

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1540 of 2022

(Arising out of Order dated 23.11.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Court-VI in IA No.5586 of 2022 in IB-822/ND/2021)

IN THE MATTER OF:

Hero Fincorp Limited
34, Community Centre,
Basant Lok, Vasant Vihar,
New Delhi-110057

.... Appellant

Vs

M/s Hema Automotive Private Limited
through Resolution Professional
Shri Vivek Sharma
Address : House No. 449,
Jheel Khuranja,
P.O. Krishna Nagar, East,
Delhi -110051

.... Respondent

Present:

For Appellant:

**Mr. Sanjeev Singh, Ms. Taniya Bansal, Ms.
Ridhi Pahuja, Ms. Pallavi Aggarwal,
Advocates**

For Respondent:

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed challenging the order dated 23.11.2022 passed by the National Company Law Tribunal, New Delhi Court-VI dismissing the IA No.5586 of 2022 filed under Section 33, sub-section (2) read with Section 34 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”) seeking initiation of the liquidation of the Corporate Debtor.

2. Brief facts of the case giving rise to this Appeal are:

- (i) The Appellant extended financial facilities to the Corporate Debtor in the year 2018-2019. The Corporate Debtor committed default in repayment of the loan facilities. The Financial Creditor initiated proceedings under Section 13, sub-section 4 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short “**SARFAESI Act**”) by taking possession of the secured assets.
- (ii) An order dated 08.07.2022 was passed by Adjudicating Authority commencing the Corporate Insolvency Resolution Process (“**CIRP**”) against the Corporate Debtor.
- (iii) The Appellant filed its claim in Form-C on 09.09.2022, which was provisionally accepted. The Committee of Creditors (“**CoC**”) was constituted with Appellant as the sole Member of the CoC. On 07.10.2022, in accordance with the approval of the CoC, the Resolution Professional (“**RP**”) published Form-G, wherein the last date for receipt of Expression of Interest (“**EOI**”) was 24.10.2022. The RP convened the CoC Meeting on 19.10.2022 with sole agenda pertaining to eligibility criteria vis-à-vis extension of time seeking EOI by issuing/ revising amended Form-G.
- (iv) On 19.10.2022 in 3rd CoC Meeting, CoC passed Resolution for liquidation of the Corporate Debtor. In pursuance of

Resolution dated 19.10.2022, the RP filed an Application IA No.5586 of 2022 praying for an order of the liquidation.

- (v) The Adjudicating Authority heard the Application on 23.11.2022 and directed the CoC to reconsider the Application. Order of Adjudicating Authority being in 2 paragraphs, is as follows:

“This is an application under Section 33(2) read with section 34 of IB Code 2016 seeking initiation of the liquidation of the Corporate Debtor and appointment of Liquidator. The present application has been filed by the RP. Para 3 of the present application says that as per the public announcement dated 28.07.2022 the last date for submission of claims by Creditors was 09.08.2022. It also transpires that M/s. Hero Fincorp Ltd. (in NBFC) is the sole Member of the CoC. It transpires that on 07.10.2022 in accordance with the approval of the CoC, RP has published “Form G” wherein the last date of receipt of Expression of Interest (“EOI”) was 24.10.2022. However, prior to the said date the sole Member of the CoC resolved and directed the RP to move an application for liquidation of the Corporate Debtor.

Such approach is not in the spirit of IB Code as Insolvency Resolution is the focus of the act. Only in the event of failure of insolvency resolution the steps for liquidation have to be taken. The sole Member of CoC has not adopted a judicious approach of exploring the possibility of resolution. Since he has recommended the liquidation even before the time period for seeking EOI had elapsed which is 24.10.2022. Therefore, CoC

is directed to reconsider the present application. CoC is also directed to release RP fee and expenses incurred by RP till date on priority basis. The prayer at “(i)”, “(iii)” & “(iv)” are denied.”

- (vi) Challenging the order of the Adjudicating Authority, this Appeal has been filed by the sole Financial Creditor.

3. The learned Counsel for the Appellant challenging the order contends that it was mandatory for Adjudicating Authority to pass an order of liquidation in view of the provision of Section 33, sub-section (2) and Adjudicating Authority committed error in not allowing Application filed by the RP. The learned Counsel for the Appellant relied on the judgment of this Tribunal in **Company Appeal (AT) (Insolvency) No.1062 of 2022 – Sreedhar Tripathy vs. Gujarat State Financial Corporation and Ors.** The learned Counsel for the Appellant submits that the decision taken by the CoC for liquidation was in the commercial wisdom of the CoC, which ought not to have been interfered by the Adjudicating Authority. The learned Counsel for the Appellant has also relied on the judgment of the Hon’ble Supreme Court in **Vidarbha Industries Power Limited vs. Axis Bank Ltd. – (2022) 8 SCC 352.**

4. We have considered the submission of learned Counsel for the Appellant and perused the records.

5. Before we proceed to consider the submission of learned Counsel for the Appellant, it is necessary to notice the relevant statutory provisions regulating the liquidation. Section 33, sub-sections (1) and (2), which are relevant in the present case are as follows:

“33. Initiation of liquidation. - (1) Where the Adjudicating Authority, -

(a) 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; or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, 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.

(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 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).

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.”

6. The Explanation to Section 33, sub-section (2) contains a legislative declaration empowering the CoC to take a decision to liquidate the Corporate Debtor any time after its constitution as per sub-section (1) of Section 31 and before the confirmation of the Resolution Plan, including at any time before the preparation of the Information Memorandum. The Explanation, thus, clarifies that CoC is fully empowered to take a decision to liquidate any time after the constitution under sub-section (1) of Section 21, but before – (i) the confirmation of the Resolution Plan; and (ii) at any time before the preparation of Information Memorandum. The above Explanation also clarifies that CoC at any time before preparation of the Information Memorandum can take decision to liquidate. The above provisions contained in Explanation has to be given meaning and effect. The Information Memorandum is prepared by the RP under Section 29. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (for short “**CIRP Regulation**”) contains relevant provisions with regard to publication of Information Memorandum. Regulation 36 provides that the RP shall submit the Information Memorandum in electronic form to each Member of the Committee within two weeks of his appointment, but not later than 54th day from the insolvency commencement date, whichever is earlier. Regulation 36, sub-regulation (1) provides as follows:

“36. Information memorandum. -- (1) Subject to sub-regulation (4), the resolution professional shall submit the information memorandum in electronic form to each

member of the committee 86[on or before the ninety-fifth day from the insolvency commencement date. “

7. Regulation 36A provides for ‘Invitation for Expression of Interest’. In the present case invitation for Expression of Interest was issued with the approval of CoC on 07.10.2022. As per the statutory Scheme contained in Regulation, the Information Memorandum must be prepared and circulated to the Members of the Committee of Creditors prior to issuance of Form-G.

8. There is no material to indicate that CoC has taken into consideration the Explanation to Section 33, sub-section (2) before taking a decision to liquidate the Corporate Debtor. Explanation to Section 33, sub-section (2) has to be given some meaning.

9. The learned Counsel for the Appellant has relied on judgment of this Tribunal in **Sreedhar Tripathy**. In that case, the CoC has passed the Resolution for liquidation. In paragraph 3 of the judgment, reasons given by the CoC for liquidation are contained, which are to the following effect:

“3. The Appellant himself has brought on record the Minutes of CoC meeting dated 05.04.2021 as Annexure A-12. The CoC initially, at Agenda Item 1, took a decision for withdrawal under Section 12A and while taking decision following reasons were given:-

“Reasons shared by CoC for Resolutions: The representatives of the COC conveyed to RP that since the Corporate Debtor was non-functional and completely shut since the year 2002, its machinery has almost become scrap with some land and building which is also in a dilapidated condition,

plus it is not a going concern since last about 19 years and there is also no possibility of it being a going concern in near future. Therefore, in such circumstances, continuation of CIRP would only involve more expenses and cost without any corresponding advantage.”

10. In the **Sreedhar Tripathy’s** case, the Corporate Debtor was not a going concern since last 19 years. After considering Section 33, sub-section (2), following was laid down by this Tribunal in paragraph 7:

“7. The Explanation under Section 33 (2) has been inserted by Act of 26 of 2019 contains the legislative declaration and intention. The CoC in the Legislative Scheme has been empowered to take decision to liquidate the Corporate Debtor, any time after its constitution and before confirmation of the resolution plan. The power given to the CoC to take decision for liquidation is very wide power which can be exercised immediately after constitution of the CoC. The reasons which has been given in Agenda Item 1, it is made clear by the CoC that the Corporate Debtor is not functioning for last 19 years and all machinery has become scrap, even the building is in dilapidated condition and the CIRP will involve huge costs. We are not convinced with the submission of learned counsel for the Appellant that the CoC’s decision is an arbitrary decision. CoC is empowered to take decision under the statutory scheme and when in the present case the decision of the CoC for liquidation has been approved by the Adjudicating Authority, we see not good ground to interfere at the instance of the Appellant. However, we make it clear that the decision taken by the CoC was in the facts of the

present case and it cannot be said that whenever decision is taken for liquidation the same is not open to judicial review by the Adjudicating Authority and this Appellate Tribunal. It depends on the facts of the each case as to whether the decision to liquidate the Corporate Debtor is in accordance with the I&B Code or not. With these observations, the Appeal is dismissed.

11. The judgment of this Tribunal in paragraph 7 in **Sreedhar Tripathy's** case, makes it clear that decision of the CoC, which was approved was in the facts of that case and it was clarified that decision taken by the CoC is subject to judicial review in the facts of the particular case and the Tribunal can very well look into as to whether the decision is in accordance with the Code or not.

12. The learned Counsel for the Appellant further relied on judgment of Hon'ble Supreme Court in **Vidarbha Industries Power Limited**, wherein in paragraphs 76 and 77 following has been laid down:

“76. The fact that the legislature used “may” in Section 7(5)(a) IBC but a different word, that is, “shall” in the otherwise almost identical provision of Section 9(5)(a) shows that “may” and “shall” in the two provisions are intended to convey a different meaning. It is apparent that the legislature intended Section 9(5)(a) IBC to be mandatory and Section 7(5)(a) IBC to be discretionary. An application of an operational creditor for initiation of CIRP under Section 9(2) IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the rules and regulations thereunder, there is no payment of the

unpaid operational debt, if notices for payment or the invoice have been delivered to the corporate debtor by the operational creditor and no notice of dispute has been received by the operational creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor.

77. On the other hand, in the case of an application by a financial creditor who might even initiate proceedings in a representative capacity on behalf of all financial creditors, the adjudicating authority might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the corporate debtor. The adjudicating authority may in its discretion not admit the application of a financial creditor.”

13. There is no doubt that in Section 33, sub-sections (1) and (2) legislature has used the expression “shall”. However, the obligation of the Adjudicating Authority to direct for liquidation shall rise only when decision of the CoC is in accordance with the Code. Judicial review of the decision of the CoC in a particular case is not precluded. In **Sreedhar Tripathy**, it has been clearly held that judicial review of the decision of the CoC is not precluded and it depends on facts of each case.

14. Coming to the facts of the present case, Form-G having been issued after preparation of the Information Memorandum and the last date fixed by the CoC being 24.10.2022 for receiving Expression of Interest, we are satisfied that Adjudicating Authority did not commit any error in rejecting for liquidation and asking the CoC to reconsider its decision. The order of Adjudicating Authority clearly empowers the CoC to reconsider its decision

and take an appropriate decision taking into consideration further facts and events. We, thus, are satisfied that there is no ground to interfere with the impugned order. The Appeal is dismissed. No costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Ms. Shreesha Merla]
Member (Technical)**

NEW DELHI

6th January, 2023

Ashwani