

NATIONAL COMPANY LAW TRIBUNAL
राष्ट्रीय कंपनी विधि अधिकरण
CUTTACK BENCH
कटक खंडपीठ

ORDER SHEET OF THE HEARING ON 13th DECEMBER, 2023, 12:00 NOON

CP (IB) No. 199/CB/2020, IA(IB) No. 354/CB/2023

Present: 1. Hon'ble Member (Judicial), Shri P. Mohan Raj
2. Hon'ble Member (Technical), Shri Satya Ranjan Prasad

Name of the Company	Indian Overseas Bank -Vs- Srabani Constructions Pvt. Ltd.
Under Section	7 IBC

Hearing through: VC and Physical (Hybrid) Mode

For Petitioner (s)

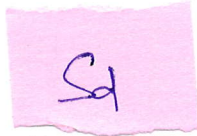
Mr. Saswat K. Acharya, Adv.

For Respondent (s)

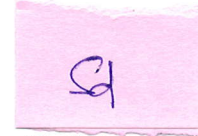
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ORDER

Order passed *vide* separate sheet.



Satya Ranjan Prasad
Member (Technical)



P. Mohan Raj
Member (Judicial)

IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK

IA (IB) No. 354/CB/2023

In

CP (IB) No. 199/CB/2020

In the matter of:

An application filed under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016;

-And-

In the matter of:

Giridhari Lal Sharma, Resolution Professional of Srabani Constructions Pvt Ltd.,
at- A/1, P.C, Plaza, Bomikhal, Bhubaneswar, Odisha- 751 006;

...Applicant

-In-

In the matter of:

Indian Overseas Bank;

...Financial Creditor

-Versus-

Srabani Constructions Pvt Ltd.

...Corporate Debtor

Coram:

Shri P. Mohan Raj : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

Appearances (through Video Conference)

For the Applicant : Mr. Saswat Kumar Acharya, Adv.

Order dated on:13.12.2023

ORDER

1. This application is filed by the Resolution professional under section 60(5) of IBC 2016 and Rule 11 of NCLT Rules 2016 to exclude the period from

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22.03.2023 till the date of filing this application i.e.01.12.2023 (252 days) from the CIRP period.

2. The brief background of the case necessary to dispose of this application are as follows: The CIRP was ordered against the corporate debtor on 29.11.2022 in C.P.No.199/CB/2020 in section 7 IBC 2016 petition filed by Indian Overseas Bank. Mr. Srigopal Choudhary was appointed as an interim Resolution professional and subsequently in the 1st COC meeting held on 29.12.2022 approved him as Resolution Professional. This was not communicated to the Adjudicating Authority as required under section 22(3)(a) of IBC 2016. The Interim Resolution professional submitted 1st progress report on 06.01.2023. The COC was constituted with sole member of financial creditor who had filed the section 7 IBC petition.

3.The sole financial creditor Indian Overseas Bank filed I.A.No.200/ CB/ 2023 on 10.07.2023 for replacement of Resolution professional Mr. Srigopal Choudhary with Mr. Giridhar Lal Sharma, the present applicant herein. In the said application the applicant sole COC member Indian Overseas Bank stated that the in the meeting held on 22.03.2023 it was decided to replace the Resolution professional since he was not carrying out his duties as per the provision of IBC and there was no progress. The respondent opposed the application stating that CIRP was delayed due to complete lack of co-operation by the sole COC member and alleged that despite good possibility of 100% recovery of their claim no co-operation was extended by the Financial Creditor. He also compliant that CIRP fee of Rs.8.26 Lakhs not cleared by the Bank. After heard the matter the said application I.A.No.200/CB/2023 was allowed on 09.10.2023 appointing Mr. Giridharilal Sharma as Resolution professional replacing Mr. Srigopal Choudhary.

4. The new Resolution professional filed this application on 01.12.2023 stating that he was communicated by the financial creditor regarding his appointment order dated 09.10.2023 only on 30.10.2023. Thereafter he convened 3rd COC meeting on 25.11.2023 and resolved to file exclusion petition to exclude the period after 22.03.2023 till the date of filing this application.

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The point for consideration is:

1. Whether the period from 22.03.2023 till 1.12.2023 date of filing this application to be excluded from the CIRP Period?

5. The corporate debtor was admitted into CIRP on 29.11.2022 this application for exclusion is filed on 01.12.2023 after expiry one year. In between I.A.No.200/CB/2023 was file for removal of resolution professional. In the mean while no time extension application was filed after the expiry of initial CIRP period of 180 days on 28.05.2023. Now the applicant wants to exclude the period from 22.03.2023 to 01.12.2023 for 252 days at one stroke. The only reasons attributed is the erstwhile Resolution professional not carried out the work properly. In the present application the present stage of CIRP is not mentioned, what was the work till date carried out also not furnished and also unable to furnish during the course of argument. From the submission it appears that the applicant wants to start the CIRP as fresh from the beginning. In the application it is stated that in the 2nd COC meeting held om 22.03.2023 resolution was passed to appoint new RP. It is stated that the erstwhile RP not taken steps to file application in this regard hence delay occurred. The application for removal of RP I.A.No.200/CB/2023 was filed on 6.07.2023, but there was no explanation why there was delay of about 100 days in filing the application, further there is no material produced regarding any compliant is made against the Resolution professional for non-function either to the IBBI nor to this Authority.

6. The maximum time line prescribed under section 12 (3) of IBC is 330 days, of course few days may be extended to complete the CIRP process, but there is no scope to exclude the entire period of 252 days in one stroke and allow to commence the CIRP as fresh. The extension or exclusion can be granted to complete the process/work, but the same cannot be granted to begin the process. Proviso to section 12 (3) IBC made it clear the CIRP shall mandatorily be completed within a period of 330 days. Here already 365 days expired, the

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applicant is not in a position to say how long he will take to complete the CIRP in the event of exclusion is allowed, it shows that the CIRP is in a beginning stage. The counsel for the applicant stated that the 330 days mentioned in proviso to section 12 (3) IBC 2016 is not mandatory it is only directory. It is true the Hon'ble Supreme Court of India in **Committee of Creditors of Essar Steel India Limited Through Authorised Signatory ...Appellant Versus Satish Kumar Gupta & others (2020)8 SCC 53**, held it is directory but given caution when the time can be extended beyond 330 days Para 127 of the citation runs as follow: -

Both these judgments have been followed in Neeraj Kumar Sainy v. State of Uttar Pradesh (2017) 14 SCC 136 at paragraphs 29 and 32. Given the fact that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant, a provision which mandatorily requires the CIRP to end by a certain date - without any exception thereto - may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and an excessive, arbitrary and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(g) of the Constitution of India. This being the case, we would ordinarily have struck down the provision in its entirety. However, that would then throw the baby out with the bath water, inasmuch as the time taken in legal proceedings is certainly a 131 important factor which causes delay, and which has made previous statutory experiments fail as we have seen from Madras Petrochem (supra). Thus, while leaving the provision otherwise intact, we strike down the word "mandatorily" as being manifestly arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution. The effect of this declaration is that ordinarily the time taken in relation

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to the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation.

From the said citation even though it is observed that the provision is not mandatory but held that period beyond 330 days can be granted only if a short period is left for completion. Here practically no effective CIRP is commenced to

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extend short period for completion. The period sought to be excluded is 252 days, this is huge, hence the request for exclusion is liable to be turned down.

7. The application is filed for exclusion and not for extension. The extension and exclusion are not synonymous. The exclusion can be granted for certain Events or Acts having legal sanction. The exclusion will be granted for the events covered under section 12 to 15 of the Limitation Act 1963 or covered under any other law such as Regulation 40C of IBBI (Regulation Process for Corporate Persons) 2016 or functioning is restrained by act of State or Unforeseen events i.e. for Act of God. The exclusion cannot be granted merely because it is asked. The extension keeps the acts carried out and give time to continue the act to complete. The exclusion can be granted only for immobilised period. Exclusion takes away the period from the counting. For extension sufficient and satisfactory reason is enough, but for exclusion it must be proved that functioning was forbidden.

8. On the applicant side rely upon NCLAT order in Company Appeal No.185 of 2018 dated 08.05.2018 **Quinn Logistics India Pvt. Ltd. vs Mack Soft Tech Pvt Ltd and others**. This order is prior to introduction of second proviso to section 12 (3) of IBC 2016, by which legislature put cap on time limit for CIRP as 330 days as mandatory with effect from 16.08.2019. On the applicant side argued that as per the supra order para 10 under clause (ii) & (vi) the period can be excluded, para 10 (ii) & (vi) runs as follows: -

(ii) If no 'Resolution professional' is functioning for one or other reason during the corporate insolvency resolution process such as removal.

(vi) Any other circumstances which justifies exclusion of certain period.

9. Here it is not the case of the applicant that erstwhile RP not functioned, he functioned and effected public announcement and visited the registered office of corporate debtor and project site, constituted COC, and filed the 1st progress report, convened 2nd COC meeting on 22.03.2023. The erstwhile RP filed minutes of 2nd COC meeting in I.A.No.200/CB/2023. Even after 2nd COC the erstwhile RP had

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constant correspondence with the sole COC member, and recorded about the non-co-operation of sole COC member and non-effective participation of senior officials of COC in CIRP. Even in this application it is not the case of the applicant that due to some reason the erstwhile RP was non-functional. In respect of clause (vi) is concern on the applicant side not made out any justifiable reason to exclude 252 days from CIRP period. On the applicant side rely upon the order of NCLAT in C.A.No.271 of 2019 **Daiyan Ahmed Azmi vs Rekha Kantil Shah Liquidator & ors dated 21.05.2019** this is the case where the licence of the RP was cancelled however the Adjudicating Authority permitted him to continue for a period of three weeks to ensure 'Corporate debtor' remains a going concern. Then new RP joined and started to function further the 90% voting members of COC informed to the Adjudicating Authority they intend to file application under section 12A of IBC 2016 for withdrawal., but the adjudicating authority declined to exclude 21 days from CIRP period. In that context the NCLAT allowed the appeal and excluded 35 days from CIRP and permitted the parties to present the withdrawal application before the adjudicating Authority within 30 days, if COC not accepted the withdrawal with requisite vote, ordered the Adjudicating Authority to pass liquidation order. Here the primarily the exclusion was ordered to put an end to the lis, since parties expressed their desire to withdraw the case. The another NCLAT citation referred on the applicant side is in C.A.No.633 of 2019 **Ramachandra D. Choudhary vs Committee of Creditors of Maharashtra Shetkari Sugar Limited dated 24.07.2019** in this case the IRP resigned and new RP could not take over the charge of the management of corporate debtor due to non-co-operation of the suspended management of the company in that situation exclusion was ordered. The facts of the case are entirely differing from the case in our hands. It is also noticed that all the three citations referred by the applicant side are relating to the period prior to introduction of second proviso to section 12 (3) of IBC 2016.

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10. The Apex court in Essar steel limited case has categorically held that only under exceptional cases the time can be extended by Adjudicating Authority by exercising its discretion for a period beyond 330 days that too for “short period”.

11. On the applicant side argued that liquidation of corporate debtor should be a matter of last resort, and every attempt should be made to revive it as a going concern. It is true but one of the legislative objects of Insolvency and Bankruptcy Code, 2016 is maximisation of value of the corporate debtor in time bound manner. Time fixed under section 12(3) of IBC 2016 should be respected, if an Adjudicating Authority indiscriminately extends the insolvency Resolution process period beyond the time limit mentioned under the code, it will defeat the time bound process enshrined in the code. Exercising discretionary power in violation of statutory provision is not permissible, of course, in an exceptional and extraordinary circumstance it can be used sparingly. In this regard NCLAT-Delhi in the matter of **Kridhan Infrastructure Pvt Ltd (Now known as Krish Steel and Trading Private Limited) & Anr -vs- Venkatesan Sankaranarayana & Anr.** Company Appeal No.202 of 2020 order dated 08.09.2020 in para 68 and 69 held as follows:

68. Ordinarily, the ‘Adjudicating Authority’ is to follow the discipline of ‘I&B’ code enacted by the Parliament, especially to streamline the 52 Company Appeal (AT) (Insolvency) No. 202 of 2020 ‘Resolution’ of ‘Corporate Insolvency matters’ involving ‘Corporate Insolvency’ and the same require the experts’ decision. Of course, it is not open to an ‘Adjudicating Authority’ to take upon itself, the onus of supervising the intricacies of ‘Resolution Process’. Although, the resolution of ‘Corporate Insolvency’ to ensure the survival of a company / enterprise as a going concern is one of the key objectives of the ‘I&B’ code but the rider is this must not come at the cost of efficiency, as opined by this Tribunal.

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To put it succinctly, a 'Timely Liquidation' is preferred over endless 'Resolution process'.

69. One cannot brush aside an important fact that longer the delay, more likely it is the 'Liquidation' will only be the sensible answer. No doubt, the 'Liquidation value' tends to go down with an efflux of time as many 'Assets' suffer from high economic depreciation value. Looking at from the point of view of creditors a good realisation can generally be secured if a company/firm is sold as a going concern. If one construes in the teeth of the object sought to be achieved by the 'I&B' Code and in the light of consequences provided by Section 33 of the Code, therefore, makes it unerringly clear that the periods mentioned in Section 12 are mandatory and cannot be extended. If time specified by statute is changed, then it will give room for wider complications/implications, in the considered opinion of this Tribunal.

In the supra citation it is made clear that timely liquidation is better than endless Resolution process. Causing delay definitely reduces the value of the assets of corporate debtor and correspondingly increases the CIRP/Liquidation cost, every day delay deteriorates the value of assets.

12. From the above citations it is clear that the CIRP must be completed within a period of 330 days from the date of commencement of Insolvency, in exceptional cases beyond 330 days short period can be extended for approval of resolution plan. In our case there is neither any resolution plan is pending, not even published form 'G'. In our case the applicant has not made out 'exceptional circumstances' for an extension of beyond 330 days. In this case till the date of filing this application already 365 days expired. In order to grant exclusion or extension beyond 330 days, the RP or the COC is required to show that there is a high prospect that he may receive a resolution plan. No such positive, viable,

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prospective were placed before us. Thus, as to the facts of the present case the applicant has not substantiated any exceptional circumstances to order exclusion of period from CIRP. This application to exclude 252 days is not considered and that the exclusion application is dismissed and in consequence, this Authority in terms of section 33(1)(a) of IBC 2016 we inclined to order liquidation. In the result the **M/s Srabani Constructions Pvt. Ltd**, corporate debtor is ordered to be liquidated.

13. The IBBI vide its power vested under section 34(4)(b) has recommended that an insolvency professional other than the RP/IRP shall be appointed as Liquidator in all cases where the liquidation is ordered. As a consequence, the corporate debtor is ordered for liquidation as per Section 33(I)(a) of IBC 2016. From the latest list provided by IBBI we hereby appoint **Mr. Gagan Bihari Bhuyan** with registration No. **IBBI/IPA-002/IP-N00928/2020-2021/13029**, and Email – gaganbhuyan29@gmail.com having office No. Flat No. 2162, 15th Floor, 2nd Tower, DN oxy Park, Dumduma, Bhubaneswar. (M.C) Khorda, Dumuduma Housing Board, Colony, Odisha 751 019 is appointed as liquidator of corporate debtor **M/s. Srabani Constructions Pvt. Ltd**,

14. The Liquidator shall file his written consent to this Adjudicating Authority within three days from the date of receipt of the order.

15. The Liquidator is directed to forthwith take into his custody all the assets, Properties, sophisticated equipment tools implement, machineries, effects and actionable claims of the corporate debtor and take necessary steps to ensure preservation, protection security and maintenance of those properties as provided under section 35(1)(b) & (d) of IBC 2016.

16. The Liquidator is directed to adhere to Section 33(1) (ii) & (iii) and discharge his powers and duties as specified under Section 35 to 41 of IBC,2016 and meticulously adhere to the Rules and Regulations issued by IBBI in this regard from time to time. Public Notice as contemplated under section 33(1) of the Code

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shall be issued in one morning, English daily and in one morning regional language newspapers.

17. All the powers of the Board of Directors of the Corporate Debtor and of its key managerial personnel, shall cease to exist in accordance with section 34(2) of the Code. These powers shall henceforth vest in the Liquidator. The personnels of the Corporate Debtor shall extend all assistance and cooperation to the Liquidator as may be required by him in the Liquidation process of the Corporate Debtor.

18. On initiation of the Liquidation process but subject to section 52 of the Code, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor, save and except the liberty of the liquidator to institute a suit or other legal proceeding on behalf of the Corporate Debtor with prior approval of this Adjudicating Authority, as provided in section 33(5) of the Code read with its proviso.

19. In accordance with section 33(7) of the Code, this liquidation order shall be deemed to be a notice of discharge to the officers, employees and work men of the Corporate Debtor, except to the extent of the business of the Corporate Debtor continued during the liquidation process by the liquidator.

20. In terms of Section 33(1) (b) (iii), the Liquidator shall file a copy of this Order with the Registrar of Companies, Cuttack, Odisha, within whose jurisdiction the Corporate Debtor is registered.

21. The fee of Liquidator is to be determined as provided under Regulation 4 of Insolvency and Bankruptcy Board of India (Liquidation process) Regulation 2016.

22. As per Regulation 13 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016, the liquidator shall submit preliminary report to the Adjudicating Authority within 75 days from the liquidation

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IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH

IA (IB) No. 354/CB/2023

In

CP (IB) No. 199/CB/2020

commencement date providing various details/information as mentioned in the said regulation.

23. The Registry is directed to send e-mail copies of the order forthwith to the Liquidator appointed and to all the parties and their Ld. Counsel for information and for taking necessary steps,

24. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.



Satya Ranjan Prasad
Member (Technical)



P. Mohan Raj
Member (Judicial)

Signed on this, the 13th day of December, 2023.

Supriya P.S