
(2023) 09 NCLT CK 0033

In the National Company Law Tribunal

Case No : IA No.1175 Of 2022 In CP (IB) No.19/Chd/Hry/2019

A.O Smith India Water Products Private Limited Vs Dawar International Electronics Private Limited ?

Date of Decision : 25-09-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 12(2), 19, 19(2), 30(6), 33, 33(2), 33(5), 33(6), 33(7), 43, 45, 50, 52, 60(5), 66, 233
Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 — Regulation 12, 13, 15
Insolvency and Bankruptcy Board of India. (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 — Section 39B, 39C, 39D, 40(2), 40C

Citation : (2023) 09 NCLT CK 0033

Hon'ble Judges : Harnam Singh Thakur, Member (J); Subrata Kumar Dash, Member (T)

Bench : Division Bench

Advocate : Balwinder Singh Kalsi

Final Decision : Disposed Of

Judgement

Harnam Singh Thakur, Member (Judicial)

IA No. 1175/2022

1. The present Application is being filed by Mr. Ajay Kumar Siwach, Resolution Professional (RP) of Dawar International Electronics Private Limited (Corporate Debtor) under section 33(2) read with Section 60(5) of Insolvency and Bankruptcy Code, 2016 ('IBC'), for initiation of liquidation of the corporate debtor.
2. It is prayed by the applicant to issue an order for liquidation in terms of Section 33(2) of the Code be passed and appoint Mr. Ajay Kumar Siwach, Insolvency Professional as liquidator.
3. The matter was relisted on 20.07.2023 seeking clarification regarding the liquidation cost which was to be decided in the 9th meeting, however, it was postponed to be decided in the 10th meeting, there was no discussion in the 10th meeting on the liquidation cost and no resolution has been passed. The

compliance has been made by way of the affidavit filed vide Dairy No. 01965/5 dated 18.08.2023 wherein it is stated that the meeting of the CoC was held on 28.07.2023 and the members of the CoC deliberated upon the best estimate of the liquidation cost under Regulation 39B of the IBBI Regulations. The Item to make the best estimate of the liquidation cost under Regulation 39B of the IBBI Regulations along with the Estimate of Liquidation Cost was again circulated with the agenda in the 10th meeting of the CoC held on 16.05.2022. The CoC approved the best Estimate of Liquidation Cost under Regulation 39B. However, due to oversight, the resolution approving the Estimate of Liquidation Cost was not recorded in the minutes of the 10th meeting. The best estimate of Liquidation Cost under Regulation 39B of the IBBI Regulations alongwith copy of the Estimate of Liquidation Cost was attached with the agenda for the approval of the members of the CoC and the members were requested to approve the same. The CoC considered the matter which had already been approved by the CoC in the 10th meeting and took note of the same.

4. The Application for the CIRP of the Corporate Debtor was admitted by this Adjudicating Authority vide order dated 10.02.2021 and Ajay Kumar Siwach was appointed as the Interim Resolution Professional by this Hon'ble Tribunal. A public announcement was made on 14.02.2021. Form G inviting Expression of Interest was published on 25.04.2021 in the Financial Express in English, and the Jansatta in Hindi. The Resolution Professional received Expressions of Interest (EOI) from two provisional resolution applicants (PRA) and all the documents pertaining to the EOI were sent to them. However, the Resolution Professional received EOI from only one PRA (Sunrise Industries) on 10th May 2021. The Committee of Creditors was constituted on 05.06.2021. There is only one financial creditor, namely CFMARC Trust - 3 Indusind Bank, who has submitted its claim which was admitted by the Interim Resolution Professional and the Committee of the Creditors was constituted with CFM ARC as the only financial creditor on 28.02.2021. Thereafter, the RP updated the COC of the provisional list of PRAs, thereafter discussed the RFRP document and sought approval from CoC with respect to the RFRP document and subsequently released it to the PRA who submitted his EOI. The last date of submission of the Resolution Plan was 06.07.2021. However, the only PRA Sunrise Industries did not submit his resolution plan by the last date. Due to the break out of the Covid pandemic, a lockdown was imposed in the entire country and restrictions were imposed by the State of Haryana from April 2021 to June 2021. The COC in their sixth meeting held on 06.08.2021, decided to request for exclusion of the time period from April 2021 to June 2021 of 90 days from the time-line of the CIRP period of the corporate debtor and an application, bearing IA no. 473/2021, was filed under Section 60(5) of the IBC, 2016 read with the Regulation 40C of the IBBI (CIRP) Regulations, 2016 seeking exclusion of the time period of 90 days. IA 473/2021 was allowed vide order dated 25.05.2022.

5. The Resolution Professional of the Corporate Debtor had also filed an application, bearing IA no. 12/2022, under section 12 (2) of the Insolvency &

Bankruptcy Code, 2016 read with Regulation 40 (2) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 seeking extension of the CIRP period by 90 days beyond 180 days of the CIRP of the corporate debtor and the same was allowed vide order dated 25.05.2022. The extended period of the CIRP is now expiring on 23.08.2022.

6. The First Meeting of the Committee of Creditors was convened on 08.03.2021. The Second Meeting of the Committee of Creditors was convened on 21.04.2021, whereby the matters pertaining to the claims filed by the creditors of the corporate debtor, progress of the CIRP, application filed by the suspended directors of the Board for withdrawal of the CIRP process before the Hon'ble NCLAT, transaction audit and appointment of the registered valuers, approval of publication of Expression of Interest (EOI), Form G, eligibility criteria for the resolution applicant, RFRP, etc. and other matters were discussed. The matter pertaining to the appointment of Ajay Kumar Siwach, the Interim Resolution Professional to act as Resolution Professional of the corporate debtor was also discussed, and the same was adjourned and thereafter, Mr. Ajay Kumar Siwach, the Interim Resolution Professional was appointed as Resolution Professional through e-voting on 25.04.2021 by the COC. The Third meeting of the Committee of Creditors was held on 05.06.2021, whereby the last date to receive the resolution plan was extended by 14 days from 24.06.2021 to 06.07.2021 and the modifications in the RFRP, IM, and EOI in this regard were also approved by the COC. The Fourth meeting of the Committee of Creditors was held on 26.06.2021 and the COC ratified the appointments made by the Resolution Professional of Ms. Ruchi Kohli, Advocate to represent the RP/CD before the Hon'ble NCLAT, and M/s SGR & Associates, Chartered Accountants as Forensic and Transaction Auditor. The Fifth meeting of the Committee of Creditors was held on 31.07.2021 and the COC discussed the progress of the CIRP of the corporate debtor. The matters pertaining to whether to invite the Expression of Interest for the resolution plan and to publish Form G again or to liquidate the corporate debtor, and to file the application for extension of the CIRP period under Section 12(2) of the IBC were deferred for the next meeting of the COC. The Sixth meeting of the Committee of Creditors was held on 06.08.2021 and the COC discussed the progress of the CIRP of the corporate debtor and the status of the application filed under Section 19(2) of the IBC, publication of Form G, or to liquidate the corporate debtor. The COC decided to file an application for the exclusion of the time period of 90 days from April 2021 to June 2021 lost due to the impact of the COVID-19 pandemic in the country. The Seventh meeting of the COC was held on 25.10.2021 and the COC took note of the progress of the CIRP of the corporate debtor and the status of the pending legal cases before the Hon'ble NCLT, NCLAT, and the District Courts, Gurgaon. The COC accorded its approval for filing an application to the Hon'ble NCLT, Chandigarh for an extension of time of 90 days of the period of the CIRP under Section 12(2) of the IBC and Regulation 40 of the IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2021. The discussions on the Liquidation Process

were not taken up by the COC. The Eighth meeting of the COC was held on 17.01.2022 and the COC took note of the progress of the CIRP of the corporate debtor and the status of the pending legal cases before the Hon'ble NCLT, NCLAT, and the District Courts, Gurgaon. The COC also discussed the progress in respect of the transaction audit and the valuation of the assets of the corporate debtor. The Ninth meeting of the COC was held on 15.03.2022. The COC took note of the progress of the CIRP of the corporate debtor and the status of the pending legal cases before the various Courts. The matter pertaining to the initiation of the liquidation process of the corporate debtor under Section 33(2) of the IBC and other related matters under Regulations 39 C, 39 B, 39 D etc. were also discussed in the meeting. As CFMARC is the sole member of the COC who is holding 100% voting shares, the COC has resolved to liquidate the corporate debtor and authorized the Resolution Professional to file an application before the Adjudicating Authority for liquidation of the corporate debtor. However, the COC deferred its decision on the appointment of the liquidator.

7. The Tenth meeting of the COC was held on 16.05.2022. The COC took note of the progress of the CIRP of the corporate debtor and the status of the pending legal cases before the various Courts and discussed the matters pertaining to the transaction audit and the valuation of the assets of the corporate debtor. Thereafter, the COC discussed the appointment of the liquidator and the fees payable to the liquidator under Regulation 39 D of the CIRP Regulations. The resolution for the appointment and fixation of the fee payable to the liquidator was approved with a 100% voting share of the COC. The Compliance under Section 39 are as follows:-

"Regulation 39 B :

1. The Estimated Liquidation Cost as arrived at as per under Regulation 39B of IBBI (CIRP) Regulations, 2016 is attached as "Annexure 17".

2. The COC also made a comment that there are no liquid assets available at the movement hence the details of the Liquid Assets is not available. Regulation 39 C:

The COC had also assessed the matter for the sale of the CD as a going concern under Regulation 39 C. The sole member of the COC was of the opinion that the CD was not in operations at the time of the commencement of the CIRP and the statutory compliances were not met for a substantial period of time prior to the commencement of the CIRP, hence the CD could not be sold as a going concern in the liquidation process.

Regulation 39 D

The COC discussed the appointment and the fees payable to the liquidator under Regulation 39 D of the CIRP Regulations. The resolution for the appointment and fixation of the fee payable to the liquidator was approved with 100% voting share by the COC on 16.05.2022".

8. It is submitted that the transaction audit is in process and is likely to be

completed very soon. The report of the transaction auditor is expected shortly. The Resolution Professional has noticed some transactions that appear to be preferential and/or fraudulent and the Resolution Professional may file the appropriate applications under Sections 43, 45, 50, or 66 of the IBC, 2016 upon receipt of the report of the transaction auditor.

9. The COC has resolved to initiate the liquidation process of the corporate debtor under Section 33(2) of the IBC in the ninth COC meeting held on 15.03.2022. The COC had also assessed the matter for the sale of the corporate debtor as a going concern under Regulation 39 C of the IBBI (CIRP) Regulations, 2016. The sole member of the COC was of the opinion that the corporate debtor was not in operations at the time of the commencement of the CIRP and the statutory compliances were not met for a substantial period of time prior to the commencement of the CIRP, hence the corporate debtor could not be sold as a going concern in the liquidation process.

10. The committee of creditors also made a comment that there are no liquid assets available at the moment hence the details of the Liquid Assets is not available.

11. The short note has been filed vide Dairy No. 01965/4 dated 01.05.2023 in order of the compliance of the order dated 24.04.2023 of this Adjudicating Authority wherein it is mentioned that the valuation of the assets of the Corporate Debtor was not done due to the non-corporation of the Directors and Mr. Ajay Kumar Juneja in possession of the assets i.e. Land and Building as no assets were handed over to him. Despite the appointment of the registered valuers, due to the non-corporation, valuation was not done. Further, it is submitted that no asset of the corporate debtor appeared in the audited annual accounts for financial year 2015-16.

12. Now, coming to the merit of the application, before considering the prayer, we would like to refer the Section 33(2) of IBC and the relevant provision is reproduced below:

"Section 33(2): Initiation of liquidation

(1)

(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 [approved by not less than sixty-six percent, 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).

[Explanation. - For the purpose of this sub-section, it is hereby declared that the Committee of Creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of Section 21 and before the

confirmation of the resolution plan, including at any time before the preparation of the information memorandum.]

13. A bare perusal of the provisions shows that there are three circumstances under which the liquidation order can be passed by the Adjudicating Authority:-

- i. before the expiry of the Insolvency Resolution Process period;
- ii. before the expiry of 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;
- iii. If no resolution plan is received under sub-section (6) of Section 30; and
- iv. after the CoC approval of the proposal for the liquidation with not less than sixty-six per cent of the voting share.

14. We have carefully considered the submissions made in the application by the Resolution Professional and have also perused the records.

15. The Liquidator's Fee shall be structured in the manner as ratified in the 10th Meeting of CoC held on 16.05.2022.

16. In view of the satisfaction of the conditions provided under Section 33 of the Code, the Corporate Debtor, i.e. Dawar International Electronics Private Limited, is directed to be liquidated in the manner as laid down in Chapter III of the Code.

17. Accordingly, by exercising our power under Section 33(2) pass the following order:-

I. The Corporate debtor is liquidated with immediate effect in the manner provided under Chapter III Part II of the IBC 2016;

II. Mr. Ajay Kumar Siwach bearing Registration No. IBBI/IPA-002/IP-N0668/2018-19/12214, Mobile No. 9643566303, e-mail: siwachajay@gmail.com CoC has resolved to appoint him as liquidator. However, in view of the guidelines dated 18.07.2023 issued by the Insolvency and Bankruptcy Board of India, Mr. Manohar Suman bearing Registration No. IBBI/IPA-003/00393/2021-22/14003, Mobile No.-8847226162, email Id:- manoharsuman10@gmail.com is hereby appointed as liquidator from the list provided by the Insolvency and Bankruptcy Board of India; subject to his written consent to be filed within 7 days of this order. The law research associate of this Adjudicating Authority has checked the credentials of Mr. Manohar Suman and nothing adverse has been found against him.

III. Mr. Manohar Suman, Shall take over the charge of the entire records and assets of the corporate and perform his duty, as required under the Code and Regulations

IV. Mr. Manohar Suman, is directed to file his written consent along with affidavit within 7 days, stating therein that no disciplinary proceedings have been initiated

against him by the Board or the insolvency professional agency;

V. The liquidator is directed to take custody and control of the assets, property of the Corporate Debtor with immediate effect and made a public announcement clearly stating that the Corporate Debtor is under Liquidation in terms of Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016;

VI. The Provision of Section 33 (5), (6) and (7) of the IBC, 2016 shall have come into force with immediate effect. The Order of Moratorium passed under Section 14 of the Insolvency and Bankruptcy Code, 2016 shall cease to have its effect, and a fresh Moratorium under Section 33(5) of the Insolvency and Bankruptcy Code shall commence;

VII. This Order shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor as per Section 33(7) of the Insolvency and Bankruptcy Code, 2016;

VIII. The Liquidator shall submit a Preliminary Report to the Adjudicating Authority within seventy-five (75) days from the Liquidation commencement date as per Regulation 13 of the Insolvency and Bankruptcy (Liquidation Process) Regulations, 2016;

IX. The Liquidator shall file regular progress reports as per Regulation 15 of the Insolvency and Bankruptcy (Liquidation Process) Regulations, 2016 every fortnightly thereafter;

X. The Liquidator shall take necessary legal action to recover the trade receivables and other credits, such as loans and advances from the parties, which are reflected in the latest Balance Sheet of the Corporate Debtor, if any. This direction is hereby given in concurrence of the jurisdiction prescribed under Section 33(5) of the Code.

XI. On initiation of the liquidation process but subject to Section 52 of the Code, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor save and except the liberty to the Liquidator to institute suit or other legal proceeding on behalf of the Corporate Debtor with prior approval of this Adjudicating Authority, as provided in Section 33(5) of the Code read with its proviso.

XII. That all the powers of the Board of Directors, key managerial personnel and the partners of the Corporate Debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator;

XIII. That the personnel of the Corporate Debtor shall extend all assistance and cooperation to the Liquidator as may be required by him in managing the affairs of the Corporate Debtor and provisions of Section 19 of the Code shall apply in relation to voluntary liquidation process as they apply in relation to liquidation process with the substitution of references to the liquidator for references to the

Interim Resolution Professional

XIV. The liquidator will be entitled to the protection of action taken in a good faith as per the provisions of Section 233 of the Insolvency and Bankruptcy Code 2016

XV. The Registry is directed to communicate a copy of the Order to the Corporate Debtor immediately;

XVI. A copy of this order be sent by the Registry to the concerned Registrar of Companies (RoC) for updating Master Data. After updating Master Data, RoC shall send a compliance report to the Registrar, NCLT, within a period of 30 days.

XVII. The Registry and Liquidator are directed to communicate a copy of this Order to the Insolvency and Bankruptcy Board of India for their record.

XVIII. The Liquidator is at liberty to seek any directions, if need be, from this Tribunal during the Liquidation Process.

18. Thus, IA No. 1175/2022 stands allowed and disposed of accordingly.