

In the National Company Law Tribunal  
Mumbai Bench.

**MA 1316/2019 & MA 1627/2019** in C.P. 294/NCLT/MB/2018

Under Section 33(2) of Insolvency & Bankruptcy Code, 2016

In the matter of

Mr. Devendra Prasad : Applicant/ Resolution Professional

In the matter of

IDBI Bank Limited : Petitioner/ Financial Creditor

V/s.

S. Kumars Nationwide Limited : Respondent/ Corporate Debtor

Heard on : 11.06.2019  
Order delivered on : 19.06.2019

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)

For the Applicant : 1. Mrs. Khusboo Shah Rajani, i/b. AKR Advisors  
LLP (for Interim Resolution Professional);  
2. Mr. Areez Gazdar, i/b. Veritas Legal (for  
Resolution Professional);  
3. Mr. Devanshu Desai, Advocate (for Finquest  
Financial Solutions Pvt. Ltd.).

For the Respondent(s) : 1. Mr. Prakash Shinde, Advocate;  
2. Mr. Rohan Agrawal, Advocate;  
3. Ms. M. Swati, Advocate; i/b. MDP & Partners  
(On behalf of IDBI Bank).

*Per M.K. Shrawat, Member (Judicial).*

### **ORDER**

#### **A) MA No.1316/2019**

1. This is an Application submitted by Resolution Professional Mr. Devendra Prasad on 05.04.2019 seeking an order u/s. 33(2) of the Insolvency Code for an Order of Liquidation in respect of the Corporate Debtor M/s. S. Kumars Nationwide Ltd.

2. A Petition was filed bearing No. CP (IB) 294/NCLT/MB/2018 u/s. 7 of the Insolvency Code by IDBI Bank as Financial Creditor, against S. Kumars Nationwide Ltd., a Corporate Debtor which was admitted by an Order dated 24.04.2018 in respect of a total **Debt of Rs.1680,69,35,210/-**. Moratorium was declared and Interim Resolution Professional was appointed. Subsequently, the appointed Interim Resolution

Professional was replaced by Resolution Professional. The NCLT has also allowed an exclusion of 55 days which were stated to be lost in litigation.

3. A Progress Report was filed by the Resolution Professional and submitted that received 7 (Seven) Expression of Interest from 7 interested entities. On 19.12.2018 the Resolution Professional had also prepared a list of potential Resolution Applicants and submitted to the members of the Committee of Creditors. During 6<sup>th</sup> Committee of Creditors meeting held on 22.01.2019 one of the provisional Resolution Applicants had made a request for extension of time for submission of Resolution Plan. The representation made by the said Resolution Applicant found to be favourable, therefore, a collective decision was taken to extend the deadline for submission of Resolution Plan. It was communicated that the Corporate Insolvency Resolution Process period was going to be completed on 15.03.2019. On 11.02.2019 the Resolution Professional had received a request from M/s. Finquest seeking extension of Resolution Plan. Giving a reasoning of maximization of value and the success of the Committee of Creditors meetings, it was decided that the Resolution Plan period be further extended.

4. On 26.02.2019 Finquest submitted its Resolution Plan which was placed before the Committee of Creditors for due consideration on 01.03.2019 at the 8<sup>th</sup> Committee of Creditors meeting. It is worth to mention at this place that Finquest happened to be a member of Committee of Creditors as well. As a consequence, on 8<sup>th</sup> Committee of Creditors meeting, Finquest, as a Resolution Applicant, was asked to cure the defects so as to discuss the viability of the Resolution Plan.

5. During 9<sup>th</sup> Committee of Creditors meeting certain queries were raised, for ready reference reproduced below:-

*"1. During the 9<sup>th</sup> COC meeting, upon a detailed study of the Resolution plan, the COC members raised several concerns regarding her viability of the Resolution plan. The commercial terms of the resolution plan were not acceptable to the COC members. It was also observed that the resolution plan was, in effect, placing Finquest (which is also a Financial Creditor of the Corporate Debtor) in an advantageous position as compared to the other Financial Creditors. The COC members had inter alia raised the following queries / concerns / observations on the proposed Resolution Plan received from the PRA:*

- A. *Whether a Resolution Plan can have disbursement of different amounts for the same class of secured financial creditors.*
- B. *Out of the total Deal value of Rs. 400 crores the PRA (being a Financial Creditor of the Corporate Debtor) shall receive approximately Rs. 135 Crores effectively reducing total outflow to approximately Rs. 265 crores which appears to be an unfair treatment for remaining financial creditors.*
- C. *All the financial creditors should be treated at par and the same has been judicially decided by the Adjudicating Authorities.*
- D. *Extinguishment of Rights as requested in the prosed Resolution Plan would not be acceptable.*
- E. *The value of assets for SPV 1 need to be aligned with the Liquidation Value of those assets.*
- F. *The value of SPV 2 and SPV 3 cannot be linked to sale of Corporate Debtor's assets and the members should receive an absolute amount.*
- G. *The PRA should pay the entire liquidation value upfront and not as deferred consideration, within 1 (one) month from the date of approval of the Resolution Plan by the Adjudicating Authority.*
- H. *The financial creditors stated that amount of approximately Rs. 300,00,00,000 to 350,00,00,000/- (Rupees Three Hundred Crores to Rupees Three Hundred and Fifty Crores Only) be retained as debt / as charge on the assets of the Corporate Debtor and the said amount be repaid to them in timeline of 1-3 years from the future cash flows of the Corporate Debtor.*
- I. *The amount to be paid to the financial creditors for funding Rs. 300-350 crores should not be in form of securities of Corporate Debtor viz. Optionally Convertible Debentures, Partially Convertible Debentures, Compulsorily Convertible Preference Shares or in any such other form."*

6. On discussion among the Committee of Creditors members it was communicated to Finquest (Resolution Applicant) to provide an upfront payment of Rs.350 Crores. It was also asked that in the Resolution application the balance Debt amount of Rs.750 Crores be paid over a period of three years. In response to the demand of the Committee of Creditors a representative of Finquest informed that only 100 Crore can be arranged as an upfront payment. It was clearly communicated that Finquest would not be able to offer anything over and above the valuation of the Corporate Debtor. As a consequence, the Committee of Creditors members have taken a view that the Resolution Plan was neither feasible, nor viable. The Resolution Plan was thus rejected by 73.78% vote.

7. A copy of the Valuation Report prepared by Mott MacDonald of 18.01.2019 is on record wherein Summary of the Valuation of the Assets was incorporated as under:-

**"Table 30: Valuation Summary (In Rs Cr)**

S. No.	Name of Site	Fair Value	Liquidation Value
1	Head Office	45.61	36.49
2	Bharuch Plant	329.71	263.77
3	Chamunda Standard Mill	40.47	32.50
4	Amana Weaving Mill	16.56	13.39
5	Residential Flat	2.49	1.99
6	Open Farm Plot	0.20	0.16
7	Trade Receivables	2.32	1.97
8	cash and bank balance	0.67	0.67
	<b>Grand Total</b>	<b>438.03</b>	<b>350.94</b>

8. On 13<sup>th</sup> March 2019, 10<sup>th</sup> Committee of Creditors meeting was convened wherein "Liquidation" was approved with a majority of 79.73% vote. In respect of the Fees of the Liquidator there was no consensus hence the lead Banker has made a proposal that JLF meeting was going to be conducted on 01.04.2019, therefore, on that date the proposal of the Fees of the Liquidator shall be decided. Later on it was informed that JLF had recommended the name of one Mr. Om Prakash Agarwal as Liquidator to the Corporate Debtor having Registration No. IBBI/IPA-001/IP-P00201/2017-18/10444. Through Resolution Professional it has also been communicated to the members of the Committee of Creditors that the Liquidator, if appointed, has agreed for a monthly fee of Rs.4 Lakhs effective from the date of implementation of the Liquidation process. Annexed with this Application is a written consent of the proposed Liquidator. Also annexed minutes of several meetings of Committee of Creditors members, more particularly, minutes of 10<sup>th</sup> meeting of Committee of Creditors held on 13.03.2019, wherein there was a discussion vide item No.6 about the Fees of the Liquidator and approval of Liquidation of S. Kumars Nationwide, Corporate Debtor. In the said Resolution, the members of the Committee of Creditors took decision that Mr. Devendra Prasad (Resolution Professional) was authorized to intimate the decision of "Liquidation" to NCLT. For ready reference, the voting pattern in favour of approval of Liquidation was as under:-

<b>Particulars of Votes Cast</b>			<i>Result Declared for the above Resolution (Resolution No.1)</i>
<i>Particulars</i>	<i>Voting Share<sup>1</sup> (INR)</i>	<i>Voting Share (In %)</i>	
<i>Votes Cast in favour</i>	<i>60,16,05,12,350.12</i>	<i>79.73%</i>	<i>Approved by requisite majority<sup>2</sup></i>
<i>Votes Cast against</i>	<i>-</i>	<i>-</i>	
<i>Votes Abstained</i>	<i>15,29,50,67,965.61</i>	<i>20.27%</i>	
<b>Total</b>	<b>75,45,55,80,315.73</b>	<b>100%</b>	

<sup>1</sup>As per section 5(28) – Part II – Insolvency Resolution and Liquidation for Corporate Person – of the Insolvency and Bankruptcy Code, 2016 – Voting share means the share of the voting rights of a single financial creditor in the Committee of Creditors which is based on

*the proportion of the financial debt owed to such financial creditor in relation the financial debt owed by the corporate debtor.*

*<sup>2</sup>As per section 33(2) of the Insolvency and Bankruptcy Code, 2016, a vote of not less than 66% of the voting share of the financial creditors is required for taking all decisions of the Committee of Creditors."*

9. Having heard the submissions and in the light of the decision of the Committee of Creditors, as discussed in foregoing paragraphs, an Order u/s.33(2) ought to be passed by NCLT approving the commencement of 'Liquidation' as resolved by members of Committee of Creditors as well as by the members of Joint Lending Forum. This Section prescribes that where the Adjudicating Authority is informed about the rejection of the Resolution Plan u/s.31 of The Code, it shall pass an Order requiring the Corporate Debtor to be liquidated. Further, Sub-section (2) says that, anytime during the Insolvency Process if Resolution Professional intimates the Adjudicating Authority the decision of the Committee of Creditors to liquidate the Corporate Debtor, the Adjudicating Authority shall pass a Liquidation Order under this Section. The mandate of this Section is unambiguous to the extent that the decision of the Committee of Creditors is simply to be approved by the Adjudicating Authority. I shall also follow the same recourse. However, before parting with the issue, I feel that an observation is necessary to be incorporated, so as to be made a part of this Order, that what is the basis of this commercial decision taken by the Committee of Creditors/ JLF in this case when a very huge Debt (Rs.1680,69,35,210/- (*supra*) ) is outstanding against the Corporate Debtor which is going to be settled on Liquidation by suffering a heavy haircut. The liquidated value as per the Valuer is only Rs. 350.94 Crore (*supra*). It appears to me that while granting the exorbitant Loan Facilities as well as while voting for Liquidation, at both the occasions, there was a lack of due diligence on the part of the Lenders. As far as this Bench is concerned, following the decision of the Hon'ble Supreme Court in the matter of K. Sashidhar Vs. Indian Overseas Bank & Ors. [*Civil Appeal No.10673 of 2018, Order dated 05.02.2019*] as well as the provisions of Section 33(2), the **proposal of Liquidation**, as voted in favour by the members of Committee of Creditors, **is hereby approved.**

**B) MA No.1627/2019**

10) This Application is submitted by IDBI (Committee of Creditors) on 30.04.2019 with a prayer that Mr. Om Prakash Agarwal, Insolvency Professional having Registration No. IBBI/IPA-001/IP-P00201/2017-2018/10444 be appointed as 'Liquidator'. In this regard an Affidavit of Mr. Devendra Prasad (Resolution Professional) dated 31.05.2019 is also submitted, wherein vehemently made an objection that the IDBI had failed to make out any case of opposing his appointment as "Liquidator". In this Affidavit, the efforts made by the said Resolution Professional are narrated and vehemently pleaded that the Committee of Creditors had never found any fault, delay or contravention in duties, hence without any reason took a decision to appoint another person as "Liquidator", instead of appointing the Applicant as "Liquidator". Certain reasons have been given by this Applicant to be appointed as Liquidator, such as: having total background of the case, knowing the facts as well as figures helpful for liquidation of the assets.

11. In this regard, this Bench is of the view that the mandate is very clear in Section 34, titled as "Appointment of Liquidator and Fee to be paid" prescribing therein that where the Adjudicating Authority passes an Order for Liquidation of the Corporate Debtor u/s.33, the Resolution Professional appointed for the Corporate Insolvency Resolution Process can be replaced by Adjudicating Authority, relevant Section 34(4)(a) is reproduced below:-

"34. (1) .....

(2) .....

(3) .....

(4) *The Adjudicating Authority shall by order replace the Resolution professional, if –*

*(a) the resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in sub-section (2) of section"*

12. To exercise this authority as enshrined upon the Adjudicating Authority in the afore cited sub-section, it is requisite to examine the merits of the matter. Although in this case there was no grievance against the Ld. Resolution Professional but considering the expenditure on Liquidation Fees, a view was taken by Committee of

Creditors for appointing a Liquidator. To conclude, this Bench is of the view that no interference is required in the decision taken by the Committee of Creditors/ JLF for proposing the name of Mr. Om Prakash\_Agarqwal as Liquidator. The name of the Liquidator is hereby approved.

13. These Miscellaneous Applications (**MA 1316/2019** & **MA 1627/2019**) are hereby '**allowed**'.

Sd/-  
**(M.K. SHRAWAT)**  
Member (Judicial)

Date : 19.06.2019  
ug