

**THE NATIONAL COMPANY LAW TRIBUNAL  
 “CHANDIGARH BENCH, CHANDIGARH”  
 (Exercising powers of Adjudicating Authority under  
 the Insolvency and Bankruptcy Code, 2016)**

**CA No.1166/2019  
 IN  
 CP (IB) No. 396/Chd/HP/2018**

**Under Section 33(1) of Insolvency  
 and Bankruptcy Code, 2016.**

**In the matter of :**

**JM Financial Asset Reconstruction  
 Company Limited**

... Financial Creditor

Versus

**Inka Foods Private Limited**

...Corporate Debtor

**And in the matter of :**

**Ashok Kumar Gupta,**  
 Resolution Professional/Applicant  
 For Inka Foods Private Limited  
 Resident of LD-46, Pitampura,  
 Delhi-110034.

...Applicant/Resolution Professional

**Judgement delivered on: 10.01.2020**

**Coram: Hon'ble Mr. Ajay Kumar Vatsavayi, Member (Judicial)  
 Hon'ble Mr. Pradeep R. Sethi, Member (Technical)**

For the Applicant : 1. Mr. Abhishek Anand, Advocate  
 2. Mr. Viren Sharma, Advocate

**Per: Pradeep R. Sethi, Member (Technical)**

**ORDER**

The instant application is filed under Section 33(2) of the Insolvency & Bankruptcy Code, 2016 (**Code**) praying for passing an order to liquidate Inka Foods Private Limited (**Corporate Debtor**) not as a going

concern and appoint the applicant Resolution Professional (**RP**) to act as a Liquidator of the corporate debtor.

2. It is submitted that JM Financial Asset Reconstruction Company Ltd. filed application under Section 7 of the Code for initiation of Corporate Insolvency Resolution Process (**CIRP**) of the corporate debtor and that the Adjudicating Authority (**AA**) vide order dated 05.04.2019 admitted the application and *inter alia* initiated the CIRP and appointed Shri Ashok Kumar Gupta as Interim Resolution Professional (**IRP**). It is stated that subsequent to the applicant collating the claims submitted by the creditors pursuant to the public announcement and after determination of the financial position of the corporate debtor, the RP constituted a Committee of Creditors (**CoC**) comprising of one financial creditor being JM Financial Asset Reconstruction Company Limited and that in the first meeting of the CoC, it was resolved by 100% voting share to appoint the applicant being IRP as RP of the corporate debtor. It is stated that consequent to updating of the claims, the CoC was reconstituted with two members i.e. JM Financial Asset Reconstruction Company Ltd. (66.8% voting share) and Himachal Pradesh Financial Corporation (33.2% voting share). The Form G is stated to be issued on 07.06.2019 and advertised in one English and one Hindi newspaper with last date for submission of Expression of Interest (**EOI**) as 28.06.2019 and last date for submission of resolution plan as 18.08.2019 and that one EOI was received from M/s Adhrit Hospitality Pvt. Ltd. A fresh Form G is stated to be advertised in one English and two Hindi newspapers on 08.07.2019 and three EOIs were further received and in respect of one of these EOIs, the documents were submitted beyond the time line as per Form G. It is submitted that in the

5<sup>th</sup> meeting of CoC convened on 06.09.2019, the applicant apprised the members of CoC that one PRA namely Adhrit Hospitality Ltd. who was earlier very keen to submit a resolution plan has now refused to submit the resolution plan and that two other PRAs have shown interest in land of the corporate debtor but there is a restriction with regard to the use of land in Himachal Pradesh. The willingness of the main promoter and ex-Director of the corporate debtor Shri Taj Pal Garg to give an OTS proposal was communicated by his son Shri Ankit Garg to the CoC.

3. It is stated that in the 6<sup>th</sup> meeting of the CoC convened on 27.09.2019, the applicant apprised the members of the CoC that the applicant has not received any OTS or resolution plan from the ex-Director of the corporate debtor nor from other PRA who has shown interest pursuant to the publication of Form G. The CIRP was coming to an end on 03.10.2019. The CoC is stated to be of the view that 90 days extension shall be an ineffective exercise as the corporate debtor is not a going concern and the corporate debtor has no such assets which can generate income and at this stage, liquidation of the corporate debtor is the most viable solution for the corporate debtor. The resolution for liquidation is stated to be passed by the CoC by 66.8% voting rights and that the applicant gave his consent to act as the Liquidator of the corporate debtor.

4. An application for liquidation is thereupon stated to be filed vide CA No.988/2019 on 08.11.2019 and the AA passed order dated 08.11.2019 as under:-

XXX XXX XXX

*“2. After advancing arguments to some extent, the learned counsel for the applicant having noticed that the CoC has not considered all the aspects required to be considered as per the provisions of the Code, 2016 and Regulations framed thereunder, seeks leave of this Tribunal to withdraw the instant CA with liberty to file better CA after holding of CoC meeting for the said purpose. Accordingly, the instant CA is dismissed as withdrawn with liberty, as aforesaid to be exercised by the applicant within two weeks.”*

5. It is submitted that the 7<sup>th</sup> meeting of the CoC was held on 19.11.2019 in which the resolutions relating to Regulation 39B to 39D of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**CIRP Regulations 2016**) were passed. It has been prayed that order be passed for liquidation of the corporate debtor.

6. We have carefully heard and considered the arguments of the learned counsel for the RP and have also perused the record.

7. The provisions of Section 33(1) and (2) of the Code are as under:-

*“33. Initiation of liquidation. –*

*(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 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).”*

8. The present application is submitted under Section 33(2) of the Code. As discussed above, it is stated in the application that 180 days of the CIRP are coming to an end on 03.10.2019. Application for further extension of time was not submitted. Therefore, the instant CA No. CA 1166/2019 filed on 02.12.2019 is not an intimation to the AA to liquidate the corporate debtor within the prescribed time i.e. during the period of CIRP. Even the earlier CA No.988/2019 seeking order under Section 33(2) of the Code and withdrawn on 08.11.2019 was filed on 15.10.2019 i.e. beyond the end of CIRP. Therefore, the present application does not satisfy the conditions provided for in Section 33(2) of the Code. Consequently, the order is being made under Section 33(1) of the Code since before the expiry of the CIRP, the AA has not received a resolution plan under Section 30(6) of the Code. In view of the provisions of Section 33(1) of the Code, order is being passed requiring the corporate debtor to be liquidated in the manner as laid down in Chapter III of the Code and the directions for issuance of public announcement stating that the corporate debtor is in liquidation and requiring such order to be sent to the authority with which the corporate debtor is registered are being issued.

9. Section 34(1) of the Code states that where the AA passes an order for liquidation of the corporate debtor under Section 33, the RP appointed for the CIRP under Chapter II shall, subject to submission of written consent by the RP to the AA in specified Form, shall act as a Liquidator for the purposes of liquidation unless replaced by the AA under sub section (4). The provisions of Section 34(4) of the Code are not applicable in the present case since the RP has submitted his written consent under Section 34(1) of the Code. The written consent in form AA is at Annexure A-11. The Law Research Associate of his Tribunal has checked the credentials of Shri Ashok Kumar Gupta, proposed Liquidator and there is nothing adverse against him. We therefore, appoint Shri Ashok Kumar Gupta, Registration No. IBBI/IPA-003/IP-N00010/2016-2017/10072, resident of LD-46, LD Block, Pitampura, North West, Delhi-110034, email address [cmaashokgupt@gmail.com](mailto:cmaashokgupt@gmail.com), Mobile No.9871251616 as Liquidator for the liquidation process of the corporate debtor.

10. Regulations 39B, 39C and 39D in the CIRP Regulations, 2016 have been inserted by Notification No. IBBI/2019-20/GN/REG/048 dated 25.07.2019. These regulations are as follows:-

**“39B. Meeting liquidation cost.**

*(1) While approving a resolution plan under sub-section (4) of section 30 or deciding to liquidate the corporate debtor under sub-section (2) of section 33, the committee may make a best estimate of the amount required to meet liquidation costs, in consultation with the resolution professional, in the event an order for liquidation is passed under section 33.*

*(2) The committee shall make a best estimate of the value of the liquid assets available to meet the liquidation costs, as estimated in sub-regulation (1).*

*(3) Where the estimated value of the liquid assets under sub-regulation (2) is less than the estimated liquidation costs under sub-*

regulation (1), the committee shall approve a plan providing for contribution for meeting the difference between the two.

(4) The resolution professional shall submit the plan approved under sub-regulation (3) to the Adjudicating Authority while filing the approval or decision of the committee under section 30 or 33, as the case may be.

**Explanation.**-For the purposes of this regulation, 'liquidation costs' shall have the same meaning as assigned to it in clause (s) of sub-regulation (1) of regulation (2) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

### **39C. Assessment of sale as a going concern.**

(1) While approving a resolution plan under section 30 or deciding to liquidate the corporate debtor under section 33, the committee may recommend that the liquidator may first explore sale of the corporate debtor as a going concern under clause (e) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 or sale of the business of the corporate debtor as a going concern under clause (f) thereof, if an order for liquidation is passed under section 33.

(2) Where the committee recommends sale as a going concern, it shall identify and group the assets and liabilities, which according to its commercial considerations, ought to be sold as a going concern under clause (e) or clause (f) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

(3) The resolution professional shall submit the recommendation of the committee under sub-regulations (1) and (2) to the Adjudicating Authority while filing the approval or decision of the committee under section 30 or 33, as the case may be."

### **39D. Fee of the liquidator**

While approving a resolution plan under section 30 or deciding to liquidate the corporate debtor under section 33, the committee may, in consultation with the resolution professional, fix the fee payable to the liquidator, if an order for liquidation is passed under section 33, for –

(a) the period, if any, used for compromise or arrangement under section 230 of the Companies Act, 2013;

(b) the period, if any, used for sale under clauses (e) and (f) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016; and

(c) the balance period of liquidation."

11. In the instant case, the CoC has taken a decision to liquidate the corporate debtor. This decision was first taken in the 6<sup>th</sup> meeting of the CoC held on 27.09.2019 i.e. before the expiry of the CIRP. Therefore, even though the decision of the CoC to liquidate the corporate debtor was not conveyed by the RP to the AA within the prescribed time period and consequently, the liquidation order is being passed under Section 33(1) of the Code, the decisions taken by the CoC in its 7<sup>th</sup> meeting held on 19.11.2019 with regard to Regulations 39B, 39C and 39D of the CIRP Regulations, 2016 are being considered below.

12. As regards Regulation 39B of the CIRP Regulations, 2016, the CoC has concluded that no fund is to be shared by the members in liquidation cost and hence Regulation 39B(3) is not applicable. With regard to Regulation 39C, the CoC noted that the corporate debtor is not in operation for last three to four years and not even having electricity installation and is not a going concern and did not recommend sale as a going concern. With regard to Regulation 39D, the CoC has fixed the fees payable to the Liquidator on passing of order of liquidation. The resolution under Regulation 39D is stated to be passed with 100% voting share.

13. It is directed that all the directions/requirements and provisions of Chapter III of the Code and Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (**Liquidation Process Regulations, 2016**) shall be strictly complied with. Some of the directions are as under:-

- i) That as per Section 33(5) of the Code and subject to Section 52 of the Code, no suit or other legal proceedings shall be instituted against the corporate debtor;

Provided that a suit or other legal proceedings may be instituted by the Liquidator on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority;

ii) That the provisions of sub-section (5) of Section 33 of the Code 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;

iii) That this order of liquidation under Section 33 of the Code 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;

iv) That all the 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; and

v) That 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 of the Code 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.

14. The Liquidator shall publish public announcement in accordance with Regulation 12 of the Liquidation Process Regulations, 2016 and in Form

B of Schedule II of these Regulations within five days from receipt of this order

calling upon the stake holders to submit their claims as on liquidation commencement date and provide the last date for submission of claim which shall be 30 days from the liquidation commencement date.

15. It is further directed that the announcement shall be published in accordance with Regulation 12(3) as under:-

*“(a) In one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the liquidator, the corporate debtor conducts material business operations;*

*(b) on the website, if any, of the corporate debtor; and*

*(c) on the website, if any, designated by the Board for this purpose.”*

16. In accordance with Regulation 13 of the Liquidation Process Regulations 2016, the Liquidator shall file his preliminary report within 75 days and also to file regular progress reports as per Regulation 15 of the Liquidation Process Regulations, 2016.

17. It is clarified that the Financial Creditors are not debarred from having recourse to enforce the personal guarantees and to take proper steps in this regard.

18. The Liquidator shall take into his possession the assets of the Corporate Debtor.

19. Thus, CA No.1166/2019 stands disposed of.

20. Copy of this order be supplied to the Applicant/Resolution Professional as well as to the Registrar of Companies, Himachal Pradesh. The

Registry is also directed to send a copy of this order at the e-mail address of the Liquidator.

Pronounced in open court.

Sd/-

(Ajay Kumar Vatsavayi)  
Member(Judicial)

Sd/-

(Pradeep R. Sethi)  
Member (Technical)

January 10, 2020  
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