

**NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-V**

**IA. NO. 80 of 2022 &
C.P. 565 OF 2021**

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

**Birla Cotsyn (India) Limited
Through its liquidator Mr. Anil Goel**

Dalmal House, 1st floor J.B. Marg, Nariman Point,
Mumbai – 400 021

..... Financial Creditor

V/s

Birla Global Corporate Private Limited

[CIN U51900MH1977PTC019921]

Industry House 159, Churchgate, Reclamation,
Mumbai – 400 020

.....Corporate Debtor

Order Pronounced on: - 09.05.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (via videoconference)

For the Petitioner: Adv. Dhananjay Sud

For the Corporate Debtor/ Respondent: Adv. Nausher Kohli

Per: Shri. Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. The above Company Petition is filed by Birla Cotsyn (India) Limited Through its liquidator Mr. Anil Goel, (hereinafter called as “**Petitioner**”) seeking to initiate of Corporate Insolvency Resolution Process (“**CIRP**”) against Birla Global Corporate Private Limited (hereinafter called as “**Corporate Debtor**”) by invoking the provisions of Section 7 Insolvency and Bankruptcy code (hereinafter called “**Code**”) read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a Resolution of an unresolved Financial Debt of Rs. 3,18,19,231/-.
2. IA. No. 80 of 2022 is filed by the Respondent herein challenging the maintainability of the present Company Petition.

FACTS OF THE CASE

3. The Petitioner has submitted that it had granted a loan to the Respondent amounting to Rs. 2,00,73,991/- during the period 2014-2015 which is evident from the balance sheets of the Respondent as on 31.03.2015.
4. Thereafter, vide order dated 20.11.2018 in C.P. (IB) 579 of 2018 the CIRP proceedings were initiated against the Petitioner and Ms. Sujata Chattopadhyay was appointed as the Interim Resolution Professional of the Petitioner.

5. The CIRP period expired on 19.08.2019 and the liquidation process was initiated against the Petitioner vide order dated 24.09.2019. whereby Mr. Anil Goel (hereinafter referred to as “**Liquidator**”) was appointed as the Liquidator of the Petitioner.
6. The Petitioner has further submitted that upon perusal of the Annual Report as on 31.03.2018, the liquidator identified that the Petitioner had extended loans/monies to the Respondent. According to the said Annual Report of Petitioner, the Corporate Debtor has not repaid the said loan amount to the Petitioner.
7. In addition to this, the liquidator came across the ledger account of the Respondent maintained with the Petitioner depicting an outstanding amount of Rs. 3,18,19,231/- to be paid by the Respondent to the Petitioner. In lieu of the same the liquidator had issued an email dated 19.02.2021 to the Respondent to repay the said loan amount. Pursuant to the said email, the Respondent issued a letter dated 07.04.2021 to the liquidator admitting the fact that an amount of Rs. 3,18,19,231/- is due from the Respondent which was granted by the Petitioner during the course of business transactions.
8. It has further submitted that a substantial amount was paid to the Respondent as advance for renting the premises. However, no rent agreement, no booking of expenditure and no computation of GST/TDS has been done by the Petitioner. Therefore, it can be presumed that the Petitioner had given a loan of Rs.3,18,19,231/- to the Respondent which is the associate concern of the Financial Creditor.

9. The Petitioner has submitted that the Respondent has failed to make the payment of the said amount which necessitated the filing of the present petition.

REPLY OF THE RESPONDENT

10. The Respondent has filed an affidavit in reply controverting the allegations made in the Petitioner.
11. The Respondent submits that the Petitioner has failed to obtain the necessary approval from this Tribunal as required under Section 33(5) of the Code. As it is an undisputed fact that the Petitioner itself is undergoing liquidation process and, therefore, by the virtue of the Section 33(5) of the Code, the Liquidator had to obtain a prior approval of the Adjudicating Authority before initiating any Suit or Legal Proceeding on behalf of the Petitioner Company. However, the Petitioner has failed to obtain an order of this Tribunal which authorizes the Petitioner to file the present Petition.
12. The Respondent has further contended that the present debt claimed by the Petitioner is barred by laws of limitation. The Petitioner has not annexed any document with regard to disbursal of the said loan. Moreover, there is no date of default mentioned in the Petition. In addition to that, the Petitioner has relied only upon a ledger to prove the existence of the debt. In the said ledger, there is an entry showing the outstanding amount as an opening balance as on 01.04.2016. Therefore, the said loan was advanced prior to April, 2016.
13. The Respondent has further submitted that orders of Tribunal Dated 20.11.2018 and 24.09.2019 admitting the above company petition and

directing the initiation of liquidation proceedings, are challenged by some of the shareholders before the Hon'ble Bombay High Court vide WP. No. 755 of 2020 filed under Article 226 of the Constitution of India. It is further pertinent to note that Hon'ble Bombay High Court was pleased to grant interim reliefs vide its order dated 16.03.2020 pursuant to which the further auction of the assets of the Corporate Debtor was stayed and same is still in operation. The Respondent has, therefore, requested for stay until the final adjudication of the said Writ Petitions.

FINDINGS

14. We have heard the Counsel appearing for both the parties and perused the records.
15. The present Company Petition has been filed by the Financial Creditor through its liquidator, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Corporate Debtor alleging that the Corporate Debtor has committed default in making aggregate payment of Rs. 3,18,19,231/- to the Financial Creditor.
16. Before going into the merits of the matter, the Bench would indicate that the Petitioner is itself a company under-going Liquidation and the present Petition has been filed by the Liquidator of the Petitioner. The Petitioner Company went into liquidation vide order dated 24.09.2019. In this regard, reference can be made to the provisions of Section 33(5) of the Insolvency and Bankruptcy Code, 2016 which are being reproduced hereunder:

“(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**”.*

17. It is further noteworthy that this Tribunal whilst passing the order of the liquidation dated 24.09.2019 categorically stipulated in para 14(f) as under:

*“Since this liquidation order has been passed, subject to Section 52 of the Code, **no suit or other legal proceedings shall be instituted by or against the Respondent**, in the event of initiation of a suit or legal proceeding by the liquidator on the Respondents behalf, **it may initiate such proceedings with prior approval of this Adjudicating Authority** save and except as mentioned in sub- section 6 of Section 33 of the Code.”*

Upon plain reading of section 33(5) of the code, it can be construed that the Company under Liquidation is disbarred from initiating any legal proceedings without seeking the prior approval of the Adjudicating Authority. However, in this case, no such approval of the Adjudicating Authority is shown to have been obtained any time prior to the filing of the instant petition. Therefore, the Liquidator was not competent to initiate proceedings under Section 7 of the Code. The Bench is further of the view that the proviso under Section 33(5) of the is mandatory in nature. Therefore, the Bench is of the considered view that as the present

Company Petition has been filed without obtaining the prior approval of the Adjudicating Authority, it **is not maintainable** and on this short ground merits dismissal.

18. Accordingly, this Company Petition C.P.(IB) No. 565 of 2021 is **“dismissed”** and **“disposed of”**. IA. No. 80 of 2022 is hereby **“allowed”**.

Sd/-

ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
MEMBER (JUDICIAL)