

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

MA 1160/2019 in CP(IB)1179(MB)/2017

(Under Section 33 of the IBC, 2016)

Mr. V. Mahesh

...Applicant/
Resolution Professional

In the matter of

Valia & Co.

...Operational Creditor

Vs

Brinzk Powertech Private Limited ... Corporate Debtor

Order delivered on 15.7.2019

Coram:

Hon'ble Member (Judicial) Shri V.P. Singh

Hon'ble Member (Technical) Shri Ravikumar Duraisamy

For the Applicant: Mr Shashwat Rai, i/b Keystone Partners

Per: Hon'ble Member (Judicial) Shri V.P. Singh



ORDER

1. MA 1160/2019 has been filed under Section 33 (2) of the Insolvency and Bankruptcy Code, 2016, seeking liquidation of the Corporate Debtor. Applicant Resolutions Professional, Mr V. Mahesh has filed this application stating that Petition filed under section 9 was admitted by order of this Bench dated on 26.6.2018.
2. It is stated in the application that the Applicant, under the said Order dated 26th June 2018, received claims from Secured and Unsecured Financial Creditors and Operational Creditors. The Applicant, after that, constituted the Committee of Creditors and the first meeting of the COC was held on 10.8.2018.
3. It is further stated in the application that by an Order dated 21st December 2018, this Tribunal granted an extension of 90 days for the completion of Corporate Insolvency Resolution Process ("CIRP").

4. It is contended by the applicant that during CIRP, the Resolution Professional received a Resolution Plan from the Promoter cum Suspended Director of the Corporate Debtor, Mr Arvind. P. Karwat on 5th February 2019, i.e., much after 10th December 2018, the last date stipulated under EOI issued by the Applicant. However, to give a fair chance to the Promoter/s, the COC agreed to consider the Resolution Plan, submitted by the promoters of the Corporate Debtor. The same was put forth before the COC at their meeting held on 15th March 2019 for their consideration. However, the COC, in the said meeting, resolved that "*the Resolution Plan as submitted by the Promoter of the Corporate Debtor, Mr Arvind P. Karwat be and is hereby, "Rejected" after detailed and due consideration and for the reasons above said, unanimously by the following members of the Committee of Creditors*". A copy of the minutes of the meeting on 15th March 2019 is enclosed with the application as Annexure- D.
5. On perusal of the minutes of the said meeting, it is observed that the CoC after due consideration and detailed discussions recorded the following points about the Resolution Plan:
- The Resolution Plan does not satisfy the fundamental and essential requisites under Section 30(2) of the IBC, 2016;
 - The Resolution Applicant does not have any clarity about the source and Application of funds;
 - The period of 6 to 7 years for repayment of dues to the Secured/Unsecured Financial creditors is not acceptable to the CoC;
 - The source of payment is not backed by credible figures.
 - The Resolution Applicant does not have the required Networth; absence of financial sponsor and the Plan does not comply with the provisions as laid down u/s 30(2)(d), (c), (d) of the IBC, 2016;
 - Approval/consent from other promoters of the Corporate Debtor has not been obtained;
 - Absence of implementation process/procedure for the proposed Resolution Plan and the Business prospects as claimed by the Resolution Plan is not submitted to the CoC;
 - It is specified that selling of Fixed Assets will be used to fund the Resolution Plan, but details as to which of the assets will be used have not been specified
 - The clientele, customers, expected profit margin, turnover and profitability of the Corporate Debtor is not present in the Resolution



Plan, and commercially the Plan is unviable and not feasible as laid down u/S 30(4) of the IBC, 2016.

6. It is further observed from the Minutes that by the resolution dated 15th March 2019, the COC also directed the Resolution Professional to file liquidation application before this tribunal. Accordingly, the Applicant filed the present Application seeking orders under Section 33(2) of the Code for liquidation of the Corporate Debtor and consequently for the appointment of the Applicant as the Liquidator.
7. In the written submissions filed by the applicant, the applicant contends that the extended period of 270 days for completion of the CIRP was to come to an end on 23rd March 2019. The Suspended Director, after that, on the 269th day of the CIRP addressed an email to the Applicant enclosing a "modified Resolution Plan". In the meanwhile, the Suspended Director of the Corporate Director approached this Tribunal by filing a Miscellaneous Application No. 1562 of 2019 seeking a direction of this Tribunal to direct the Applicant to call a COC meeting to vote on the "modified Resolution Plan" as submitted on 22nd/ 23rd March 2019.
8. This Tribunal, by an Order dated 9th May 2019, directed the Applicant to submit the revised resolution plan submitted by the suspended Director of the Corporate Debtor before the COC of the Corporate Debtor. Accordingly, in compliance with the said order dated 9th May 2019, the Applicant called for a meeting of the COC, by consent and concurrence of all, on 18th May 2019. In the meanwhile, the Applicant had also requested the Resolution Applicant to provide the signed Resolution Plan to the members of the COC for their consideration on 18th May 2019. After repeated reminders issued to the Resolution Applicant, the Resolution Applicant ultimately provided the members of the COC and the Applicant with a copy of the unsigned Resolution Plan only on 17th May 2019 at 10 pm, and a signed copy of the Resolution Plan on 18th May 2019 at 11 am. But the modified Resolution Plan was substantially different from the original Resolution Plan submitted on 23rd March 2019.
9. It is further contended by the applicant that as per schedule, a meeting of the COC was held on 18th May 2019 to consider the modified Resolution Plan submitted by the Resolution Applicant. The Resolution Applicant was present at this meeting along with 2 of his consultants, being a Company Secretary and a Chartered Accountant respectively. During the meeting, the COC members placed some queries to the Resolution Applicant as also, pointed out inconsistencies in the assumptions and raised concerns on the viability and feasibility of the Resolution Plan. The Resolution Applicant and his consultants, after that, agreed to rectify



the same. Pursuant to the representation made by the Resolution Applicant, COC members directed the Resolution Applicant to make suitable changes, modification and/ or correction to the Plan and submit the same to the Applicant and the members of the COC on or before 22nd May, 2019 and it was agreed that voting on the said revised Resolution Plan by the COC was fixed for 25th May 2019. The Resolution Applicant after that brought certain changes to his Resolution Plan and submitted the revised Plan to the members of the COC only on 24th May 2019 two days late, which was allowed by the Applicant. Upon submission of the revised resolution plan by the Resolution Applicant, members of the COC communicated their views by emails on the said revised plan to the Applicant.

10. The applicant further contends that the members of COC after careful consideration and deliberation on the revised Resolution Plan as submitted by the Resolution Applicant, with a **100% unanimous** vote rejected the said revised Resolution Plan. The COC members rejected the same as being unviable, not feasible and not adhering to the maximisation of the value proposition to secured and unsecured Financial Creditors and Operational Creditors and other stake holders.
11. In the written submissions filed by the Applicant, it is stated that 3 days before the next day of the hearing, the Suspended Director by his Practicing Company Secretary's letter dated 21st June 2019 served a copy of an Additional Affidavit on behalf of the Suspended Director/ Resolution Applicant in his Miscellaneous Application No. 1562 of 2019. By the said Additional Affidavit, the Resolution Applicant made various untenable and unscrupulous allegations *among others* against the Applicant and the members of the COC. The said allegations are an afterthought and made only to delay the present Application. Significantly, the Practicing Company Secretary appearing for the Resolution Applicant did not even refer to the said allegations during the hearing before this Tribunal held on 24th June 2019.
12. It is further contended that the Resolution Plan did not adhere to the provisions of the Code and was not viable and feasible according to the members of the COC. The Resolution Plan as finally submitted by the Resolution Applicant on 24th May 2019, was in contravention of Regulation 38 of the CIRP Regulation. Regulation 38 of the CIRP Regulation provides that the amount due to the Operational Creditors under a resolution plan shall be given priority in payment over Financial Creditors. However, the Resolution Applicant in its Resolution Plan pays the Financial Creditors (secured and unsecured) in stages in a period of 3 months to 54 months whereas the Operational Creditors are paid the first instalment in



the 2nd month and the remaining amount in 55 months to 60 months. Hence, at least part of the amount paid to the Operational Creditors is after the Financial Creditors are paid in clear and brazen contravention of Regulation 38 of the CIRP Regulations.

13. It is further submitted by the applicant that the Code places considerable force in the commercial wisdom of the COC, particularly when considering the Resolution Plans by which the COC and other creditors will get paid. In this case, the COC in its collective wisdom did not find the said Resolution Plan submitted by the Resolution Applicant as feasible and viable and hence, **unanimously** rejected the said Resolution Plan. The Resolution Applicant cannot now question the commercial wisdom of the COC as it is trying to do by making a frivolous and untenable allegation, among other things, the members of the COC and the Applicant.
14. The Applicant places reliance on the decision of the Supreme Court in the matter of K Sasidhar vs Indian Overseas Bank & Ors [2019 SCCOnLine SC 257], wherein it is held that -

“... 39. As aforesaid, upon receipt of a “rejected” resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of Sick Industrial Companies Act, 1985 or under other such enactments which have now been forsaken. Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. 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. That is made nonjusticiable.

... 46. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to



reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority percent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 06.06.2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter-III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October, 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified percent (25% in October, 2017; and now after the amendment w.e.f. 06.06.2018, 44% (sic)). The inevitable outcome of voting by not less than requisite percent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection. (Emphasis supplied)

15. In the above circumstances, where the 270 days of the CIRP period has already expired on 23rd March 2019 and as per our order dated 9th May 2019, the Applicant has put the revised resolution plan of the Director of the Corporate Debtor before the COC, which has been unanimously rejected. The only resolution plan dated 24th May 2019, after giving appropriate chances for modification and correction, the CoC has unanimously rejected the plan. Therefore the Applicant has filed this application for the liquidation of the Corporate Debtor in terms of Section 33(2) of the Code. Given the provisions of Section 33 of the Code, this application deserves to be allowed.

ORDER

16. MA 1160/2019 is allowed, and we at this moment pass the order of liquidation Section 33 of IBC as follows:



That the Corporate Debtor is liquidated in the manner as laid down in the Chapter by issuing a Public Notice stating that the Corporate Debtor is in liquidation with a direction to the Liquidator to send this order to RoC under which this Company has been registered.

- b. As to the appointment of Liquidator, Mr V. Mahesh, Resolution Professionals at this moment appointed to act as a Liquidator for the liquidation of Corporate Debtor company with all powers as envisaged in the Code.
- c. On such appointment under Section 34 of the Code, all powers of the Board of Directors, key managerial personnel and the partners of the Corporate Debtor shall cease to affect and shall be vested in the Liquidator.

- d. That the personnel of the Corporate Debtor shall extend all co-operation to the Liquidator as may be required by him in managing the affairs of the Corporate Debtor.
- e. That the Liquidator will charge fees for conduct of the liquidation proceedings in proportion to the value of the liquidation estate/assets as specified under Regulation 4 of Insolvency and Bankruptcy (Liquidation Process) Regulations, 2016 and the same shall be paid to the Liquidator from the proceeds of the liquidation estate under Section 53 of the Code.
- f. 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 Corporate Debtor, in the event of initiation of a suit or legal proceeding by the liquidator on the corporate debtor 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.
- g. This liquidation order shall be deemed to be notice of discharge to the officers, employees and workmen of the Corporate Debtor except to the extent of the business of the Corporate Debtor continuing during the liquidation process by the Liquidator.
17. Moratorium declared vide Order dated 26.6.2018 in CP No.: 1179/2017 ceased to exist.
18. The registry is directed to communicate this order to the Liquidator immediately even by way of e-mail.
19. MA 1160/2019 is disposed of accordingly.

Sd/-
RAVIKUMAR DURAISAMY
Member (Technical)



Sd/-
V. P. SINGH
Member (Judicial)

Certified True Copy
Copy Issued "free of cost"
On 19/08/2019

Assistant Registrar
National Company Law Tribunal Mumbai Bench