

IN THE NATIONAL COMPANY LAW TRIBUNAL

COURT VI, NEW DELHI

I.A. 867/2023

IN

Company Petition No. (IB) - 822/(ND) /2021

*Under Section 33(2) of the Insolvency and Bankruptcy Code,
2016 for liquidation of the corporate debtor*

In the matter of:

M/s. Five Ess Precision Components Pvt. Ltd.

...Operational Creditor

Versus

M/s. Hema Automotive Pvt. Ltd.

...Corporate Debtor

In the matter of:

Mr. Vivek Sharma

Resolution Professional of M/s. Hema Automotive Pvt. Ltd.

...Applicant/RP

Order Pronounced on: 11.04.2023

CORAM:

SHRI. BACHU VENKAT BALRAM DAS, MEMBER (JUDICIAL)

SHRI. RAHUL BHATNAGAR, MEMBER (TECHNICAL)

For the Applicant: Mr. Vivek Sharma, Resoltuion Professional

ORDER

PER- BACHU VENKAT BALRAM DAS, MEMBER (JUDICIAL)

1. This is an application filed by the Resolution Professional, under Section 33(2) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the “Code”) for issuance of directions for liquidation of Corporate Debtor, M/s. Hema Automotive Pvt. Ltd.
2. The facts in brief are that the Operational Creditor of the Corporate Debtor had filed an application under Section 9 of the Code, bearing number IB-822/(ND)/2021, for initiation of Corporate Insolvency Resolution Process (CIRP), against the Corporate Debtor. The said application was admitted by this Tribunal on 08.07.2022, thereby initiating CIRP against

the Corporate Debtor and therein, appointing Mr. Vivek Sharma as the Interim Resolution Professional (IRP).

3. That based upon the unanimous resolution passed by the 3rd CoC meeting of the Corporate Debtor, consisting of sole Financial Creditor i.e. Hero Fincorp Limited (an NBFC company), the Applicant/ Resolution Professional had earlier filed an application under section 33(2) read with Section 34 of the Code before this Tribunal. The following resolutions were passed in the 3rd CoC meeting:

"RESOLVED THAT subject to the approval of the Hon'ble National Company Law Tribunal (NCLT), New Delhi the Committee of Creditors ('COC') of M/s Hema Automotive Pvt. Ltd. (the Corporate Debtor) hereby approves the Liquidation of the Corporate Debtor.

"RESOLVED FURTHER THAT the Resolution Professional be and is hereby authorized to file an application with the Hon'ble National Company Law Tribunal [NCLT, New Delhi (Bench VI)] for approval of Liquidation of the Corporate Debtor, along with the written consent of Mr. Umesh Gupta to act as liquidator, on behalf of CoC. In accordance with the provisions of the Insolvency, and Bankruptcy Board of India (Liquidation Process) Regulation, 2016, the terms of appointment including the fee of liquidator shall be discussed in the first meeting of

the Stakeholders Consultation Committee ('SCC')."

4. That the Tribunal vide its Order dated 23.11.2022 directed the COC to "reconsider" the Liquidation application as the same has been recommended before the elapse of time period for seeking Expression of Interest.
5. That in accordance with the directions of the Tribunal, the matter was duly reconsidered at the 4th COC meeting of the Corporate Debtor held on 07.12.2022, wherein post examining the Order of this Tribunal dated 23.11.2022, the COC (with Hero Fincorp Ltd being sole member) with 100% voting, directed the RP to file the fresh application re-seeking liquidation of the Corporate Debtor as the Corporate Debtor has not been a Going Concern since last two years before the initiation of CIRP proceedings via Order of this Tribunal dated 08.07.2022 and the entire Machinery of the Corporate Debtor had already been realized by Hero Fincorp Ltd. (Financial Creditor, also being sole member of COC) before the commencement of the CIRP proceedings, under SARFAESI Act, 2002. Therefore, the CoC shall only be incurring additional costs under CIRP process.
6. Pursuant to the provisions of Section 34 of the IBC, 2016,

the Insolvency Professional Mr. Umesh Gupta has submitted his written consent to act as the Liquidator.

7. The Hon'ble NCLAT vide order dated 25.11.2021 in *Company Appeal (AT) (Insolvency) No.470 of 2019 in the matter of Innovative Construventures Private Limited and Anr. Vs Brainer Trade and Fin-Tech Private Limited and Ors.* held that the IBC empowers the Committee of Creditors to liquidate the Corporate Debtor any time after its constitution under Section 21 and before confirmation of Resolution Plan including any time before the preparation of Information Memorandum.

Further, Section 33(2) states as follows: "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.”

8. In the matter of *Sreedhar Tripathy vs. Gujarat State Financial Corporation and Ors. Company Appeal (AT) (Insolvency) No. 1062 of 2022*, the Hon’ble NCLAT in para 7 of its order dated 12.10.2022 stated as under: -

*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 no 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 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.

9. It is well settled that decision taken by CoC for liquidation in commercial wisdom of the CoC should not be interfered with by the Adjudicating Authority. In the present situation extension of time will only result in unnecessary expenses. Further the resolution for liquidation of CD was approved by COC with 100% voting. Therefore, this Tribunal sees no merit in interfering with the commercial wisdom of the CoC.

10. In view of the above, the application is allowed by ordering liquidation of the Corporate Debtor, namely M/s. Hema Automotive Pvt. Ltd. with following directions:

- a. That Mr. Vivek Sharma, the Resolution Professional of the Corporate Debtor, is relieved from the present assignment as Resolution Professional.
- b. That Mr. Umesh Gupta, holding Registration No. *IBBI/IPA001/IP-P008482017-18/11431*, is appointed

- as the Liquidator in terms of Section 34(1) of the Code;
- c. Registry is directed to communicate this Order to the Registrar of Companies, NCT of Delhi & Haryana and to the Insolvency and Bankruptcy Board of India;
 - d. 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;
 - e. This order shall be deemed to be notice of discharge to the officers, employees and the workmen of the corporate debtor as per Section 33(7) of the Insolvency and Bankruptcy Code, 2016;
 - f. The Liquidator is directed to proceed with the process of liquidation in the manner laid down in Chapter III of Part II of the Insolvency and Bankruptcy Code, 2016 and in accordance with the relevant rules and regulations.
 - g. The Liquidator shall follow up and continue to investigate the financial affairs of the Corporate Debtor in accordance with provisions of Section 35(1)

of the Code.

- h. The liquidator shall also follow up the pending applications for their disposal during the process of liquidation including initiation of steps for recovery of dues of the Corporate Debtor as per law.
- i. The Liquidator shall submit Preliminary Report to the Adjudicating Authority within seventy-five days from the liquidation commencement date as per Regulation 13 of the Insolvency and Bankruptcy (Liquidation Process) Regulations, 2016;
- j. Copy of this order be sent to the Financial Creditor, Corporate Debtor and the Liquidator for taking necessary steps;
- k. I.A. 867/2023 filed in IB- 822/ND/2021 is disposed of in terms of the aforesaid terms.

SD/-

(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

SD/-

(BACHU VENKAT BALRAM DAS)
MEMBER (JUDICIAL)