

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH-1

IA 446/2022

IN

CP (IB) NO. 291/10/HDB/2020

*Application under Section 33 (1) (a) & 34 (1) of IBC, 2016, R/w Rule 11,13 &
32 of NCLT Rules, 2016*

In the matter of SSB Retail India Private Limited
(Corporate Applicant)

Filed by

Pavan Kankani
Resolution Professional
For SSB Retail India Private Limited
302, 3rd Floor, 3-6-140/A, City Centre
Above Bata Showroom, Himayat Nagar Main Road
Beside Kotak Mahindra Bank, Himayat Nagar Branch
Hyderabad – 500029

....Applicant/
Resolution Professional

VERSUS

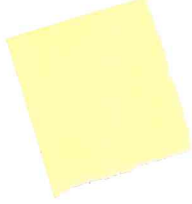
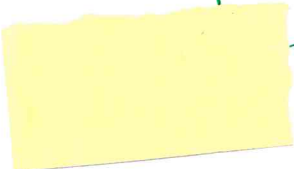
- 1, Karnataka Bank Limited
No.1-1-262/3, Plot No. 73, Srinivasa Nagar
AS Rao Nagar, Secunderabad – 500062
2. Basanthlal Sah, S/o Bijay Lal Sah
R/o 6-264/13/1/A-35. Raghavendra Colony
Suchitra, Opp: SBI Bank Jeedimetla
Suchitra Junction, Ranga Reddy District
Telangana – 500067

Respondents
Members of CoC

Coram

Date of order: 19.07.2022

Dr. N. Venkata Ramakrishana Badarinath, Hon'ble Member Judicial
Shri Veera Brahma Rao Arekapudi, Hon'ble Member Technical



Appearance:

For Applicant: Resolution Professional in person

PER: BENCH

ORDER

1. This is an Application filed under Section 33(1)(a) & 34(1) of Insolvency & Bankruptcy Code, 2016, read with Rule 11, 13 & 32 of NCLT Rules, 2016, by the Resolution Professional seeking order of liquidation, in respect of Corporate Applicant.
2. To put concisely, the Company Petition CP (IB) No. 291/10/HDB/2020 filed under Section 10 of IBC by Corporate Applicant i.e. SSB Retail India Pvt Limited was admitted by this Adjudicating Authority on 01.10.2021 and the Applicant herein is appointed as Interim Resolution Professional, pursuant to which, a public announcement was made on 06.10.2021 in leading newspapers inviting claims from the creditors by 15.10.2021.
3. The 1st meeting of Committee of Creditors conducted on 29.10.2021 and on 16.11.2021, the CoC was reconstituted with a new financial creditor and 2nd meeting of CoC which was scheduled on 24.11.2021 was cancelled as no member of CoC was present in the said meeting, the CoC meeting was not held.
4. In the 5th CoC meeting held on 25.02.2021, the Secured Financial Creditor i.e. Karnataka Bank having 55.87 % voting share in CoC has opined that resolution of the Corporate Applicant is difficult in the instant case and as such recommended for liquidation of the Corporate Applicant. However,

Mr. Basanthlal Sah, the other Financial Creditor representing 44.13% voting rights was neither present nor casted his vote. Thus submitting, the Applicant prayed the Tribunal to pass an order of Liquidation and appoint the Applicant herein as Liquidator, who has filed his consent.

5. Therefore the point that require our consideration is;

Whether the Adjudicating Authority can order liquidation of the Corporate Debtor in terms of Section 33 (1) (a) of IBC, when the resolution for liquidation of the Corporate Debtor has been voted with only 55.87% voting share?

6. We have heard Mr. Pavan Kankani, Liquidator, perused the record and the case law.
7. A short, yet a very intriguing question that arose in this application is whether the Adjudicating Authority can order liquidation of the Corporate Debtor in terms of Section 33 (1) (a) of IBC, when only one out of the two members of the CoC having voting share of only 55.87% present and voted for liquidation of the corporate debtor and the other lone member remained absent, when not less than *sixty-six per cent* of the voting share is required in terms of sub-clause (2) of Section 32 of IBC.
8. Before we proceed to discuss, it would be necessary to refer to the following factual aspects of the matter.
- (i) On 01.10.2021, this Tribunal vide order in CP (IB) No. 291/10/HDB/2020 admitted the Company Petition filed under Section 10 of the IBC by the Corporate Applicant/SSB Retail India Private Limited and appointed an IRP to carry out Corporate Insolvency Resolution Process against the Corporate Applicant.

- (ii) The CoC as constituted by the IRP, initially comprised of Karnataka Bank Limited alone, the 1st Respondent herein with 100% voting right. Later the CoC was reconstituted with the 2nd Respondent as another member as per the report dated 16.11.2021 certifying re-constitution of committee of creditors. With the admission of the said 2nd Respondent into CoC, the voting share of the 1st Respondent / Financial Creditor has become to 55.87% and that of the 2nd Respondent 44.13%.
- (iii) The Interim Resolution Professional in pursuance of the resolution of the CoC dated 24.01.2022 published Form-G/Expression of Interest for placing resolution plan for the Corporate Debtor. However, the publication of Form-G dated 25.01.2022 did not evoke any response. Therefore, in the above backdrop the 1st respondent having opined that revival of the Corporate Applicant is difficult and as the Corporate Debtor has no assets in its name, felt that the liquidation was the only option available, hence in the 5th CoC meeting held on 25.02.2022 suggested to the Resolution Professional to file necessary application before this authority for liquidation of the Corporate Applicant.
- (iv) The CoC meeting dated 25.02.2022 was not attended by the 2nd Respondent/the only other member of the CoC. Under the said circumstances the 1st Respondent, the lone CoC member present with a voting right of 55.87% opted for the following resolutions:-

“Resolved that approval of CoC be and is hereby granted for making application before the Hon’ble National Company Law Tribunal, Hyderabad Bench, for passing appropriate orders u/s 33 (1) (a) and u/s 34 (1) of Insolvency and Bankruptcy Code, 2016”.

Further resolved that Mr. Pavan Kankani, Resolution Professional be is hereby authorised to make an application, sign, execute all such documents and papers, appoint professionals to represent before the Hon’ble National Company Law

Tribunal and do all such acts and deeds as may be required to give effect to the above resolution”.

Hence the present application.

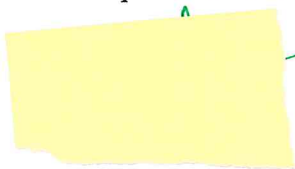
9. In this backdrop, we first refer to Section 33(2) of IBC, which is as follows: -
33 (2): Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors 1 [approved by not less than sixty-six per cent. of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).
10. No doubt from a plain reading of 33 (2) of the Code, supra, it is manifestly clear that the decision of the committee of creditors seeking liquidation of the Corporate Debtor be approved by not less than sixty-six per cent of the voting share, however it is pertinent to note that sub-section 2 of section 33 (2) of the Code, is silent as to whether the said 66% of voting share shall comprise of the members present either in person or by video-conference alone or shall include/exclude the other member(s) of CoC who are not present physically or through video conference in the meeting.
11. In so far as the case on hand is concerned, admittedly the voting share of the Financial Creditor who was present and voted for liquidation of the Corporate Debtor, is only 55.87%.
12. Here we may state that Section 30 (4) of the IB Code, which is as below, is almost identical to sub-clause (2) of Section 33 of IB Code.

13. Referring to sub-section (4) of Section 30, which says that the 'Committee of Creditors' required to approve a 'Resolution Plan' by a vote of *not less than sixty-six percent*, Hon'ble NCLAT *in re Tata Steel Limited v. Liberty House Group Pte. Ltd. & Ors. (Company Appeal (AT) (Insolvency) No. 198 of 2018*, held that

"On plain reading of sub-section (4), it is clear that the members of the 'Committee of Creditors' only after considering its feasibility and viability, and such other requirements as may be specified by the Board is entitled to approve or reject the 'Resolution Plan'. A member of the 'Committee of Creditors' who is not present in the meeting either directly or through Video Conferencing and thereby not considered its feasibility and viability and such other requirements as may be specified by the Board, their voting shares, therefore, cannot be counted for the purpose of counting the voting shares of the members of the 'Committee of Creditors'.

"Therefore, we hold that only the members of the 'Committee of Creditors' who attend the meeting directly or through Video Conferencing, can exercise its voting powers after considering the other requirements as may be specified by the Board. Those members of the 'Committee of Creditors' who are absent, their voting shares cannot be counted".

"We find that the 'Resolution Plan' submitted by 'JSW Steel' has been approved by the 'Committee of Creditors' with 97.12% voting shares and voters having 2.88% voting shares remained absent. If some members of the 'Committee of Creditors' having 2.88% voting shares remained absent, it cannot be held that they have considered the feasibility and viability and other requirements as specified by the Board, therefore, their shares should not have been counted for the purpose of counting the voting shares of the Company Appeal (AT) (Insolvency) No. 198 of 2018 'Committee of Creditors'. In fact, 97.12% voting shares of members being present in the meeting of the 'Committee of Creditors' and all of them have casted vote in favour of 'JSW Steel', we hold that the 'Resolution Plan' submitted by 'JSW Steel' has been approved with 100% voting shares". (Emphasis Supplied

14. Since both provisions, namely, *sub section 4 of section 30* and sub clause 2 of section 33 of IB Code, in so far as they relate to the requirement of minimum voting share being identical, the ruling, *in re, Tata Steel Limited*, supra, in our considered view can be applied to the case on hand.
15. It is pertinent to state herein that the other lone Financial Creditor neither present nor cast his vote through it is entitled to vote. As per the
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submissions made before us there are no chances of the resolving the existing stalemate in near future as the other sole member of CoC is not willing to even attend the meetings of CoC. Therefore, under these circumstances, even if direct the Resolution Professional to once again call for the meeting of members of the CoC to consider the feasibility of going for a fresh EOI or liquidation, the same would only contribute to further delay in liquidating the corporate applicant herein, and thus, defeat the timelines set under the IB Code, hence we do not wish to go for the said option.

16. Therefore, following the ruling in *Tata Steels, supra*, where it was held that if some members of the 'Committee of Creditors' having 2.88% voting shares remained absent, it cannot be held that they have considered the feasibility and viability and other requirements as specified by the Board, therefore, their shares should not have been counted for the purpose of counting the voting shares of the Company Appeal (AT) (Insolvency) No. 198 of 2018 'Committee of Creditors'. In fact, 97.12% voting shares of members being present in the meeting of the 'Committee of Creditors' and all of them have casted vote in favour of 'JSW Steel', we hold that the 'Resolution Plan' submitted by 'JSW Steel' has been approved with 100% voting shares", we hold that that the resolution passed in the 5th CoC meeting held on 25.02.2022 recommending to the Resolution Professional to file necessary application before this Authority for liquidation of the Corporate Applicant, having been passed by the member present in the meeting of the Committee of Creditors, has 100% voting share, and thus, satisfies the requirement under Section 33 (2) of IBC.

15. Before we part with, we wish to state that a member of the CoC though required to attend the meetings and vote when abstains or having been present fails to vote, such absence or abstaining from voting should not bring either the resolution or the liquidation process, as the case may be, to a grinding halt when the same results in falling short of 66% voting share as mandated under sub-section (2) of Section 33 of IBC. Hence, in our considered view, such dead-lock situation, since would defeat the timelines set under the IBC or against the objectives of IB Code. We therefore take this opportunity to suggest to IBBI, to ponder upon bringing a suitable amendment to sub clause 2 of section 33 of IB Code, to meet situations of the present kind, so that the stalemate in taking the liquidation process forward when resolution fails, can be avoided.
16. Hence, in the interest of justice we allow this application and pass order for liquidation of the Company in the manner laid down in Chapter-III of the Code.

ORDER

17. The Application is accordingly allowed with the following directions: -
- (a) The Corporate Debtor i.e M/s SSB Retail India Private Limited shall be liquidated in the manner laid down in Chapter-III of the Code.
 - (b) The Resolution Professional Mr. Pavan Kankani having IBBI Registration No. IBBI/IPA-002/IP-N00368/2017-18/11062 will continue as Liquidator for conducting liquidation of the Corporate Debtor.
 - (c) He shall issue public announcement stating that the Corporate Debtor is in liquidation.
 - (d) The Moratorium declared under Section 14 of the code shall cease to operate here from.

- (e) Subject to Section 52 of the Code, no suit or other legal proceedings shall be instituted by or against the Corporate Debtor. This shall however not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (f) All powers of the Board of Directors, Key Managerial Personnel and partners of the Corporate Debtor shall cease to have effect and shall be vested in the Liquidator.
- (g) The Liquidator shall exercise the powers and perform duties as envisaged under Sections 35 to 50 and 52 to 54 of the Code, read with Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016.
- (h) Personnel connected with the Corporate Debtor shall extend all assistance and co-operation to the Liquidator as would be required for managing its affairs.
- (i) The Liquidator shall be entitled to such fees as may be specified by the Board in terms of Section 34 (8) of the Code.
- (j) This order shall be deemed to be a notice of discharge to the Officers, employees and workmen of the Corporate Debtor, except when the business of the Corporate Debtor is continued during the liquidation process by the Liquidator.
- (k) Copy of the order shall be furnished to the Regional Director, Ministry of Corporate Affairs, Registrar of Companies & Official Liquidator, Hyderabad, the Registered Office of the Corporate Debtor and the Liquidator.
- (l) Copy of this order to be communicated to IBBI who shall ponder upon this case to be taken as classic case where the provisions of Section 33 (2)

of IBC as it exists, is in a way defeating the object of the Code on the same technical reasons of voting percentage less than 66% if the resolution for liquidation of the Corporate Debtor is passed, is rejected, the very object of IBC would be defeated. Therefore, this order is to draw the attention of the IBBI to suggest ways and means to prevent misuse of Section 33 (2) by some of the Financial Creditors.

(VEERA BRAHMA RAO AREKAPUDI)
MEMBER (TECHNICAL)

(Dr N.VENKATA RAMAKRISHNA BADARINATH)
MEMBER (JUDICIAL)

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