NATIONAL COMPANY LAW TRIBUNAL, BENCH-1, HYDERABAD

IA (IBC)/71/2022
In CP (IB) No.651/7/HDB/2018
Application under Section 33(3) (b) of the Insolvency and Bankruptcy Code, 2016

(IN THE MATTER OF M/s SAINATH ESTATES PRIVATE LIMITED)

Between**.**
Dr.K.V.Srinivas
Chairman,
Monitoring Committee,
Sainath Estates Private Limited
402, 4th Floor, 6-3-249/6,
"Alcazar Plaza & Towers,
Road No.1, Banjara Hills,
Hyderabad 500 034.

…Applicant

VS

K. Premsagar Rao,
1-8-333&334,
A-Wane, Begumpet, Opp Police Lanes,
Near U.S.Consulate,
Secunderabad- 500 003.

….Respondent/
Successful Resolution Applicant

Date of order: 08.07.2022

Coram

Dr. N. Venkata Ramakrishna Badarinath, Hon'ble, Member (Judicial)

Shri Veera Brahma Rao Arekapudi, Member (Technical)

<u>Parties/ Counsels present:</u>

For the Applicant : Shri. Y.Suryanarayana, Counsel.

For the Monitoring Committee/RP: Dr.K.V.Srinivas.

For the Financial Creditor: Shri VVSN Raju, Counsel.

<u>PER: BENCH</u>

This is an application filed by the Chairman, Monitoring Committee, Sainath Estates Private Limited, under Section 33(3) of the Insolvency and Bankruptcy Code, 2016, R/w Regulation 36B(4A) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and R/w Rule 11 of NCLT Rules, 2016 seeking permission to forfeit the Performance Bank Guarantee amount and pass appropriate orders in accordance to the provisions of Section 33 of IB Code.

1. The facts that lead to the filing of this petition in brief are that; this Hon'ble Tribunal approved the Resolution plan submitted by Respondent, vide its order dated 09.11.2021(revised order on 11.11.2021).

2. A monitoring committee was formed in accordance to the terms and conditions of the approved resolution plan consisting of Canara Bank, the Applicant, the representative of the Resolution Applicant.

3. The Applicant vide email dated 07.01.2020, reminded the respondent about the last date of implementation of the approved Resolution Plan and requested him to remit the plan amounts as per the key milestones specified in the approved resolution plan. The email correspondence with the respondent is enclosed as Annexure-4 to the application.

4. The key milestones of the approved resolution plan and the current status as on date of filing the application is mentioned below:

S.NO	Particulars	Key Terms/Amount in Rs	Status as on 12.01.2022
1	Payment of deposit/1st Tranche	Rs.1.00 Crore along with Resolution Plan submission	Complied(BG)
2	Payment of deposit/2nd Tranche- upfront payment to proposed creditors	9.00 Crores- immediately within two weeks upon receipt of official communication from COC and Resolution Professonal about the Approval of Resolution Plan	Complied(BG)
3	Payment of deposit/3rd Tranche- Balance payment(other than amount specified (S.No.2&3) obligation to creditors	107.59 Crores- within 60 days from the final order passed by the Hon'ble NCLT, therein approving the instant Resolution Plan	Not complied
4	Proposed instruments for repayment	Cheque/Through banking system out of the amount infused	not complied
5	Amount of fresh equity proposed to be infused for revival and improvement of operations of corproate debtor	The total amount of Rs.117.59 crores(including deposit) will be infused with a combination of equity, quasi equity and or debt instruments	Not complied
6	implementation Schedule proposed by Resolution Applicant	Within 60 days from the approval date of resolution plan by AA	Not complied

5. The Applicant vide email dated 13.01.2022 had informed the stakeholders about the failure of the resolution applicant in implementing the key milestones of the Resolution Plan. A copy of email and the response given by Canara Bank is annexed to the application as Annexure-5.

6. Thereafter the Applicant received an email from the member of the Monitoring Committed i.e Canara Bank requesting the Applicant to move an application before the Tribunal to take further step as per the law.

7. It is stated that as per the provisions of Section 33(3), if resolution plan approved by the Adjudicating Authority is contravened an application can be filed for liquidation as referred to in Sub-clauses (i)(ii)(iii) of Clause(b) Sub-Section (1) besides in terms Regulation 36(4A) of IBBI (Insolvency Resolution Process for corporate persons) Regulations, 2016, the request for resolution plan shall require the resolution applicant, in case if 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.

8. It is contended that in the present case, the resolution applicant had deposited an amount of Rs.10.00 crores as performance bank guarantee and the same has to be forfeited since the Respondent failed to implement the resolution plan in as per the Schedule.

9. Pleading breach of the terms of the approved resolution plan by the SRA, the Chairman of Monitoring Committee filed IA 71/2022 praying as below;

- To pass an order in accordance to the provisions of Section 33;
- Permit the applicant to forfeit the performance Bank Guarantee amount.

10. While the above 71/2022 is pending, the Successful Resolution Applicant, being unable to comply the terms and conditions of approved resolution plan pertaining to the payment of the 3rd tranche amount filed IA No.95/2022 on 24.01.2022 with the following prayers:

- To permit the Applicant to make the payment of 3rd tranche together with the agreed interest rate of 15% p.a.
- To direct the respondent not to forfeit the performance Bank guarantee.

11. This Tribunal on 16.02.2022 disposed of IA No.95/2022 with the following directions.

(i) The petitioner shall deposit 1/3rd per annum to be calculated from the due date of 3rd trench payment till the date of payment, within 30 days from the date of this order.

(ii) The remaining 2/3rd amount of 3rd trench with interest @15% per annum shall be deposited within 30 days thereafter.

(iii) It is made clear that default of the first condition above by the Successful Resolution Applicant itself is sufficient for the chairman of the Monitoring Committee to forthwith forfeit the

Performance Security furnished by the SRA and for initiation of steps for liquidation of the Corporate Debtor.

12. As the above order was not complied by the SRA, one of the Members of Stake holders Committee i.e Bank of India, on 14.03.2022 filed IA no.252/2022 praying as below;

- Respondent No.1 to invoke and encash the Bank Guarantee and to distribute the amount of Rs.10 crores among the stakeholders in terms of approved resolution plan without any delay.
- Respondent No.1 to distribute the remaining amount to be received as per the order dated 16.02.2022 that is to be paid by the Respondent no.2 in two tranches immediately, on receipt of amount among the stakeholders as per the terms of the approved resolution plan.

13. Pursuant thereto, this Tribunal vide order dated 23.03.2022 directed the RP to distribute the amount so far deposited by the Successful Resolution Applicant towards first and second trenches of the Resolution Plan among the stake holders in the ratio of their voting share forthwith, without deducting CIRP expenses claimed by the RP. *Later this Tribunal was informed that the directions were carried out.*

14. Therefore, in the undisputed factual background, since the performance security furnished by the respondent has already stood forfeited due to noncompliance of the order of this Tribunal dated 16.02.2022, the only relief that remains for consideration by this Tribunal in this IA whether or not to pass a liquidation order against the corporate debtor.

15. Since contravention of the resolution plan approved by the Adjudicating Authority under section 31 is not in dispute, besides as a consequence, the interests of the applicant (Members of Stake holders Committee) are prejudicially affected by such contravention, the Adjudicating Authority can pass an order of liquidation the corporate debtor. Here it maybe stated that even though the primary object of the Code is resolution and liquidation being the last resort, in the case on hand, as the resolution applicant since failed in implementing the terms of the resolution plan despite giving long rope, we find no alternative but to order liquidation of corporate debtor lest, there will be further deterioration in the value of the corporate debtor.

16. It may be pertinent to state that, the respondent herein on 8/06/2022 filed yet another IA 541/2022 praying for the following reliefs:

- To take on record the Judgements of Hon'ble Supreme Court and the Hon'ble NCLAT for consideration while passing order/judgement in IA No.71/2022.
- To pass an order that the Applicant be liable to pay interest @15% p.a from the date of delay till the date of payment in terms of the approved Resolution plan.
- To pass an order for extension of time frame of two months from the date of the order in the present application for payment of the third trench amount due as per the Resolution plan together with interest.

17. This Tribunal after hearing the Ld. Counsel for the Applicant reserved the same for orders and dismissed the same vide separate order dated 08.07.2022.

18. Therefore, taking into consideration the facts and circumstances of the case we are of the confirmed view that it is fit case to order liquidation of the corporate debtor.

19. In so far, the appointment of liquidator is concerned, the financial creditors on 26.04.2022 have filed a memo seeking leave of this Tribunal for appointment of another resolution professional as Liquidator in place of the resolution applicant contending that the Joint lenders in the meeting held on 26.04.202 have decided so. The Applicant/RP had filed a reply to the memo, opposing his replacement as Liquidator.

20. In the above backdrop we framed the following **point** for consideration by this Tribunal.

Whether the existing resolution professional can by replaced as liquidator by another resolution professional on the grounds pleaded in the application?

21. We have heard the Ld. Counsel Shri.Y. Suryanarayana, for the applicant and Shri. VVSN Raju, Ld. Counsel, for the Lenders. Perused the record and the case law.

POINT.

Whether the existing resolution professional can by replaced as liquidator by another resolution professional on the grounds pleaded in the application?

22. Shri. VVSN Raju, the Learned Counsel for the Lenders, placing reliance on the minutes of the joint lenders meeting held on 26.04.2022, besides on the ruling of Hon'ble NCLAT, in the matter *of Sandeep Kumar Gupta Resolution Professional Vs Stewarts & Lloyds of India Ltd & Anr , supra*. vehemently contended that existing RP be replaced with the person whose name is being proposed by the lenders as the joint lenders, since are dissatisfied with the performance of the present RP.

23. Per Contra, Learned Counsel for RP Shri Y.Suryanarayana, submitted that though, Adjudicating Authority in terms of Section 34(1)(4) of IBC, is empowered to replace the RP as liquidator, the said power can be exercised only when the conditions laid down under Section 34 (4) of I&B Code are pleaded and exist. As no such condition is neither pleaded nor exist, the plea for replacement of the existing RP as liquidator is liable to be dismissed.

24. Before we proceed to decide the Point, we intend to refer to Section 34 IBC, which is as follows;

"**34.** (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 [1][Chapter-II [2][or for the pre-packaged insolvency resolution process under Chapter III-A] shall, subject to submission of a written consent by the resolution professional to the Adjudicatory Authority in specified form,] act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority under sub-section (4).

(2) On the appointment of a liquidator under this section, all 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.

(3) 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 shall apply in relation to voluntary liquidation process as they apply in relation to liquidation process with the substitution of references to the liquidator for references to the interim resolution professional.

(4) The Adjudicating Authority shall by order replace the resolution professional, if—

(a) the resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in sub-section (2) of section 30; or

(b) the Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded [3][in writing; or]

[4][(c) the resolution professional fails to submit written consent under sub-section (1).]

(5) For the purposes of [5][clause (a) and (c)] of sub-section (4), the Adjudicating Authority may direct the Board to propose the name of another insolvency professional to be appointed as a liquidator.

(6) The Board shall propose the name of another insolvency professional [4][along with written consent from the insolvency professional in the specified form,] within ten days of the direction issued by the Adjudicating Authority under sub-section (5).

(7) The Adjudicating Authority shall, on receipt of the proposal of the Board for the appointment of an insolvency professional as liquidator, by an order appoint such insolvency professional as the liquidator.

(8) An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board.

(9) The fees for the conduct of the liquidation proceedings under sub-section (8) shall be paid to the liquidator from the proceeds of the liquidation estate under section 53.

25. A bare perusal of *sub clause* 1 of the above provision, the aforesaid Section clearly discloses that subject to submission of written consent by the RP to the Adjudicating Authority in the manner specified to act as liquidator for the purposes of liquidation, the RP is **entitled to act as liquidator, unless he is replaced by the Adjudicating Authority under Sub-Section (4). Therefore,** replacement if warrants, shall be in accordance with *sub clause 4* of the above section, which says that the Adjudicating Authority shall by order replace the resolution professional, if—

(a) The resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in sub-section (2) of section 30; or

(b) The Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded in writing; or

(c) The resolution professional fails to submit written consent under sub section (1).

26. In so far as the case on hand is concerned, since the present RP had filed his written consent to act as liquidator the requirement under subsection 1 of section 34 IBC stands satisfied. None of the requirements mandated under sub section 4 of section 33 IB Code, either exist or even pleaded by the Lenders. As regards the allegation that lenders are dissatisfied with the functioning of RP as such another person be appointed to act as liquidator, firstly, the same does not fit in the scope of sub section 4 of IB Code, supra. *Nextly,* the minutes of the joint lenders meeting held on 26.04.2022 is totally silent with regard to expression of dissatisfaction on the performance of the Resolution professional**.**

27. Now coming to the ruling in re, *Sandeep Kumar Gupta* , relied on by the Learned Counsel Shri V VSN Raju for the lenders, we state that the facts in the present case do not match to the facts in the case of *Sandeep Kumar Gupta.* In *Sandeep Kumar Gupta's, case* NCLT, finding as to non-submission of the resolution plan by the RP was found to be incorrect by Hon'ble NCLAT. Nextly, Hon'ble NCLAT, having found that the Adjudicating Authority has recorded that it was not satisfied with the performance of the RP, upheld the replacement on the said ground alone, thereby added a new dimension to Sec 34(1) for replacement of the RP as liquidator.

28. As far as the case on hand is concerned the Financial Creditors have not whispered replacement of the RP to act as liquidator in the present Application nor this Adjudicating Authority had not ever made any finding of the mis-conduct of the RP, therefore in our view the ruling in NCLAT is not acceptable to the case on hand.

29. Therefore, having regard to Section 34(1) of IBC, *supra,* more particularly, *sub-clause* (4), we find that the situation as contemplated under Section 34(1) (4) of IBC for replacement of the present RP to act as liquidator, since neither pleaded nor exists, We find merit in the submission of the Learned Counsel for the Applicant Shri Y. Suryanarayana, that replacement of the present RP to act as liquidator by another RP is unsustainable under law.

30. It is pertinent to note that minutes of joint lenders meeting discloses that newly proposed liquidator had accepted to act as liquidator by agreeing for 50% of cost under Regulation towards his fee. Therefore, the only 'reason' for replacement of the RP as liquidator appears to be the willingness of the newly proposed liquidator to accept 50% of the cost.

31. Be that as it may, the fact remains that the lenders in their wisdom wanted replacement of the existing resolution professional as Liquidator by another resolution professional. Therefore, graceful exit of the present resolution professional perhaps will pave way for smooth liquidation process. Hence, without accepting the plea put forth by the lenders that the performance of the present resolution professional is unsatisfactory, and only to facilitate smooth liquidation process of the corporate debtor, we allow the plea of the lenders for replacement of the present by another resolution professional as liquidator named in the minutes of the joint lenders meeting dated 26.04.2022. The fee and expenses of the present RP if not paid shall forthwith be paid and only upon complete payment, the newly appointed resolution shall assume charge.

32. Accordingly, we hereby pass the order of liquidation against the corporate debtor.

a. The Corporate Debtor, M/s. SAINATH ESTATES PRIVATE LIMITED, is put under liquidation process in the manner laid down in Chapter-III of the Code with effect from the date of order.

b. Mr. Gollamudi Krishna Mohan, having IBBI Registration No. IBBI/IPA-003/IP-N000161/2018-19/11952, # Flat 107, Maurya Towers, D.No.1-9-648, Adikmet Road, Vidyanagar, Hyderabad-500 044, is appointed as Liquidator.
c. The erstwhile RP is directed to handover the records to the Liquidator appointed by this Tribunal forthwith.
d. He shall issue public announcement stating that the Corporate Debtor is in liquidation in terms of Regulation 12 of IBBI (Liquidation Process) Regulations, 2016.
e. The Moratorium declared under Section 14 of the code shall cease to have its effect.
f. Subject to Section 52 of the Code, no suit or other legal proceedings shall be instituted by or against the Corporate Person. This shall however 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.
g. All powers of the Board of Directors, Key Managerial Personnel and partners of the Corporate Debtor shall cease to have effect and shall be vested in the Liquidator.
h. The Liquidator shall exercise the powers and perform duties as envisaged under Sections 35 to 50 and 52 to 54 of the Code, read with Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

i. Personnel connected with the Corporate Debtor shall extend all assistance and co-operation to the Liquidator as would be required for managing its affairs.

j. The Liquidator shall be entitled to such fees as may be specified by the Board in terms of Section 34 (8) of the Code.

k. This order 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.

l. The Registry is directed to inform and serve a copy on the erstwhile Resolution Professional and Liquidator appointed herein above.

m. The copy of the order is to be communicated to Regional Director, Ministry of Corporate Affairs, Registrar of Companies & Official Liquidator, Hyderabad, the Registered Office of the Corporate Debtor and IBBI.

33. Accordingly, this Application is disposed of.

Sd/-
Veera Brahma Rao Arekapudi
Member (Technical)

Sd/-
Dr.N.V.Ramakrishna Badarinath
Member (Judicial)

Pavani