

IN THE NATIONAL COMPANY LAW TRIBUNAL  
CUTTACK BENCH  
CUTTACK

M.A. No. (IB) 7/CB/2022

In

C.P (IB) No. 167/CTB/2019

*In the matter of:*

Application u/s 33(3) of the Insolvency and Bankruptcy Code 2016.

**N.K MINERLS PRIVATE LIMITED**, CIN: U13100OR2011PTC013022 having registered address at Near Veterinary Hospital, Station Road, Barbil Keonjhar, Odisha-758 035.;

...Applicant/operational creditor.

-Versus-

**ORISSA MANGANESE AND MINERALS LIMITED**, CIN: U13201OR1953PLC017027, having registered address at IPICOL House, 3<sup>rd</sup> Floor Annexe Building, Janpath, Bhubaneswar, Khorda, Odisha- 751 022;

... 1st Respondent/Corporate debtor.

**GHANASHYAM MISRA & SONS PRIVATE LIMITED**, having registered office 2<sup>nd</sup> Floor, 7 Waterloo Street, Kolkata, West Bengal, Pin- 700 069

2<sup>nd</sup> Respondent/Successful Resolution Applicant.

-In-

**N.K MINERLS PRIVATE LIMITED**, CIN: U13100OR2011PTC013022 having registered address at Near Veterinary Hospital, Station Road, Barbil Keonjhar, Odisha-758 035.

...Operational creditor.

-Versus-

**ORISSA MANGANESE AND MINERALS LIMITED**, CIN: U13201OR1953PLC017027, having registered address at IPICOL House, 3<sup>rd</sup> Floor Annexe Building, Janpath, Bhubaneswar, Khorda, Odisha- 751 022;

...Corporate Debtor.

*Coram:*

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

*Appearances*

For the applicant : Mr. Chittaranjan Panda, CS

For the respondent : Mr. Anuj Singh, Adv.  
Mr. Amit Patnaik, Adv.



**Order reserved on: 01.08.20223**  
**Order Pronounced on: 05.09.2023**

**ORDER**

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

1.This is an application filed under Section 33 (3) of the IBC, 2016 to pass an order of liquidation against the Corporate Debtor.

2. **The brief facts of the case necessary to dispose of this application are as follows:** The Financial Creditor i.e., State Bank of India filed an application under Section 7 of IBC, 2016 for initiation of CIRP against the Corporate Debtor i.e., Orissa Manganese and Minerals Limited, in C.P No. 371/KOB/2017 on the file of NCLT, Kolkata Bench. The corporate debtor was admitted into CIRP on 03.08.2017. During the CIRP proceedings Ghanashyam Misra & Sons Private Limited, the second respondent herein submitted a resolution plan which was approved by the NCLT, Kolkata Bench on 20.06.2018. The applicant herein is one of the Operational Creditors of the Corporate Debtor, Orissa Manganese and Minerals Limited submitted a claim before the resolution professional for a total claim of Rs. 5,50,58,773.93. In the Resolution Plan, the claim amount of the applicant Rs. 85,65,163.00 was admitted. In the Resolution Plan, one month time from the date of approval of resolution has been prescribed to pay the claim amount. After the approval of the Resolution Plan by the NCLT, Kolkata Bench, on formation of this NCLT- Cuttack Bench the case records were transferred to this Adjudicating Authority on the point of jurisdiction, the records were received from the NCLT, Kolkata Bench and assigned new number as TP No. 43/CTB/2019. The first respondent being the successful Resolution applicant failed to pay the admitted claim amount of Rs. 85,65,163.00 to the applicant. The applicant then issued a statutory notice and filed a petition under Section 9 of IBC, 2016 in CP No. 167/CTB/2019 against the corporate debtor before this Adjudicating Authority. For initiation of CIRP against the first respondent herein. The said petition was heard in detail. When the matter was reserved for orders, the first respondent filed an interlocutory application IA No. 162 of 2022 and tendered



the amount of Rs. 85,65,163.00 by demand draft, the same was refused on the applicant side. The refusal of applicant to accept the tender amount is recorded by this Adjudicating Authority and in consequence dismissed the Section 9 IBC 2016 application C.P.No.167 of 2019 on 12.07.2022. It is learnt from the applicant side that appeal has been preferred before the NCLAT-New Delhi against the dismissal order dated 12.07.2022, but later appeal was not perused. Now this miscellaneous application has been filed to pass an order of liquidation against the corporate debtor stating that belated tender of claim amount will not absolve the corporate debtor from the order of liquidation. The belated tender of claim amount itself proves that the applicant not complied the direction contained in the approved resolution plan, thus the 2<sup>nd</sup> respondent successful resolution applicant made liable to pass an order of liquidation against the 1<sup>st</sup> respondent corporate debtor under section 33(4) of IBC 2016.

3. After heard both side's submissions and perusal of available records, the followings points are framed for consideration:

1. Whether for the non-payment of claim amount in time to the operational creditor as per the resolution plan leads to mandatorily or automatically to pass an order of liquidation?
2. Whether this application is hit by principle of res-judicata in view of the order passed in CP No. 167/CTB/2019 dated 12.07.2022.

4. **Point No:1** At first before touching the merits of the application it has to be considered that whether the application presented by the applicant is in order? This miscellaneous application has been filed for passing of liquidation order under section 33(4) of IBC 2016 against the corporate debtor for contravention of the provision of the resolution plan. This interlocutory miscellaneous application has been filed in C.P.No.167/CB/2019. In fact, C.P.No.167/CB/2019 was filed by the applicant for initiation of CIRP against the corporate debtor, the said petition was dismissed on 12.07.2022, so obviously there wouldn't be any resolution plan, in such a case the question of contravention of provision of resolution plan does not arise. Thus, this miscellaneous application filed in dismissed C.P.No.167/CB/2019 is not in order and consequently this miscellaneous



application is unsustainable in C.P.No.167/CB/2019. The corporate debtor was admitted into CIRP in C.P.No.371/KOB/2017 on the file of NCLT, Kolkata Bench on 03.08.2017, after received by transfer re-numbered as T.P.No.43/CB/2019, the resolution plan also filed in C.P.No.371/KB/2023 and approved on 20.06.2018. This is the resolution plan referred in this miscellaneous application. Thus C.P.No.167/CB/2019 is nothing to do with this resolution plan, hence this application ought to have been filed in T. P. No.43/CB/2019 (formerly C.P.No.371/KOB/2017) hence application filed in non-existing plan C.P.No.167/CB/2019 is unsustainable in law.

5. In this case, the admitted fact is the 2<sup>nd</sup> respondent is a successful resolution applicant as per the plan approved by the NCLT, Kolkata Bench dated 22.06.2018, the second respondent is liable to pay a sum of Rs. 85,65,163.00 to the applicant. When the 2<sup>nd</sup> respondent defaulted to pay the amount as per the approved resolution plan for whatever reasons the applicant preferred an application in CP No. 167/CTB/2019 under Section 9 of IBC, 2016. During the pendency, after the matter was reserved for order the first respondent tendered the amount by way of Demand Draft the same was not accepted by the applicant herein. The delayed tender of the amount shows that the first respondent committed default in payment of amount to the Creditor as mentioned in their Resolution Plan. When that default is proved, the next question is to whether for non-compliance or non-implementation of the Resolution Plan in time leads to pass an order of liquidation automatically. Section 33 (3) of the IBC, 2016 shows that after the resolution plan is approved by the Adjudicating Authority is contravened by the concerned corporate debtor i.e., the successful resolution applicant, the person affected by such a contravention can prefer an application for liquidation before the Adjudicating Authority. In this case, the applicant is the aggrieved person hence, the applicant preferred this application. The next provision is Section 33 (4) enables the Adjudicating Authority to pass an order of liquidation if there is any contravention of the any provisions or non-implementation of the approved resolution plan.



6. To pass an order of liquidation under Section 33(3) of IBC, 2016 two conditions need to be full filed. (1) There should be a violation of the resolution plan. 2. The person aggrieved by such a violation should file an application for an order of liquidation. When these two conditions are satisfied under Section 33(4) of the Code, an order of liquidation shall be passed. Even though the word “shall” used in Section 33(4) but by judicial interpretation and experience it is seen that word” shall” in Section 33 (4) has been read as “may” these factor shows that the liquidation under the Section 33(4) is neither automatic nor mandatorily. In this regard, the NCLAT in Panch Tatva Promotors Pvt. Ltd – vs- GPT Steel in industries Ltd. Com. Appeal (AT) (Insolvency) No. 316 of 2020 held as follows: -

*Thus, it is job of the Adjudicating Authority to “determine” if provisions of the Resolution Plan have been contravened. Admittedly, there does not exist any order under Section 33(4) holding Respondent No.3 to have contravened provisions of the Resolution Plan in any other proceedings. Merely because in execution of the Resolution Plan application for time is under consideration with regard to other CIRP would not be sufficient at this stage to say that ineligibility has already been incurred.*

*Similarly, the NCLAT in Edelweiss Asset Reconstruction Co Ltd. v Peter Beck and Peter Vermoögensverwaltung Ltd, without directing liquidation, extended the time limit for implementation of the Resolution Plan and obtaining a performance bank guarantee, by taking note of the interests of all stakeholders, by holding that all persons, including the creditors”.*

7. In view of the supra citations, it is made clear that default in payment of claim amount in time as per resolution plan ipso facto not leads to pass an order of liquidation. The time extension may grant to comply the conditions/to make payment as provided in the resolution plan. decisions extension of time to implead the conditions laid down in the Resolution Plan is permissible. When the successful resolution applicant failed to carry out the conditions laid down in the resolution



plan considering the each and every case and opportunity must be given to the successful resolution applicant to comply the conditions and reasonable opportunity to be given before passing an order of liquidation. Unlike in section 33(1) the ordering of liquidation is not mandatory under section 33(3) of the IBC 2016 and the Adjudicating Authority has discretion to extend the time for compliance of conditions/payments laid down in the approved resolution plan. In the circumstances it is concluded that failure to comply the provisions of approved resolution plan will not lead to mandatorily pass an order of liquidation. Thus, this point is answered.

8. **Point No.2:** This applicant previously filed C.P.No.167/CB/2019 under section 9 of IBC 2016 for initiation of CIRP against the 1<sup>st</sup> respondent corporate debtor for the default committed by the second respondent to pay the claim amount as per the approved resolution plan. Even though the said petition was filed under section 9 of IBC 2016, this Adjudicating Authority while disposing of the said petition by order dated 12.07.2022 observed in paragraph 12 of the order that petition is considered only under Section 33(3) of the IBC, 2016.

9. The previous petition C.P.No.167/CB/2019 was filed for the same default, when C.P No. 167 of 2019 was reserved for orders, the respondent filed an application I.A No. 162 /CB/2022 along with the demand draft for a sum of Rs. 85,65,163/- drawn in favour of the applicant and tendered the Demand Draft, but on the applicant, side refused to accept the Demand draft, after recording the tender and refusal of the default due amount this Adjudicating Authority dismissed the petition on 12.07.2022. The said order was passed after hearing both sides on merits. The issue/default involves in this application, the parties involve in this application and C.P.No.167/CB/2019 are same, the former petition was decided on merit by this competent Adjudicating Authority, thus all ingredients to constitute res-judicata are available, in consequence it held that this application is hit by principle of res-judicata.

10. On the applicant side submitted that when the applicant submitted claim form he had furnished Bank Account Details of the applicant, in spite of that the respondent not made any attempt to deposit the amount into the Bank account

