

NATIONAL COMPANY LAW TRIBUNAL, COURT-V, NEW DELHI
C.A.121/ND/2019 IN Company Petition No. (IB) 323(ND) /2019

In the matter of:

Ratan Singh

Operational Creditor

V.

Theme Exports Private Limited
F-25/1 Okhla Industrial Area,
Phase-Ii New Delhi- 110020

Corporate Debtor

AND

In the matter of:
Mr. Vikram Bajaj

Applicant/Resolution Professional

Under Section 33(2) of the Insolvency and Bankruptcy Code, 2016 for liquidation of the Corporate Debtor.

Judgment delivered on: 29.07.2020

Coram:

ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

K.K. VOHRA, MEMBER (TECHNICAL)

Present:

For the Resolution Professional: Mr. Abhishek Anand. Mr. Tushar Tyagi,
Mr. Viren Sharma, Advocates

For the Operational Creditor : Mr. Sagar Agnihotri, Advocate

For the Ex-Management : Mr. Brijender Singh, Advocate

ORDER

Per: K.K. Vohra, Member (T)

1. This is an application filed by the Resolution Professional (RP) under Section 33(2) of the Insolvency and Bankruptcy Code, 2016 (Code) for



issuance of directions for liquidation of the Corporate Debtor (CD), Theme Exports Private Limited.

2. The Operational Creditor (OC), Mr. Ratan Singh, had filed an application under Section 9 of the Code for initiation of Corporate Insolvency Resolution Process (CIRP) against the CD. The said application was admitted by this Tribunal on 29.08.2019 initiating CIRP against the CD and appointing Mr. Vikram Bajaj as the Interim RP (IRP).
3. IRP made the Public Announcement in respect of initiation of CIRP and intimated to the all suspended directors of the CD. The IRP after collecting and verifying claims received, constituted Committee of Creditors (CoC).
4. First meeting of CoC was held on 28.09.19. The second meeting of CoC, held on 04.11.19, appointed IRP as RP and CoC decided to liquidate the CD after due deliberations. Minutes of 1st and 2nd meetings of CoC have been placed on record.
5. RP has referred to Section 33 (2) of Code which is reproduced below:

“where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the AA of the decision of the committee of creditors (approved by not less than sixty-six percent of the voting share) to liquidate the corporate debtor, the AA shall pass a liquidation order....

Explanation: For the purpose of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan,



including at any time before the preparation of the information memorandum.”

6. The RP has now filed present application with a prayer for liquidation as the CoC in its second meeting approved the Resolution for Liquidation of CD with 98.50% voting share.
7. OC as well as the ex-management have raised objections against the present application on the following grounds:
 - a) The intent of the Code is to explore possibility for maximization of value of assets and explore proper resolution. However, CD in the present matter has not tried to do that. It is also alleged that the RP has not performed its duty in terms of Section 25 (2) (g) and (h) of the Code by not preparing Information Memorandum and by not even inviting Expression of Interest for Resolution Plan.
 - b) Reference has been placed to the minutes of first meeting of the CoC whereas it has been recorded that ex-directors informed that customers of CD are interested in placing orders. It was also recorded that the possession of manufacturing unit of CD has been taken over by the Bank of Baroda (BoB) and handover of the possession by BoB is pre-requisite for business of operation (Page 29 of the application).
 - c) It is further argued that the CD is a registered MSME and the Code provides some exceptions to the MSMEs [Page 4 para 3 (d) of the reply of Respondent 1].
8. The main objection of both the objectors is that the intention of the legislature is to ensure revival and continuation of CD and in the present matter the RP and CoC are doing contrary. In support of their arguments, reliance has been placed upon judgement passed by Hon'ble Supreme Court



in the matter of Swiss Ribbons Pvt. Ltd. vs Union of India, in WP (Civil) petition no. 99 of 2018 passed on 25.01.2019 and order passed by Principal Bench of this Tribunal in matter of Vedica Nut Craft Private Limited dated 12.01.2018 in which it was held that liquidation should be the last resort.

9. In rejoinder to the aforementioned objections, the RP submitted:
- a. Objectors have no locus to raise objection against the decision of CoC.
 - b. The commercial decision of CoC cannot be reviewed by the Adjudicating Authority (AA) because as per Section 33 (2) of the Code, the decision of CoC is final.
 - c. The minutes of the second meeting of CoC [page 40 (of application) item No. 2 and page 45 Item No.7] also reveal that after joint visit of manufacturing unit, it is seen that the business operation of the CD was lying closed for nearly a year and the company does not have any stocks/working capital and significant plant and machinery has also been disposed of. It is also recorded that the ex-directors had not provided any updated financial statements from which financial status of the company could be verified. In view of this, the CD cannot run as a going concern and liquidation is an only viable option.
 - d. In terms of Section 33 (2) Explanation of the Code, the CoC can pass resolution for liquidation any time after its constitution and RP is only performing its duty by filing the present application in conformation with the decision of the CoC.
 - e. It is also submitted that the judgements relied by the Objectors were passed before the explanation to the Section 33 (2) was added (before 06.08.2019).

10. In support of his argument, RP has relied upon judgment passed in the matter of K. Sashidhar Vs. Indian Overseas Bank & Ors., Civil Appeal No.



10673 wherein it was observed that *“The legislature, consciously, has not provided any ground to challenge the ‘commercial wisdom’ of the individual financial creditors or their collective decision before the adjudicating authority. This is made non-justiciable.”*

11. Heard the Ld. Counsels for the parties. We observe that:

- a) CoC has given due thought on running the Company as a going concern. There are timelines prescribed under the law and assets may deteriorate with the passage of time. In the present matter, there is evidence that no machinery was left and the business operation of CD is lying closed for quite some time. Latest financial statement have not been provided. As per the minutes of Second meeting of CoC, it is clear that there are no chances of revival of CD and hence the company should be liquidated. Thus, CoC has recommended for Liquidation as a last resort.
- b) In Essar Steels case (supra), Hon’ble Supreme Court has held that the decision of CoC must prevail. And in this way Hon’ble Supreme Court endorsed the decision of K. Sashidhar Vs. Indian Overseas Bank & Ors., Civil Appeal No. 10673 in which Hon’ble Supreme Court held *“The legislature, consciously, has not provided any ground to challenge the ‘commercial wisdom’ of the individual financial creditors or their collective decision before the adjudicating authority. This is made non-justiciable.”*

12. So far decision of Swiss Ribbons Pvt. Ltd. vs Union of India, in WP (Civil) petition no. 99 of 2018 passed on 25.01.2019 is concerned, in Essar Steels case Hon’ble Supreme Court has also considered this decision, therefore, same will not help the Objector.



13. So far decision of Principal Bench in Vedica Nut Craft Pvt Limited dated 12.01.2018 is concerned, after this decision an amendment is made in Section 33(2) of IBC which is effective from 16.08.19 and as per Explanation of Section 33(2), the CoC may take the decision to liquidate the CD at any time after its constitution or before the confirmation of resolution plan, including any time before the preparation of the information memorandum; therefore that decision will not help the Objector.
14. In view of the above, the liquidation has to follow as recommended by the CoC in terms of provisions of Section 33 (2) of the Code.
15. In the factual background and in conformity with the decision of the CoC with 98.50% voting share, the payer for Liquidation of the CD under Section 33 of the Code is liable to be allowed.
16. The CoC has also approved appointment of RP as Liquidator. The RP has filed its written consent dated 20.11.2019 to act as a Liquidator.
17. In the result, **the application is allowed by ordering liquidation of the corporate debtor**, namely Theme Exports Private Limited in the manner laid down in the Chapter III of Part II of the Code, along with following directions:
- A. Mr. Vikram Bajaj Registration No. IBBI/IPA-002/IP-N-00003/2016-17/10003, is appointed as Liquidator in terms of Section 34(1) of the Code;
- B. Mr. Vikram Bajaj is directed to issue Public Announcement stating that the CD is in liquidation, in terms of Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Regulations);



- C. The Registry is directed to communicate this Order to the Registrar of Companies, NCT of Delhi & Haryana and to the Insolvency and Bankruptcy Board of India;
- D. The Order of Moratorium passed under Section 14 of the Code shall cease to have its effect and a fresh Moratorium under Section 33(5) of the Code shall commence;
- E. The Liquidator is directed to proceed with the process of liquidation in the manner laid down in Chapter III of Part II of the Code and in accordance with the relevant Regulations;
- F. The Liquidator shall also follow pending application, if any, for its disposal during the process of liquidation including initiation of steps for recovery of dues of the CD as per law;
- G. The Liquidator shall follow up and investigate the financial affairs of the corporate debtor in accordance with provisions of Section 35 (1) of the Code;
- H. The Liquidator shall submit a Preliminary Report to the AA within seventy-five days from the liquidation commencement date as per Regulation 13 of the Regulations.

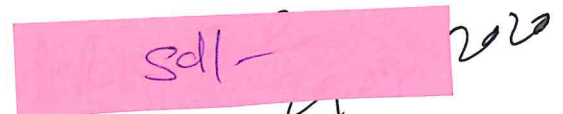
18. Copy of this order be sent to the financial creditors, corporate debtor and the Liquidator for taking necessary steps.

19. C.A. 121/ND/2019 filed in IB 323 (ND) /2019 is disposed of in the aforesaid terms.

sdh-

(K. K. VOHRA)

MEMBER (T)

sdh- 2020

(ABNI RANJAN KUMAR SINHA)

MEMBER (J)

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