

By Speed Post/Email

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

**6th Floor, Fountain Telecom Building No. 1, Near Central Telegraph Office,
M. G. Road, Fort, Mumbai - 400 001**

**In the matter of the Insolvency & Bankruptcy Code, 2016
C.P. No. 1817/IBC/NCLT/MAH/2017**

F. No.: CP-1817/IBC/NCLT/MB/MAH/2017/ 103-104

Date: 08.03.2019

Krishna Chamadia - **Applicant**

In the matter of

ICICI Bank Limited - **Financial Creditor**

V/s

Usher Agro Limited - **Financial Debtor**

To,

1. **Applicant**

(a) **Krishna Chamadia**

B-1804, Raheja Heights,
Off Gen A K Vaidya Marg, Dindoshi East, Mumbai- 400 097
Email: krishna@sphereadvisory.com , Ph: 98339 09615

(b) **Advocate of Applicant**

Arihant Associates , 1/9, Shefalee,
Phiroz Shah Road, Santacruz (Wes), Mumbai – 400 054
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Subject: MA filed under section 33 of IBC, 2016 read with Regulation 3 of IBBI (Liquidation Process) Regulations, 2016 by the Resolution Professional of Usher Agro Limited, Corporate Debtor in CP (IB) 1817/MB/2017.

Take notice that above MA was heard by Division Bench No. I of NCLT, Mumbai Bench on 07.03.2019 and the order dated 07.03.2019 was passed by said bench in this regard. The copy of the said order is **enclosed** for your kind perusal and compliance.

Encl.: As Above

B. A. Patel

(B A Patel)
Dy. Registrar
NCLT, Mumbai Bench

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

MA 1586/2018 in CP(IB)1817(MB)/2017

(Under Section 33 of the IBC, 2016)

Krishna Chamadia

... Applicant

In the matter of

ICICI Bank Ltd

...Petitioner

V/s

Usher Agro Ltd

... Corporate Debtor

Order delivered on 07.03.2019

Coram:

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

Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For the Applicant: Pooja Mahajan, Aayush Singhvi, i/b Arihant Associates

For the Resolution Applicant: Mr. Kunal Mehta, i/b AAT Legal for Next Orbit Ventures Fund

Per V.P. Singh, Member(Judicial)

ORDER

MA 1586/2018 has been filed under Section 33 of IBC, 2016 read with Regulation 3 of the IBBI (Liquidation Process) Regulations, 2016 by the Resolution Professional of Usher Agro Limited, Corporate Debtor.

2. It is stated in the application that vide order dated 21.2.2018, Petition under Section 7 of IBC, 2016 was admitted by this Tribunal and the applicant was appointed as the Resolution professional. It is further stated in the application that the CIRP period got extended by 90 days vide order dated 12.9.2018 till 16.12.2018. It is also stated in the application that despite a grant of additional time till 30.11.2018, no resolution plan was received for the Corporate Debtor. In the meantime, the 270 days' timeline for completion of CIRP was nearing, being 16.12.2018.

3. It is further stated in the application that:

“the 9th meeting of CoC was held on 3.12.2018 during which the Applicant, inter alia, updated the members of CoC about the resolution process and informed that even though 8 EOIs were submitted, no legally compliant plan was received till the last date of submission of resolution plan, i.e. 30.11.2018, as stipulated in the latest Form G. The CoC members were informed that one of the prospective resolution applicants namely One Life Capital Advisors Limited, had submitted a resolution plan on 1.12.2018 but withdrew it on the same date and the required earnest money deposit was not submitted. Further, the RP received requests for extension of time from some of the prospective resolution applicants (including, one New Rishta Agro India Limited, which jointly with Trans Earth General Trading LLC, had submitted an EOI). Taking the same into consideration, the CoC members unanimously agreed to extend the deadline for submission of legally compliant resolution plan to 11.00 a.m. on 10.12.2018 in the interest of value maximization for stakeholders, by way of resolution, if possible. That accordingly, revised Form G was issued by me. Form G was issued by me. Copy of minutes of the 9th CoC meeting held on 3.12.2018, along with a copy of the attendance sheet, is annexed with the application as Exhibit 22. Copy of the revised Form G dated 3.12.2018 is annexed with the application as Exhibit 23.

That despite the extension granted, no resolution plan was received by the Applicant till 10.12.2018. Instead, at 2:05 p.m. on 10.12.2018, the Applicant received an EOI (not a resolution plan) from an entity called Next Orbit Ventures Fund along with a request for further extension of resolution plan submission date by 4-5 days. Also, at 4:15 p.m., New Rishta Agro India Limited (one of the parties that had submitted EOI earlier and requested for extension of plan submission timelines on 30.11.2018) emailed the RP requesting for further extension of 5 days. The Applicant replied to New Rishta Agro India Ltd and Next Orbit Ventures reminding that the deadline, as decided by the CoC, for submission of legally compliant resolution plan was 11:00 a.m. on 10.12.2018 and that the CIRP period of the Corporate Debtor was ending on 16.12.2018. The applicant also intimated the CoC about the emails received from the said two parties. Copies of the emails dated 10.12.2018 received from New Rishta Agro India Ltd and Next Orbit Ventures along with reply of the applicant are annexed with the application as Exhibit 24.

That the 10th meeting of the CoC was conducted on 12.12.2018, the RP informed the CoC members that, despite multiple extensions, no resolution plan for the Corporate Debtor had been received till the stipulated last date. The CoC discussed the further course of action in light of the fact that no party had submitted a resolution plan despite multiple extensions. The email requests received from New Rishta Agro India Ltd and Next Orbit Ventures were also discussed. The CoC was of the view that despite several extensions being granted from time to time, no legally compliant resolution plan had been received for the Corporate Debtor till date (being the 266th day of CIRP). The CoC noted that there were significant challenges in further extension of timelines given that, after receipt of resolution plan (if any), considerable time would be needed for review of the resolution plan to check for compliance with the provisions of the Code (including Section 29A), curing defects (if any), commercial negotiations, subsequent consideration and voting by CoC, arranging performance bank guarantee of Rs. 25 Crores and filing of the plan approval application with the Adjudicating Authority. The CoC concurred that as 270 days of the CIRP period of the Corporate Debtor was expiring on 16 December 2018, it would not be possible to complete all these processes within the timelines permitted under the Code, even assuming that a resolution plan is received.

Taking into consideration the fact that sufficient opportunity had already been given by way of several extensions allowed in the past and considering that only 4 days were left for the CIRP period to end, the COC unanimously agreed not to extend the timelines for submission of resolution plan any further. It was highlighted to the COC members that with no resolution plan being received for the Corporate Debtor within the CIRP period, the Corporate Debtor would automatically go into liquidation after the end of CIRP period, as per the provisions of the Code. In the said meeting, the RP agreed to continue as the liquidator in terms of Section 34(1) of the Code, read with Regulation 3(1) of the Liquidation Process Regulations, for the purposes of liquidation of the Corporate Debtor. A copy of the minutes of 10th COC meeting held on 12 December 2018, along with a copy of the attendance sheet, is annexed with the application as Exhibit - 25. A copy of the signed consent form for the Applicant to act as the liquidator is annexed as Exhibit - 26.

That after the conclusion of the 10th COC meeting, the Applicant received an email at 04:51 pm on 12 December 2018 from Next Orbit Ventures submitting its "non-binding proposal for bringing about resolution of the

Company” stated to be made “basis information available on the public domain, subject to financial and legal due diligence”. Vide the said email, Next Orbit Ventures requested the Applicant and the COC to accept its EOI submitted on 10 December 2018, provide requisite information and documents to conduct financial and legal due diligence and subsequently, permit it to submit its final and binding proposal in the form of a comprehensive resolution plan for the Corporate Debtor. The Applicant intimated the COC members about the said email received from Next Orbit Ventures and requested for their views. A copy of the email received from Next Orbit Ventures on 12 December 2018 is annexed as Exhibit – 27. A copy of the email sent by the RP to the COC on 12 December 2018 is annexed as Exhibit – 28.

That further, on 13 December 2018, the RP replied to Next Orbit Ventures highlighting the sequence of events since the publication of invitations for EOI submission and the multiple extensions granted from time to time for submission of a resolution plan. The RP informed that the EOI of Next Orbit Ventures, which was received post the already extended deadline for submission of resolution plan (i.e. 11:00 am on 10 December 2018) had been placed before the COC in its 10th meeting and that, after considering various practical challenges, the members had declined to extend the timelines any further. The RP also highlighted that in addition to the time needed by the RP/COC for various processes, the resolution applicant would also be requiring time to conduct financial and legal due diligence and submit a fully legally compliant resolution plan with all formats and documentation. The RP further informed that, as per the request made by Next Orbit Ventures, its non-binding offer for resolution of the Corporate Debtor had been shared with the COC members for their views and that the Applicant would update Next Orbit Ventures as and when any response was received from the COC members. Copy of the reply sent by the Applicant to Next Orbit Ventures on 13 December 2018 is annexed as Exhibit – 29.

That in the preceding facts and circumstances, the present application is being filed under Section 33 of the Code read with Regulation 3 of the Liquidation Process Regulations for initiating the liquidation of the Corporate Debtor as per Chapter III of Part II of the Code.”

4. In the circumstances, the Resolution Professional has requested for passing an order directing the Corporate Debtor to be liquidated in terms of

Chapter III of Part II of the Code and further requested has been made for the appointment of Mr Krishna Chamadia (IBBI/IPA-001/IP-P00694/2017-2018/11220) as Liquidator of the Corporate Debtor.

5. We have heard the argument of the Ld. Counsel is representing the Resolution Professional and Counsel for the proposed Resolution Applicant and perused the records.

6. On perusal of the records, it appears that "within the stipulated period for completion of CIRP, no resolution plan has been approved by the CoC. The CoC in its 10th meeting held on 12.12.2018 discussed the progress on the resolution plan at length. The CoC also discussed challenges in further extension of timelines and highlighted that firstly there is no legally compliant plan received till date, which is the 166th day of CIRP. After receipt of resolution plan, the CoC and RP would need sufficient time for

- (i) review of eligibility of the Resolution Applicant under Section 29A Of the Code,
- (ii) negotiation of commercial terms and conditions if at all a plan is received,
- (iii) review of resolution plan by a legal counsel, since only a legally compliant plan, can be put to voting,
- (iv) resolution applicant would need considerable time in curing the defects on plan
- (v) arrange a performance bank guarantee of Rs.25 crores, in case CoC approved the plan and
- (vi) documentation and filing of the plan with NCLT for approval. The CoC deliberated that it will not be possible to complete all these processes in time, even assuming that a resolution plan is received. Taking into consideration that sufficient opportunity had been given and several extensions have already been made in the past and considering that only 4 days are left for the CIRP period to end, the CoC unanimously agreed not to extend the timelines for submission of Resolution Plan any further. The RP highlighted that since no plan has been received till date and the timelines is not further extended, the Company would automatically go into liquidation after the end of CIRP period."

7. It appears that CoC unanimously decided that liquidation is only potential solution left. It is also decided by the CoC that sufficient opportunities have been given and several extensions have been already made in the past and considering that only 4 days are left in CIRP period to end, the CoC unanimously agreed not to extend the time for submission of the resolution plan.

8. Given the unanimous decision of CoC, RP has filed this MA for passing an order for liquidation under Section 33(1) of IBC, 2016.

9. It is pertinent to mention that Section 33(1) (a) provides that *"before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; then it shall—*

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered."

10. It is also important to point out that Hon'ble Supreme Court in case of K.Shashidhar has held that *"the scope of enquiry and the grounds on which the decision of "approval" of the resolution plan by the CoC can be interfered with by the adjudicating authority (NCLT), has been set out in Section 31(1) read with Section 30(2) and by the appellate tribunal (NCLAT) under Section 32 read with Section 61(3) of the I&B Code. No corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the "commercial decision" of the CoC muchless of the dissenting financial creditors for not supporting the proposed resolution plan. Whereas, from the legislative history there is contra indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority".*

11. Hon'ble Supreme court has further held that *".....there is no provision in the I&B Code which empowers the adjudicating authority (NCLT) to oversee the justness of the approach of the dissenting financial creditors in*

rejecting the proposed resolution plan or to engage in judicial review thereof. Concededly, the inquiry by the resolution professional precedes the consideration of the resolution plan by the CoC. The resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under Section 30(4) of the I&B Code. At best, the Adjudicating Authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors - be it for approving, rejecting or abstaining, as the case may be".

12. In the above judgement, Hon'ble Supreme Court has specifically held that Adjudicating Authority has no power to issue any direction in relation to the exercise of commercial wisdom of the Financial creditors, be it for approving, rejecting or abstaining, as the case may be.

13. In this case, it has been further held that *"It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting. To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite percent of voting share to approve the resolution plan; and in the process authorize the adjudicating authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating authority under Section 31 of the I&B Code dealing with approval of the resolution plan."*

14. Para 64 of Hon'ble Supreme Court judgement has specifically held that *"as regards the application by the Resolution Applicant for taking his revised resolution plan on record, the same is also devoid of merits inasmuch as it is not open to the Adjudicating Authority to entertain a revised resolution plan after the expiry of the statutory period of 270 days."*

15. Given the law laid down by Hon'ble Supreme Court in K. Shashidhar(supra), it is clear that the Adjudicating Authority has no power to interfere with *the exercise of commercial wisdom of committee of Creditors .After completion of statutory period of 270 days, Adjudicating Authority is not authorized to give direction to the CoC for considering any other plan. Since the statutory period has expired and CoC has taken a commercial decision of*

liquidation of the Corporate Debtor, therefore we in exercise of our powers as Adjudicating Authority would not interfere in the commercial decision of of the CoC.

16. We hereby allow MA 1586/2018 and pass the order of liquidation under Section 33(1) of the Code. It is clear that CoC passed the resolution to appoint the Resolution Professional Mr Krishna Chamadia as the Liquidator. The Resolution professional has also filed the written consent to act as the Liquidator. Given the decision of the CoC, we at this moment appoint Mr Krishna Chamadia as the Liquidator. This Bench at this moment orders 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, the Resolution Professional, i.e. the applicant herein is at this moment directed 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 Insolvency Resolution Professional appointed as 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 21.3.2018 in CP No.: 1817/2017 ceased to exist.

18. Accordingly, the MA No. 1586/2018 in CP-1817/2017 is at this moment **allowed.**

19. The registry is directed to communicate this order to the Applicant immediately even by way of e-mail and submit a compliance report on 8th March 2019.

SD/-

RAVIKUMAR DURASAMY
Member (Technical)

SD/-

V. P. SINGH
Member (Judicial)