

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

**C.P. No. 1148/I&BC/NCLT/MB/MAH/2017
Under Section 10 of the Insolvency & Bankruptcy Code, 2016**

Fortune Pharma Private Limited ... Corporate Debtor

**M.A. Nos. 2276/2019 & 2277/2019
Under Sections 33(3), 74 & 60(5) of the Insolvency and Bankruptcy Code, 2016**

State Bank of India : Applicant

V/s

**1. Sudhakar H. Mulay
2. Anurag Kumar Sinha : Respondent.**

Order Pronounced on: 25.11.2019

Coram :

Hon'ble M.K. Shrawat, Member (J)
Hon'ble Chandra Bhan Singh, Member (T)

For the Petitioner(s) : Mr. Prakash Shinde, Mr. Nishit Dhruva, Mr. A.K. Mishra, Mr. Rohan Agrawal i/b MDP & Partners for SBI present.

For the Respondent(s) : Resolution Professional Mr. A.K. Sinha present. Mr. S.H. Mulay for Resolution Applicant present.

Per: M.K. Shrawat, Member (J)

ORDER

1. This Petition filed under section 10 of I&B Code was Admitted vide an Order dated 28.08.2017 and Mr. Martin Golla was appointed as IRP. A meeting of the COC was held on 16.11.2017 wherein it was decided to change the IRP which was granted by this Bench and Mr. A.K. Sinha was appointed as new IRP vide Order dated 14.12.2017. Since 180 days for completion of CIRP Process was about to expire Mr. A.K. Sinha IRP sought extension wherein vide Order dated 07.03.2018 extension of 90 days was granted.
2. MA-2276/2019 - It is submitted that 3 companies Gangamai Industries and Constructions Limited, Ken Software Technologies Limited and Tagros Chemicals India Private Limited submitted their Expressions of Interest for submission of Resolution Plan. The plan of Gangamai Industries and Constructions Limited was discussed in the COC Meeting held on 05.05.2018 and 23.05.2018, however that was rejected.

3. It is submitted that in the 11th, 12th and 13th COC Meetings held on 23.05.2018, 08.06.2018 and 11.06.2018 the Respondent No. 1 (Sudhakar Mulay) being the Chairman of the suspended board of Directors of the Corporate Debtor requested for approaching for extension of CIRP beyond 270 days. On the last date of CIRP, the Respondent No. 1 submitted a Resolution plan on the ground that under the amendment in the Insolvency and Bankruptcy Code, 2016 he was eligible to be a Resolution Applicant as the Corporate Debtor is an MSME. The proposal was considered in the 13th COC Meeting but this proposal was also not found acceptable by COC. Therefore it was decided to liquidate the Corporate Debtor. Accordingly an Application under section 33 of the Code for liquidation of Corporate Debtor was filed bearing No. MA-1511/2019.
4. MA-682/2018 was filed by Respondent No. 1 (Mr. Mulay) of this Misc. Application now under consideration, this Bench directed the Mr. Mulay to submit the Resolution Plan before the Resolution Professional by 22.10.2018. This plan was submitted on 22.10.2018 which was not acceptable to the COC and asked Mr. Mulay to modify the same at the earliest. Mr. Mulay submitted revised Resolution Plan on 14.11.2018 and increased the amount payable to the Financial Creditors and other stake holders. This Resolution Plan was approved by a 100% voting of the COC. Vide an Order dated 20.02.2019 (MA-1483/2019) the said Resolution Plan was allowed.
5. It is pertinent to note that the Resolution Plan envisaged the following :-
 - (a) *Payment of the CIRP costs to the Applicant to the tune of 0.50 Crores, immediately upon approval of the Resolution Plan dated 14.11.2017.*
 - (b) *Upfront payment of Rs. 2.00 Crores immediately within 7 days of approval of the Resolution Plan dated 14.11.2017.*
 - (c) *Payment of Rs. 14.99 Crores within a period of 3 months from the date of receipt of the order approving the resolution plan dated 14.11.2018.*
6. These facts were considered by this Bench in the said Order dated 20.02.2019 at paragraphs 15 and 24, which are reproduced below :-
 15. *Insolvency Resolution Process Cost*
The Resolution Applicant considered the Insolvency Resolution process costs of Rs. 0.50 Crore or actual. The same will be paid under this resolution plan on approval by NCLT immediately.
 24. *Summary of Resolution Plan*
...

*The Secured Creditors will be paid upfront of Rs. 2.00 crores as immediate payment within 7 days from the date of the order received/issued from the Hon'ble NCLT and the balance amount of Rs. 14.00 Crores will be paid within 3 months starting from the date of the order received /issued from the Hon'ble NCLT or latest by 31st March 2019. **The Payment to Secured financial creditor has been offered for full and final settlement of Rs. 16.99 crores on immediate basis within three months from the date of receipt/issue of NCLT order or latest by 31.03.2019.** The Original Title deeds/guarantees/counter guarantees will be immediately released on the payment of the entire dues of Rs. 16.99 cr. by the Secured financial creditor. **(emphasis supplied)**"*

7. The Applicant submits that pursuant to the passing of the said Order dated 14.11.2018, the Respondent No.1 has made the following payments to the Applicant :-

SL No.	Mode of Receipt	Date of Receipt	Amount
1	RTGS	13.03.2019	3,80,000.00
2	DD No.029564	04.03.2019	50,00,000.00
3	DD No.029563	04.03.2019	50,00,000.00
4	DD No.029515	04.03.2019	25,00,000.00
5	DD No.029513	04.03.2019	30,00,000.00
6	DD No.029517	04.03.2019	30,00,000.00
7	RTGS	02.03.2019	15,00,000.00
	Grand Total		2,03,80,000.00

8. The Applicant submits that there was a clear breach of the representations made by the Respondent No. 1 (Mr. Mulay) in the approved resolution plan dated 14.11.2018. Further the Respondent No.1 has, till date, not fulfilled and complied with its obligations stipulated therein. It is submitted that the Corporate Debtor filed Company Petition under section 10 of the I&B Code with an attempt to evade action taken by the Applicant under the provisions of SARFAESI Act, 2002. The Respondent No. 1 has all along during the CIRP process adopted dilatory tactics thereby affecting the CIRP Process of the Corporate Debtor. The Respondent No.1 has now breached his obligations under the Resolution Plan dated 14.11.2018. As per one of the basic undertaking the Resolution Applicant had assured that a sum of ₹ 16.99 Crores should be paid to Financial Creditors as final settlement upto 31st March 2019.
9. On 22.04.2019 this Bench was pleased to issue notice to the Respondent No.1 to show cause as to why action should not be taken for breach of the Order dated 20.02.2019. Vide Order dated 03.06.2019 this Bench had directed the Respondent

No.1 Mr. Mulay to make the balance payment of Rs. 14.99 Crores plus the balance unpaid CIRP costs, to the COC, on or before 15.06.2019. Despite the unambiguous and clear directions by this Bench vide Order dated 20.02.2019 had repeatedly disobeyed the orders and directions. The Respondent No.1 has contravened the Resolution Plan dated 14.11.2018 and the Orders dated 20.02.2019 and 03.06.2019 and therefore, the Respondent No.1 (Mr. Mulay) is liable to be penalized under the provisions of Section 74 of the Code. Therefore, the Applicant being an aggrieved party is seeking liquidation of the Corporate Debtor under the provisions of Section 33(3) of the Code and has prayed for the following reliefs :-

- (a) That this Hon'ble Tribunal be pleased to pass an order directions the Corporate debtor to be liquidated under section 33(3) of the Code.
 - (b) That this Hon'ble Tribunal be pleased to pass an Order imposing the maximum punishment against the Respondent No.1 under section 74 of the Code for committing breach and contravention of the Resolution Plan dated 14.11.2018 and the said Orders dated 20.02.2019 and 03.06.2019.
10. That Section 33 of the I&B Code prescribes for initiation of liquidation where the AA before the expiry of the Corporate Insolvency Resolution Process period does not receive a Resolution Plan or reject the Resolution Plan under section 31 of the I&B Code for the non-compliance of the requirements specified shall pass an Order requiring the Corporate debtor to be liquidated in the manner prescribed in the Code. Where the Resolution Plan approved by AA is contravened by the Resolution Applicant the matter is required to be referred for liquidation. In this case the admitted factual position is that the Resolution Applicant has defaulted in carrying out the terms of the Resolution Plan. It is also worth noting that the Corporate Insolvency Resolution Process period had already expired, therefore, fresh Expression of Interest can also not be invited for calling new Resolution Plan. The only remedy left is to proceed with the Liquidation Process.
11. Thus considering the totality of the circumstances, when the Resolution Applicant has grossly failed to implement one of the important assurance of payment to Financial Creditors upto the date specifically given, this Bench is of the considered view that this is a fit case to approve liquidation of the Corporate Debtor.

12. As a result, the debtor company is hereby directed to be liquidated. The RP shall function as Liquidator. **Application allowed.**

13. Order under section 74 of the I&B Code :-

This Section prescribes that where the Corporate Debtor or any Officer violates the provisions and wilfully as well as knowingly contravene the undertakings is liable for punishment. Sub-section (3) prescribes that where the Corporate Debtor or any of its Officer on whom the approved Resolution Plan is binding under section 31 of the I&B Code who knowingly and wilfully contravenes the terms of such Resolution Plan shall be punishable with imprisonment of not less than One Year, but may extend to Five Years or with fine which shall not be less than One Lakh Rupees, but may extend to One Crore Rupees or with both. In this case Mr. Sudhakar Mulay, the Resolution Applicant, has knowingly and wilfully failed to make the payment as proposed by him in the impugned Resolution Plan.

13.1 Section 236 of I&B Code has now been enforced w.e.f. 01.12.2016 prescribing Trial of Offences by Special Court. As per this Section Offences under this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013. Under the said Chapter of the Companies Act, 2013 there is a section 435 of the Companies Act, 2013 wherein Central Government has provided establishment of Special Court for speedy trial of offences. On enquiry it is informed that the jurisdiction to initiate punishment proceedings are vested within the jurisdiction of District Magistrate Alamgir Colony, Maulana Azad Research Centre Road, Collector Office Campus, Aurangabad, Maharashtra-431003. Registry is directed to take necessary steps for lodgement of the case before the said Special Court.

14. MA-2277/2019 - The only prayer is to pass an Order directing the Applicant to forfeit the amount of ₹ 2,03,80,000/-. Since it is a clear defiance of the Order of this Bench as well as breach of undertaking given in the Resolution Plan, therefore, it is hereby directed that the RP/COC shall forfeit the amount deposited.

SD/-

CHANDRA BHAN SINGH
Member (Technical)

25.11.2019
Aah

SD/-

M.K. SHRAWAT
Member (Judicial)