NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
SPECIAL BENCH (COURT-II)

CA. 734/2018, IA. 5026, IA.5027 AND IA.5028/ND/2021
IN
Company Petition No. (IB)-525 (ND)/2017

IN THE MATTER OF:

M/s Noble Co-operative Bank Ltd.
First Floor, Amaltash Marg,
Q-Block, Chaura Raghunathpur,
Sector-22, Noida,
Uttar Pradesh-201301 **...Applicant/Financial Creditor**

Versus

M/s Shivkala Developers Pvt. Ltd.
26-c-2, East Arjun Nagar,
Pole No. 13, Shahadra,
Delhi - 110032 **...Respondent/Corporate Debtor**

AND IN THE MATTER OF :

Mr. Anup Kumar (Resolution Professional)
M/s Shivkala Developers Pvt. Ltd.
734, Lawyers Chamber Block Western Wing **...Applicant**

Versus

M/s Cimco Projects Limited
C-97, Ground Floor
Lajpat Nagar-II
Delhi -110024 **...Respondent**

SECTION: 30(6) AND 31 of IBC, 2016

Order Delivered on: 24.11.2021

CORAM:

SH. BHASKARA PANTULA MOHAN, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

-Sd-

PRESENTS:

For Applicant	**: Adv. Santosh Pandey, Adv. Chetna Tyagi for Resolution Applicant in IA.5026, 5027, 5028/2021**
For the RP	**: Adv. Anup Kumar**
For the CoC	**: Adv. Govind Bhardwaj on behalf of CoC in CA.734/2018**

ORDER

PER SHRI. BHASKARA PANTULA MOHAN, MEMBER (J)

That CA 734/2018 is an Application filed by the Resolution Professional (hereinafter referred as "RP") under Section 30(6) and Section 31 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the "Code") for passing an order for approval of the Resolution Plan as approved by the Committee of Creditors in the meeting held on 07.11.2018. That IA.5026, IA.5027 and IA.5028/ND/2021 are filed by the Directors of Resolution Applicant Company for cancellation of Non-Bailable Warrants issued vide order dated 03.09.2021 passed by this Adjudicating Authority.

2. That the Applicants has made the following prayers in the CA No. 734 of 2018:

a. Allow the present Application;

b. May be please approve the resolution plan as approved by the Committee of Creditors as submitted before this Hon'ble Tribunal;

c. To issue direction to Existing equity shareholder M/s Binita Design Pvt. Ltd., and M/s. Astha Studio Pvt. Ltd. to get transfer shareholding in favor of Resolution Applicant;

-Sd/-

d. To issue direction Ex-Director of Corporate Debtor vacate his office from the date approval of resolution plan;

e. Pass such any orders as may deemed fit and proper in the facts and circumstances of the instant case."

3. The facts in brief are that on 12.2.2018, Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") of M/s Shivkala Developers Pvt. Ltd. (hereinafter referred to as the "Corporate Debtor") was initiated by this Tribunal on an Application being C.P (IB) No. 525 of 2017 filed by Noble Cooperative Bank under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Mr. Anup Kumar was appointed as the Interim Resolution Professional, who was later confirmed as the Resolution Professional by a 100% majority in the first meeting of Committee of Creditors ("CoC") dated 9.3.2018.

4. That thereafter, the CoC with 93% of voting share approved the Resolution Plan submitted by M/s Cimco Projects Ltd. (hereinafter referred to as the "Resolution Applicant") in the 10^{th} COC meeting which was held on 7.11.2018 and authorize the Applicant/ Resolution Professional to file appropriate application before this Tribunal to seek appropriate order from Adjudicating authority. In lieu of the same, the Applicant/ Resolution professional had filed an Application bearing No. IA-734 of 2018, under Section 30(6) & 31 of the Code on 11.9.2018 for approval of the Resolution Plan, which was listed on various occasion before this Tribunal.

5. That none appeared for the Resolution Applicant on any of the above dates despite Bailable warrants issued against them by this

- Sd -

Tribunal. Therefore, this Tribunal issued Non-Bailable warrants of Arrest against the Resolution Applicant through DCP and listed the said IA-734 of 2018 on 11.10.2021. On 11.10.2021, when no report in respect of the Non-Bailable warrants, issued against the Resolution Applicant, was received by the Court Master of this Tribunal the IA-734 of 2018 for approval of Resolution Plan was further adjourned to 12.11.2021. In the meantime, the Resolution Applicant has filed Applications for cancellation of the NBW's issued by this Tribunal, being IA No. 5026/2021, 5027/2021 and 5028/2021 on behalf of its three Directors and the reason for non-appearance provided by the Resolution Applicant was that they were not aware of the Resolution Plan being pending before this Tribunal. In our considered view, this is untenable and therefore, depicts that the Resolution applicant is not serious towards complying with the terms of the Resolution plan being approved before the COC. The relevant portion of the reason being mentioned by the Resolution Applicant in IA No. 5026/2021, 5027/2021 and 5028/2021 is reproduced below,

> "*That though the applicant is director of resolution Applicant but the authorised signatory on behalf of resolution applicant is some other person and therefore, the applicant was not aware properly about ongoing proceedings before the Hon'ble Tribunal*"

6. During the Course of hearing held on 12.11.2021, the Ld. Counsel for the RP submitted that its almost three long years' i.e., 1099 days since filing of IA-734 of 2018 for approval of the Resolution Plan of the Corporate Debtor by the CoC. However, till date the Resolution Applicant

-Sd-

has neither furnished the performance guarantee as directed by this Tribunal vide order dated 03.03.2021 nor has shown any willingness to proceed with the Resolution Plan approved by CoC. Even on the date of hearing, when asked for furnishing of performance guarantee, the counsel appearing for RA, to the shock and surprise of this Bench, stated that they were not even aware about these proceedings and the fact that the Resolution Plan approved by them has been approved by the COC. The said submission made by the Ld. Counsel of the RA shows the non-seriousness of the RA towards the Resolution Plan, it has submitted.

7. It is further brought to the knowledge of this Bench that vide order dated 03.03.2021, the application filed by the RP for amendment of Memo of Parties and including the name of the RA in the memo of parties was allowed in which one of the prayer was for deposit of the performance guarantee. The said order of this Bench has also not been complied with by the RA till date. The above facts make it clear that the RA is not interested in going ahead with the implementation of the Resolution plan and is only wasting time of everyone, which is causing huge loss to the Creditors of the CD.

8. Looking into the above scenario, where already a period of 3 years have lapsed and till date the RA has not taken any steps towards deposit of performance guarantee as part of the Resolution Plan, this Bench does not think it fit to allow the CA No. 734 of 2018 filed by the RP, as till date the RA has not shown any intention to abide by the Resolution Plan. Thus, the application filed by the RP being CA No. 734 of 2018 is hereby

-Sd-

dismissed and the Resolution plan submitted by the RA being incomplete stands rejected.

9. The Ld. Counsel appearing for the RP submits that in case, this Tribunal does not approve the Resolution Plan under Section 30(6) and Section 31 of Insolvency and Bankruptcy Code, 2016, this Bench has power under section 33 of the code to order liquidation of the Corporate Debtor. The Section 33 of the Code reads as under:

"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 creditors 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-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

Explanation- For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

-Sd-

(3) Where the resolution plan approved by the Adjudicating Authority under section 31 or under sub-section (1) of section 54L,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) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) 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.

(7) The order for liquidation under this section 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."

10. On mere perusal of the above section, this Tribunal is in agreement with the submissions made by the Ld. Counsel for the RP and further holds that as per the above section, if the Resolution plan is rejected for non-compliance of any requirement, then this Tribunal can direct for liquidation of the CD. The CIRP period has already expired and till date the Resolution Applicant has not fulfilled the requirement of the approved Resolution Plan, we are of the view that the only course left is to order liquidation of the Corporate Debtor.

-Sd-

11. The Counsel for the RP further relies upon the judgments passed by the Hon'ble Supreme Court in ***Innoventive Industries Ltd. v. ICICI Bank (2018) 1 SCC 407*** and ***Arcelor Mittal India Private vs Satish Kumar Gupta (2019 2 SCC(1)),*** whereby it has been held that the Adjudicating Authority has power under Section 33(1) of the code to reject the resolution plan and direct for liquidation of the CD. The relevant portion is quoted below:

> *"After admission of the application under Section 7 by the Adjudicating Authority, the scheme of the Code is as follows:*
>
> *(i) Under Sections 13 to 15, a moratorium is declared; a public announcement of the initiation of the corporate insolvency resolution process and call for submission of claims is made; and an Interim Resolution Professional is to be appointed under Section 16 of the Code. This action is to be completed by the Adjudicating Authority within a period of 14 days from the insolvency commencement date, i.e., the date of admission of the application under Section 7 by the Adjudicating Authority..*
>
> *(ii) Under Section 17, the corporate debtors affairs are to be managed by the Interim Resolution Professional so appointed, and the Board of Directors of the corporate debtor shall stand superseded. The officers and managers of the corporate debtor are now to report to the Interim Resolution Professional, who has the authority to act on behalf of the corporate debtor.*
>
> *(iii) Under Section 18(1), some of the important duties of this Interim Resolution Professional are set out, which are to collect all information relating to the financial position of the corporate debtor and, most importantly, to constitute a Committee of Creditors. That this has to be done at the very earliest, is clear from the scheme of the corporate insolvency resolution process which, as has been stated earlier, cannot exceed the maximum*

Sd-

period of 270 days from the date of admission of the financial creditors application.

(iv) *Under Section 21, the Interim Resolution Professional is to constitute this Committee of Creditors after collating all claims received against the corporate debtor and after determination of the financial position of the corporate debtor, both of which need to be done at the very earliest. This Committee of Creditors is to comprise of financial creditors of the corporate debtor. All decisions of this Committee of Creditors are to be taken by a majority vote of not less than 51% of the voting share of each financial creditor.*

(v) *Under Section 22, the first meeting of the Committee of Creditors is to be held within 7 days of its constitution in order to appoint a Resolution Professional. The Committee of Creditors either continues the Interim Resolution Professional or replaces the Interim Resolution Professional by a majority vote of 66%. The application to replace the Interim Resolution Professional is then to be sent to the Adjudicating Authority, who is to forward the same to the Insolvency and Bankruptcy Board of India (hereinafter referred to as the IBBI) for confirmation. Upon such confirmation, the Adjudicating Authority then appoints the Resolution Professional. In case the IBBI does not confirm the name of the proposed Resolution Professional within 10 days of receipt of the same, the Adjudicating Authority is then to direct the Interim Resolution Professional to continue to function as the Resolution Professional until such time as the IBBI confirms the appointment of the Resolution Professional.*

(vi) *It is this Resolution Professional who is then to conduct the corporate insolvency resolution process, which really begins at this stage (see Section 23). Section 25 then lays down some of the duties of this Resolution Professional, which are to continue the business operations of the corporate debtor,*

-Sd-

subject to the prior approval of the Committee of Creditors over the matters stated in Section 28. One of the important duties of the Resolution Professional under Section 25 is to invite prospective resolution applicants to submit resolution plans.

(vii) *Under Section 29, the Resolution Professional is to prepare an information memorandum giving relevant information, as may be specified by the IBBI, to persons interested in formulating a resolution plan.*

(viii) *Section 30 is an important provision in that a resolution applicant may submit a resolution plan to the Resolution Professional, who is then to examine the said plan to see that it conforms to the requirements of Section 30(2). Once this plan conforms to such requirements, the plan is then to be presented to the Committee of Creditors for its approval under Section 30(3). This can then be approved by the Committee of Creditors by a vote of not less than 66% under sub-section (4). What is important to note is that the Committee of Creditors shall not approve a resolution plan where the resolution applicant is ineligible under Section 29A, and may require the Resolution Professional to invite a fresh resolution plan where no other resolution plan is available. Once approved by the Committee of Creditors, the resolution plan is to be submitted to the Adjudicating Authority under Section 31 of the Code. It is at this stage that a judicial mind is applied by the Adjudicating Authority to the resolution plan so submitted, who then, after being satisfied that the plan meets (or does not meet) the requirements mentioned in Section 30, may either approve or reject such plan.*

(ix) *An appeal from an order approving such plan is only on the limited grounds laid down in Section 61(3). However, an appeal from an order rejecting a resolution plan would also lie under Section 61.*

-Sd-

(x) As has been stated hereinbefore, the liquidation process gets initiated under Section 33 if, (1) either no resolution plan is submitted within the time specified under Section 12, or a resolution plan has been rejected by the Adjudicating Authority; (2) where the Resolution Professional, before confirmation of the resolution plan, intimates the Adjudicating Authority of the decision of the Committee of Creditors to liquidate the corporate debtor; or (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 apply to the Adjudicating Authority, who may then pass a liquidation order on such application."

12. The above judgments of the Hon'ble Supreme Court make it clear that this Bench has power under Section 33(1) of the Code to reject the plan and direct liquidation of the CD, if any of the requirement is not fulfilled by the RA. The present case is a fit case, in which this Bench can exercise its powers vested in section 33(1) of the Code as CIRP period has already expired on 8.11.2018 and till date the Resolution Applicant has not fulfilled requirement as prescribed under Section 31 of the Code.

13. It is further submitted by the Ld. Counsel for the RP that at this stage, the valuation report of the assets of Corporate Debtor and undertakings by the Resolution Applicant given in 2018 and the value of the asset namely, Plot No. 2, Block H1A, Sector 63, Noida, Gautam Budh Nagar, UP 201301 has under gone a change due to passage of time and any further delay, will cause further prejudice to the Creditors of the Corporate Debtor.

-Sd-

14. Thereby we are inclined to invoke power under section 33 of the Code and order liquidation of the CD, as laid down in the Chapter III of Part II of the Insolvency and Bankruptcy Code, 2016.

15. The Resolution Professional Mr. Anup Kumar is hereby appointed as the Liquidator in terms of Section 34(1) of the Code, subject to the condition that no disciplinary proceedings are pending against him. The RP is required to file consent to act as liquidator in Form AA along with certificate of Registration within one week from this order and following directions are issued:

a) The liquidator 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;

b) The liquidator to proceed with the process of liquidation in a manner laid down in Chapter III of Part II of the Insolvency and Bankruptcy Code, 2016 and in accordance with the relevant rules and regulations.

c) The liquidator to follow up and continue to investigate the financial affairs of the Corporate Debtor to determine any undervalued, preferential transactions, fraudulent transactions etc.

d) This order is deemed to be a notice of discharge to the officers, employees and the workmen of the corporate debtor as per Section 33(7) of the Insolvency and Bankruptcy Code, 2016.

e) The Liquidator to 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.

-Sd-

16. As a consequence of the liquidation being allowed, the Moratorium as envisaged under Section 14 of the Insolvency and Bankruptcy Code, 2016 shall cease to have its effect and a fresh Moratorium under Section 33(5) of the Insolvency and Bankruptcy Code shall commence. Further, any earnest money deposited shall be forfeited and will be given to the COC to be shared as per IBC.

17. Also, all the pending applications in connection with the resolution plan become infructuous, as the resolution plan stands rejected by this Tribunal.

18. A copy of the order shall be communicated by the Registry immediately to the Applicant and the Corporate Debtor as well as to the Liquidator above named.

19. In addition, a copy of said order shall also be forwarded to IBBI for its records and to ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

20. Since, the Resolution Applicant has failed to furnish the performance guarantee nor has proceeded further with the approved Resolution Plan, the Liquidator is directed to take necessary steps for filing complaint under Section 74(3) of IBC, 2016 against the Resolution Applicant.

21. EMD Deposited, if any, by the Resolution Applicant, shall be forfeited and the same shall become part of the Liquidation Estate of the Corporate Debtor.

-Sd/-

22. Accordingly, CA-734/2018 is disposed of with aforesaid directions.

23. Since the resolution of the Corporate Debtor has been derailed by non-cooperation of the Resolution Applicant, we are not inclined to cancel the Non-Bailable Warrants issued against the Resolution Applicant vide order dated 03.09.2021

24. **Hence, the IA.5026, IA.5027 and IA/5028/ND/2021 are dismissed.**

-Sd-

(L. N. Gupta)
Member (T)

-Sd-

(Bhaskara Pantula Mohan)
Member (J)