

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

MA 2318/2019 in CP(IB)1103(MB)/2017

(Under Section 33 of the IBC, 2016)

Ms. Rekha Kantilal Shah

... Applicant/RP

In the matter of

Leo Duct Engineering & Consultants Ltd ... Corporate Debtor

Order delivered on 9.7.2019

Coram:

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

Hon'ble Member (Technical) : Mr. Ravikumar Duraisamy

**For the Applicant: Ms Khushboo Shah Rajani, i/b AKR Advisors LLP for RP
Ms Rekha K Shah, RP**

Member(Judicial) Mr.V.P. Singh

Member (Technical) Mr. Ravikumar Duraisamy

Dictation in open Court:

ORDER

MA 2318/2019 has been filed under Section 33 (1) of the Insolvency and Bankruptcy Code, 2016, seeking liquidation of the Corporate Debtor. By the order of Hon'ble NCLAT dated 21.5.2019 in Company Appeal No.271 of 2019 Hon'ble NCLAT has set aside the order dated 8.3.2019 passed by this Bench regarding liquidation of the Corporate Debtor and further excluded 35 days, i.e. from the date of receipt of the order by the Resolution Professional for counting the period of 270 days, so as to ensure successful Resolution Process in terms of Section 12A.

2. Hon'ble NCLAT has further observed that "*Ms Rekha Shah, the Resolution professional who is present in the Court is directed to conduct immediately the meeting of the Committee of creditors' and place the application under Section 12A before it and if it is accepted with 90%*

of the voting share of the Financial Creditor, the Adjudicating Authority will allow the applicant to withdraw the application under Section 10. All processes should be completed within 30 days, and the matter should be placed before the Adjudicating Authority. If the 'Committee of Creditor' does not accept the application in terms of Section 12A with 90% voting shares, then only the Adjudicating Authority will pass an order for liquidation." In compliance of the order of Hon'ble NCLAT, CoC meeting took place on 28.5.2019. Copy of the minutes of the meeting is annexed with the application as Annexure 6.

3. It is contended by the applicant that in the meeting mentioned above, the applicant first intimated CoC regarding the order dated 21.5.2019 quashing the liquidation order and allowing the exclusion of 35 days from the computation of 270 days of CIRP period. The applicant has further contended that since no settlement offer was forthcoming and exclusion period as directed by Hon'ble NCLAT was about to expire, the applicant held a meeting of CoC on 19.6.2019. Copy of the minutes of the said meeting is enclosed with the application as Annexure 7.

4. The Resolution Professional has further contended that in the aforesaid meeting, the promoter stated that he would submit his application to the applicant by 20.6.2019, to which the applicant informed him that even if he submits the application the Bank Guarantee for CIRP cost needs to be filed along with the application as required as per Regulation 30A of CIRP Regulations, 2016.

5. The RP has filed the Additional Affidavit annexing the minutes of CoC minutes 19th June 2019 which shows that Agenda was relating to the deliberations on the directions given by Hon'ble NCLAT for withdrawal application under Section 12A of IBC, 2016. The RP informed the members of CoC that till date she had not received documents relating to withdrawal application under Section 12A, while it was assured to CoC members in the previous meeting by Mr Azmi that the relevant information and documents will be submitted to RP by 10.6.2019.

6. The RP further contends that the order of Hon'ble NCLAT was explained to the members of CoC. By the said order, the application under Section 12A should have been filed within 30 days from the date of order. However, no document is received by RP till date. Then Mr Azmi intervened and mentioned that all the requisite documents would be filed before 21.6.2019. After that, Canara Bank asked him about the status of fulfilling the term of their accepted proposal. Mr Azmi mentioned that it would take another three months. Canara Bank further stated that even if you put up the application to RP before 21.6.2019 and do not complete the prime condition of their acceptance of proposal for settlement, the withdrawal application will be rejected by them and accordingly it will go for liquidation.

7. RP further mentioned that the discussion part of settlement should be done between both the parties and RP shall not be part of it. Considering the fact of no receipt of any document to date and the direction of the Hon'ble NCLAT, the application must be filed within 30 days; i.e. up to 20.6.2019. Since there is no withdrawal application submitted to RP till 19.6.2019, the application will be for liquidation, as directed in the Hon'ble NCLAT.

8. It is further informed by the RP that 13th CoC meeting was called on 21.6.2019, wherein Agenda Item No.4 was relating to the withdrawal application received from Promoter and Director of Corporate Debtor, under Section 12A of IBC, 2016. It is stated in the said Agenda Item that *"RP briefed to CoC members that in the 12th CoC meeting held on 19.6.2019, Mr Azmi had mentioned that he would be submitting his withdrawal application having CP No.1103/2017 filed on 7.6.2017 to RP. The RP received the hard copy of the application from him on 20.6.2019. The RP also mentioned that Mr Azmi had sent an email on 20.6.2019 to all the CoC members in this regard with the set of documents."*

9. RP further stated that it was discussed in 12th CoC meeting that it should be considered as final meeting regarding withdrawal application, provided conditions for withdrawal are fulfilled. Hence, considering the paucity of time, RP had to invite the COC meeting by giving a notice period of 24 hours, which is approved in the 7th COC meeting held on 8.1.2019.

10. It is further informed that Form FA, One Time Settlement Letters from Canara Bank and Firm Investment Letter Term Sheet From Allied-Union Global Institute & Foundation Limited was placed before the CoC for deliberation on the withdrawal application.

11. RP has informed the members that the Bank Guarantee is not provided to RP. However, he has stated in point no. 5 of FORM FA that the Fund balance in the bank is around RS. 35 lacs and Fixed deposits of approx. Rs. Thirty-five lacs put together can be considered to meet the payment of CIRP cost. RP brought to the notice of members that the Fixed Deposits are with Canara Bank and they had not released the same in the past during the tenure of Erstwhile RP. The RP has further stated that these Fixed Deposits are the property of Corporate Debtor and under the control of RP; hence Bank cannot place its rights on the same, as part of their settlement terms. Canara Bank has accepted to release the lien on Fixed deposit as per the instruction of RP.

12. It is further stated that RP opened the forum for COC members to discuss the withdrawal of the application to conclude voting. She further informed members that Section 29A is not applicable in case of Section 12A application, however some due diligence may be made in terms of finding the details of investors, trustees of investor firm, source of funding, their creditability on meeting the payment as per commercial terms, meeting the compliance as per RBI Guidelines for foreign funding etc.

13. The COC members asked Mr Azmi to share details of investors and their background. Mr Azmi mentioned that they are from Hongkong and it is a Financial Trust. However, as per search is done by Canara Bank, the registered office of the investor shown to be in Switzerland. Mr Padman from Canara Bank further mentioned that there was no interaction with the investor through any mode of communication till date. Standard Chartered Bank asked Mr Azmi to provide details of trustees to which Mr Azmi replied that they are private parties from different countries.

14. After deliberations, the matter was put to the vote regarding the withdrawal of application under Section 12A. It is further stated by the RP that Form FA for withdrawal of the application was laid before the CoC. The COC members deliberated among themselves in detail.

15. After that, in the absence of clarity about investor; no interaction with investor with CoC members; no clarity on meeting the required compliance; no security deposit or upfront amount in escrow account; no clarity on financial viability; The COC members decided unanimously for dissenting the withdrawal application under section 12A of IBC, 2016. The Resolution was dissented by 100% vote share.

16. Based on the resolution passed by the CoC, RP has filed this application under Section 33(1) of IBC, seeking liquidation of the Corporate Debt.

17. Since the CoC, by applying commercial wisdom, rejected withdrawal application filed under Section 12A of the Code. Therefore as per the direction of Hon'ble Supreme Court in the case of K. Shashidhar, this court has no power to interfere in the commercial decision taken by the CoC.

18. Therefore, it is clear that the application under Section 12A could not be accepted and deserves to be rejected. Since the period of 270 days has expired and no resolution plan has been approved within the statutory period as provided under the Code. Therefore, the application No.2318/2019 filed under Section 33(1) for liquidation of the Corporate Debtor deserves to be allowed.

ORDER

19. MA 2318/2019 is allowed, and we at this moment pass the order of liquidation Section 33 of IBC as follows:

- a. 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 Pramod Dattaram Rasam is 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.
20. Moratorium declared vide Order dated 21.3.2018 in CP No.: 1103/2017 ceased to exist.
 21. The registry is directed to communicate this order to the Liquidator immediately even by way of e-mail.
 22. MA 2318/2019 is disposed of accordingly.

Sd/-
RAVIKUMAR DURAISAMY
Member (Technical)

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