petition has been filed quoting under section 60(5) of IBC 2016 Read with 74(3). On the respondent side questioned the correctness of the provision of law under which this petition is filed. Further it is stated that after the approval of resolution plan the application can be filed for liquidation only under section 33(3) & (4) of IBC for contravention any provisions of the resolution plan by the corporate debtor. It is stated that the liquidation application can be preferred only if the contravention of resolution plan is committed by the corporate debtor and not by the Successful Resolution Applicant.

11. It is settled law that quoting of incorrect provision of law is not fatal to the proceeding, in such a case the court can treat the application in appropriate section and pass suitable orders. Even though the application is filed under the caption under Section 60(5) 2016 R/W 74(3) but in the prayer column (a) prayed to pass an order of liquidation under section 33(1) of IBC.

12. As stated on the respondent side the provisions available to pass an order of liquidation by the adjudicating authority after the approval of Resolution plan is under section 33(3) & (4), for contravention of provisions of approved

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resolution plan by the concerned corporate debtor. The word corporate debtor is defined in section 3(8) of IBC 2016 as follows:

*“Corporate debtor” means a corporate person who owes a debt to any person;*

13. The definition covers both the corporate debtor and Successful resolution applicant of course in different stages. At the beginning of the insolvency proceedings, original promoters and the key managerial personnel of the corporate debtor are the ones who owe debt to the creditors. Once Resolution plan is approved, it is the successful resolution applicant who now owes a debt to other creditors and undertakes to pay them. Thus, the successful Resolution Applicant becomes the new corporate debtor to the creditors and the Resolution plan becomes binding on the new corporate debtor as per section 31(1) of IBC. When the Resolution plan is approved by the Adjudicating Authority, the successful resolution applicant who stepped into shoes of the corporate debtor having control and supervision over the finance of the company, so any contravention or violation of resolution plan by the Successful Resolution Applicant amounts contravention/violation by corporate debtor as mentioned in section 33(3) of IBC as such order of liquidation can be ordered for contravention of resolution plan by the Successful Resolution applicant under section 33(3) of IBC. The defence taken on the respondent side is unsustainable. Therefore, it is fit case to pass an order of liquidation thus the point is answered.

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14. On the petitioner side made a prayer to forfeit the amount of Rs.15 crores paid by the respondent, since for the past more than two years the respondent dodging to pay the balance amount of Rs.30/- corers in spite of conditional orders passed by this Authority, it is also stated that the respondents taken possession of the corporate debtor and running the business by using the premises and apparatus of the corporate debtor and substantially earned without fulfilling its obligation. Further it is alleged that the respondents have alienated or sold off the sophisticated machineries/assets of the Corporate Debtor. In contra on the respondent side submitted that the order of forfeiture cannot be passed in the absence any pleadings and very much relies upon the order of this Bench dated 09.07.2019 passed in Adhunik Metaliks Ltd. in T.P. No. 44/CTB/2019. In the said order this Authority after referring Regulation 36B(4A) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for corporate persons) Regulation 2016 held that since the said regulation enabling the Adjudicating Authority to forfeit the performance security amount was introduced by amendment w. e. f 24.01.2019 it has no retrospective effect in the case where resolution plan was approved year ago before the amendment.

15. In this case the question of forfeiting performance security amount does not arise but the respondent taken undue advantage of the of the procedure and from the beginning he committed default, the erstwhile resolution professional also filed periodical reports pointing out the default of the respondents but the respondent ignoring all these things without making payment started to earn by using the assets of the corporate debtor in such circumstances the depreciation and

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loss of value caused to the value of the corporate debtor should be suitably compensated. Hence in the interest of justice and to do complete justice we inclined to invoke inherent power of this Authority provided under Rule 11 of NCLT Rules 2016. Further the order of this Authority referred supra is no better after the pronouncement Judgment of Apex court in **Kridhan Infrastructure Pvt. Ltd. vs Venkatesan Sankaranarayan on 1 March, 2021: LL 2021 SC 139 Paragraph 11.**

*“The orders of the NCLT and NCLAT make it abundantly clear that despite the grant of sufficient time, the appellant has not been able to comply with the terms of the Resolution Plan. Since 9 October 2020, despite the passage of almost five months, the appellant has not been able to deposit an amount of Rs 50 crores. Time is a crucial facet of the scheme under the IBC. To allow such proceedings to lapse into an indefinite delay will plainly defeat the object of the statute. A good faith effort to resolve a corporate insolvency is a preferred course. However, a resolution applicant must be fair in its dealings as well. The appellant has failed to abide by its obligations. In that view of the matter, we see no reason or justification to entertain the Civil Appeal any further. The consequence envisaged under the order of this Court shall accordingly ensue in terms of*

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*the forfeiture of the amount of Rs 20 crores. As a consequence of this order, the management shall revert to the liquidator for taking steps in accordance with law. The Civil Appeal is accordingly dismissed."*

16. The above citation is applicable to the facts of this case also. In the circumstances we inclined to accept the plea made on the petitioner side to forfeit the amount deposited by the respondents.

17. On the applicant side prayed to pass an order under section 74(3) of IBC for taking penal action against the respondents. As pointed out on the respondent side as far as penal provision is concern under Section 236 (1) of IBC the special court alone has exclusive jurisdiction. Under section 236(2) IBC cognizance of an offence can be taken only on the complaint made by the Board or central Government. In the circumstances liberty is granted to the applicant to make appropriate complaint with the Insolvency and Bankruptcy Board of India or the Central Government on the allegation of wilful or intentional default and to pursue the appropriate remedy for the offences, if any committed by the respondents.

18. In the result the Application is allowed in respect of prayer (a) M/s BSR Diagnostic Limited, corporate debtor is ordered to be liquidated.

19. The erstwhile Resolution professional Mr. Sundresh Bhat, expressed his inability to give consent to appoint as liquidator and made a request to discharge

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him. In view of section 34(4) of IBC 2016 the Erstwhile Resolution Professional Mr. Sundresh Bhatt is discharged.

20. From the list of panels of Liquidator sent by IBBI for the NCLT, Odisha Mr. Mukesh Kumar Jain (Registration No. IBBI/IPA-001/IP-P01236/2018-2019/11944 and E-mail ID [mkj2822@gmail.com](mailto:mkj2822@gmail.com) having office at Chhattisgarh is appointed as Liquidator.

21. The Liquidator is directed to forthwith take into his custody all the assets, Properties, sophisticated equipment tools implement, machineries, effects and actionable claims of the corporate debtor and take necessary steps to ensure preservation, protection security and maintenance of those properties as provided under section 35(1)(b) & (d) of IBC 2016.

22. The respondents Nos 1 & 2 are hereby directed to hand over all book's assets, Properties and sophisticated equipment tools implements and machineries of the corporate debtor to the Liquidator.

23. All the amounts deposited/paid by the 1<sup>st</sup> Respondent as successful Resolution Applicant towards the credit of the corporate debtor is hereby forfeited and Liquidator is directed to include the said forfeited amount into the Liquidation estate under section 36 of IBC 2016.

24. The Liquidator is directed to adhere to Section 33(1) (ii) & (iii) and discharge his powers and duties as specified under Section 35 to 41 of IBC,2016 and meticulously adhere to the Rules and Regulations issued by IBBI in this regard from time to time.

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25. Public Notice as contemplated under section 33(1) of the Code shall be issued in one morning English daily and in one morning regional language newspapers.

26. All the powers of the Board of Directors of the Corporate Debtor and of its key managerial personnel, successful resolution applicant, shall cease to exist in accordance with section 34(2) of the Code. These powers shall henceforth vest in the Liquidator. The personnel of the Corporate Debtor shall extend all assistance and cooperation to the Liquidator as may be required by him in the Liquidation process of the Corporate Debtor.

27. On initiation of the Liquidation process but subject to section 52 of the Code, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor, save and except the liberty to the liquidator to institute a suit or other legal proceeding on behalf of the Corporate Debtor with prior approval of this Adjudicating Authority, as provided in section 33(5) of the Code read with its proviso.

28. In accordance with section 33(7) of the Code, this liquidation order shall be deemed to be a notice of discharge to the officers, employees and work men of the Corporate Debtor, except to the extent of the business of the Corporate Debtor continued during the liquidation process by the liquidator.

29. In terms of Section 33(1) (b) (iii), the Liquidator shall file a copy of this Order with the Registrar of Companies, Chhattisgarh, Bilaspur, within whose jurisdiction the Corporate Debtor is registered. Additionally, the Registry shall also forward a copy of this Order to the Registrar of Companies, Chhattisgarh, Bilaspur.

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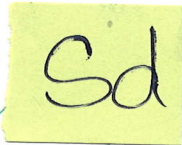
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30. As per Regulation 13 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016, the liquidator shall submit a preliminary report to the Adjudicating Authority within 75 days from the liquidation commencement date providing various details/information as mentioned in the said regulation.

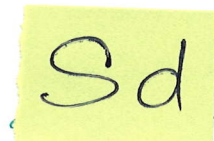
31. The Registry is directed to send e-mail copies of the order forthwith to Liquidator appointed and to all the parties and their Ld. Counsel for information and for taking necessary steps,

32. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.



**Satya Ranjan Prasad**  
**Member (Technical)**

Kaushal



**P. Mohan Raj**  
**Member (Judicial)**

Signed on this the 09<sup>th</sup> March, 2022.