

**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ**

IA NO.187/2024 IN CP (IB) NO.421/ALD/2019

(Company Application under Section 60(5) and 33(5) of the Insolvency and Bankruptcy Code, 2016 Read with Rule 11 of the NCLT Rules, 2016)

IN THE MATTER OF:

AJIT KUMAR

LIQUIDATOR, HIPAD TECHNOLOGY INDIA PVT. LTD.

REGISTRATION NO:IBBI/IPA-003/IP-N000062/2017-2018/1058

ADDRESS: 1A, SANSKRIT APARTMENT, GH-22, SECTOR 56,
GURUGRAM, HARYANA, 122011.

..... **APPLICANT**

AND IN THE MATTER OF:

INDUSTRIAL AND COMMERCIAL BANK OF CHINA LTD.

.....**FINANCIAL CREDITOR**

Vs.

HIPAD TECHNOLOGY INDIA PRIVATE LTD.

.....**CORPORATE DEBTOR**

Order pronounced on:- 4th July, 2024

Coram:

Mr. Praveen Gupta. : Member (Judicial)

Mr. Ashish Verma : Member (Technical)

Appearances:

Sh. Shivanshu Kumar, Adv. :For the Applicant/Liquidator,
Mr. Ajit Kumar present in
person

ORDER

1. This application has been filed U/s 33 (5) of the Code seeking *ex-post facto* approval from this Adjudicating Authority for the institution of legal proceedings for filing of the CIRP by the Liquidator against another Corporate Debtor, namely, OPPO Mobiles India Pvt. Ltd. The prayer as sought in the present application has been enumerated at Page No.24 and 25 which reads as under:

“V. RELIEFS SOUGHT

26. In light of the aforesaid facts and circumstances, the Applicant humbly prays that this Hon'ble AA may be pleased to:

- a. Allow the present Application.*
- b. Grant post facto approval under section 33 (5) of the Code, to the institution of legal proceedings and the filing of CIRP Application by the Liquidator, on behalf of the Corporate Debtor, against Oppo Mobiles India Private Limited, for the default in repayment of debt owed towards the Corporate Debtor.*
- c. Permit the Liquidator to continue and proceed with the CIRP Application, as filed under section 9 of the Code, and currently pending before the Hon'ble NCLT, Chandigarh Bench.*

- d. Permit the Liquidator to file any fresh applications against Oppo Mobiles India Private Limited, if any or all of the reliefs as sought under prayers (a) to (c) get(s) dismissed, on the ground of non-availability of the prior approval of the Hon'ble AA, as provided under section 33(5) of the Code.*
- e. Pass any other order or direction that this Hon'ble AA deems fit and proper, in facts and circumstances of the present case.”*

2. Briefly stated the facts of the case are that the Liquidator of the Corporate Debtor is seeking *ex-post facto* approval for initiating a Section 9 petition against another company, namely, OPPO Mobiles India Pvt. Ltd., which is allegedly liable to pay the debt to the present Corporate Debtor. The CIRP against the present Corporate Debtor was initiated in terms of an order dated 9th December, 2020 in the company petition CP (IB) No.421/ALD/2019 filed by the Financial Creditor U/s 7 of the Code and accordingly, the IRP was appointed. Eventually, the IRP who was further appointed as RP on the basis of the decision taken by the COC in its 5th meeting held on 25th March, 2021 moved an application U/s 33 of the Code before this Adjudicating Authority for initiating the liquidation process against the Corporate Debtor. The said application was allowed vide order dated

15th July, 2021 and the liquidation process against the Corporate Debtor was initiated.

- 3.** In pursuance of the order dated 15th July, 2021 passed by this Adjudicating Authority as referred to above, the Liquidator made public announcement on 16th July, 2021 and also constituted the SCC of the Corporate Debtor and on scrutinization of the available books of accounts, it came to the knowledge of the Liquidator that certain debts were reflected in the ledger as outstanding from a debtor, namely, OPPO Mobiles India Pvt. Ltd.
- 4.** The Liquidator, therefore made certain communications with the aforesaid debtor, namely, OPPO Mobiles India Pvt. Ltd. seeking clarifications regarding the transactions and the debts, and on receiving some clarifications as well as further scrutiny of the ledger accounts, the Liquidator apprised the SCC about the developments in relations to the transactions with OPPO Mobiles India Pvt. Ltd. Since the debts were outstanding to be paid by OPPO Mobiles India Pvt. Ltd. to the present Corporate Debtor, therefore the Liquidator issued a demand notice dated 5th April, 2022 U/s 8 of the Code and in response to the said demand notice the

aforesaid debtor, namely, OPPO Mobiles India Pvt. Ltd. admitted the existence of the debt worth Rs. 2.29 cr. as due and payable to the present Corporate Debtor.

5. In the 2nd meeting of the SCC, the Liquidator apprised the SCC Members and also advised to file an application U/s 9 of the Code against the aforesaid debtor, namely, OPPO Mobiles India Pvt. Ltd. It is averred in the application as also submitted by the Ld. Counsel representing the Liquidator that accordingly a Company Petition No.165/CHD/HRY/2022 was filed U/s 9, for initiating CIRP against the aforesaid debtor before NCLT, Chandigarh Bench, and the matter is under adjudication.
6. It is also further averred by the Liquidator that since the petition U/s 9 of the Code was pending before NCLT, Chandigarh Bench filed by the Liquidator against the debtor, namely, OPPO Mobiles India Pvt. Ltd., therefore an application vide IA No.35 of 2024 was also filed for seeking an extension on this very ground of pendency of Section 9 petition before NCLT, Chandigarh Bench. He has referred to one order dated 18th January, 2024 passed in the aforesaid IA No.35 of 2024 by this Adjudicating Authority granting

extension in the time on the aforesaid ground as stated therein.

7. It is submitted by the Ld. Counsel representing the Liquidator that Section 33 (5) of the Code casts a mandate upon the Liquidator to seek approval of the Adjudicating Authority when initiating any legal proceedings by and on behalf of the present Corporate Debtor. Since the filing of the Section 9 petition against another debtor, namely, OPPO Mobiles India Pvt. Ltd. was at the instance of the present Corporate Debtor, wherein the Liquidator has already been appointed, therefore proviso to Section 33 (5) envisages seeking approval from the Adjudicating Authority prior to initiating any proceedings by or on behalf of the present Corporate Debtor. The provision of Section 33 (5) along with its proviso reads as under:

“Subject to Section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor:

***Provided** that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.”*

8. It has also been submitted by the Liquidator that it has initiated the CIRP application U/s 9 against the debtor, namely, OPPO Mobiles India Pvt. Ltd. in NCLT, Chandigarh Bench on the basis of the provisions of Section 35 (1)(k) of the Code which empowers the Liquidator to institute or defend any suit, prosecution or other legal proceedings, civil or criminal in the name of and on behalf of the Corporate Debtor. Section 35 of the Code is also reproduced below:

“35(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:-

- a. to verify claims of all the creditors;*
- b. to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;*
- c. to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report;*
- d. to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;*
- e. to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary;*
- f. subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified; Provided that the*

liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.

- g.** to draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business;
- h.** to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself;
- i.** to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities;
- j.** to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;
- k.** **to institute or defend a suit, prosecution or other legal proceedings, civil or criminal, in the name of or on behalf of the corporate debtor;**

- l. to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;*
- m. to take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;*
- n. to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board; and*
- o. to perform such other functions as may be specified by the Board.”*

9. It is the case of the Liquidator in the present application that though an application U/s 9 for initiating CIRP against another debtor, namely, OPPO Mobiles India Pvt. Ltd. has already been filed by the Liquidator in NCLT, Chandigarh Bench on behalf of the present Corporate Debtor in the exercise of the duties cast upon it under the provisions of the Code. However, to avoid any technical objection being raised in the CIRP application the present application for sanction of “*ex-post facto*” has been moved now for seeking the said permission from the Adjudicating Authority.

10. For the purpose of seeking *ex-post facto* approval concerning the Section 9 petition which has already been filed by the Liquidator on behalf of the present Corporate Debtor in NCLT, Chandigarh Bench, he relies upon certain judgments wherein according to him the *ex-post facto* has been allowed under the similar circumstances.
11. In the case of ***Ravi Shankar Devarakonda v. M/s Bharat Heavy Electricals Ltd.***, the application was filed by the Liquidator under section 60(5) of the IBC, 2016 read with NCLT Rules, 2016 for seeking ex post-facto approval of the NCLT, Cuttack Bench to permit the Liquidator to contest the case before the Hon'ble City Civil Judge at Bangalore under Section 34 of The Arbitration and Conciliation Act, 1996. The Cuttack Bench in this matter discussed at length whether subsequent approval under Section 33 (5) of the Code was permissible. The court opined that while prior approval was succinctly provided under section 33 (5) of the IBC, the enactment is silent when it comes to ex-post facto approval. The petitioner in this case relied upon certain judgments of other courts wherein such acts had been ratified under similar provisions of various laws. The Court subsequently

granted ex-post facto approval to the in the interest of justice and keeping in mind the objectives of the Code. Relevant excerpt of the judgment has been reproduced hereunder:

- 7. "...The question squarely lies then specific provision under the enactment has not been followed by the Liquidator. Can we set aside the irregularity under application under Rule 11 of the NCLT Rules, 2016? Secondly, whether de facto approval of sanction is allowed and up to what stage can we allow de facto sanction?*
- 8. What ought to be done, if the parties failed to do. It cannot be ratified by the subsequent Act. However, the petitioner counsels vehemently argued that sanction of approval is only a formal Act. Hence, in the interest of justice and the overall view of the enactment for maximisation of the value of the assets of the Corporate Debtor. An approval will only amount to regularisation of appeal already filed and pending. It is only a formality to regularize the application which was filed before the District Court.*
- 9. The permission to go on Appeal against the company under liquidation was obtained by the respondent herein and this Adjudicating Authority by Order dated 08.04.2019 has given approval to the respondent to file Appeal against the Corporate Debtor against the Award passed by the Hon'ble Sole Arbitrator. By Order dated 08th April, 2019 this Adjudicating Authority granted leave, which is as follows*
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"CP No. 593/KB/2017 is already disposed of passing order of Liquidation. Corporate Debtor is already under process of liquidation. Liquidator is appointed. TA No. 21/CTB/2019 is filed by one of the applicants i.e. Bharat Heavy Electrical Limited.

Heard Ld. Senior Counsel. This application is under Section 33 (5) of IBC for leave of this Authority to file applications U/s 34 of the Arbitration & Conciliation Act, 1996, before Debtor is already under the liquidation. Since this application is very formal nature hence by keeping all points on facts and law open to be considered in proper proceeding this application is allowed and disposed of.

Main proceeding stands adjourned for further consideration on 29.04.2019."

The Liquidator also could have taken steps at that stage to obtain necessary permission for filing the appeal. However, it is the fact that Liquidator failed to do so.

10. *In view of the foregoing judgment, and in the interest of justice, keeping in mind the spirit of IBC, focus of the company in liquidation is to "maximization of the asset". This application is ALLOWED.*

11. *The application seeking permission to proceed with A.S. No.: 58/2019 & A.S. No.: 59/2019 under Section 34 of Arbitration and conciliation Act, pending on the file of the Hon'ble City Civil Court, Bangalore. The leave is granted ex post facto."*

12. This judgment of the NCLT, Cuttack Bench was challenged in appeal before the NCLAT, Principal Bench, New Delhi wherein the appellant challenged the ex-post facto approval granted by the adjudicating authority. The NCLAT ruled that the adjudicating authority while granting ex-post facto approval had not determined any issue on merit. Therefore, it found no ground to interfere with the impugned order, and the appeal was disposed of.

The relevant paragraph of the case has been reproduced for reference:

"Be that as it may, the Adjudicating Authority while passing the Order under Section 33(5) granting approval was not to consider the maintainability and legality of the Application to be filed or filed by the Liquidator under Section 34 of the Code. It is the City Civil Court which has to take decision regarding all these issues. We are thus of the view that observations in Paragraph 11 of the Impugned Order in so far as the Adjudicating Authority observed 'the leave is granted ex post fact' does not determine any issue by the Adjudicating Authority and all contentions and issues are left open to be considered and argued by the parties before the City Civil Court, Bangalore. We are of the view that there is no ground to interfere with the Order impugned. With these observations and clarifications, we dispose of the Appeal."

- 13.** A similar matter came for consideration before the NCLT Delhi, Court-V wherein, the Liquidator filed an application under section 33(5) of IBC,2016 read with Rule 11 of NCLT Rules, 2016 for seeking permission of the adjudicating authority to proceed with the petition already pending before the District Judge, Patiala House Court filed by the Liquidator under Section 34 of the Arbitration and Conciliation Act, 1996. The Liquidator submitted that it was an inadvertent error on his part that he could not seek prior

approval from the adjudicating authority. The liquidator relied upon the afore-mentioned rulings of NCLT Cuttack Bench and NCLAT, New Delhi while defending his stance. The court after careful consideration of the matter allowed the Applicant/ Liquidator to proceed with the application filed under section 34 of the Arbitration and Conciliation Act, 1996. Thus, subsequent approval was granted and the application was allowed.

- 14.** After perusing the application and on hearing the submissions made by the Ld. Counsel representing the Liquidator, we are satisfied that in a given situation where the legal proceedings have been already initiated by the Liquidator by or on behalf of the Corporate Debtor, grant of *ex-post facto* approval can be permitted with respect to the act already done by the Liquidator to meet the objective of proviso to Section 33 (5) of the Code.
- 15.** We have noted that in the judgments referred to above the identical issue came in for consideration wherein the *ex-post facto* approval has been granted with respect to the legal proceedings initiated by the Liquidator by or on behalf of the Corporate Debtor. We also note that any realization of debt

as a result of the resolution of the Corporate Debtor, namely, OPPO Mobiles India Pvt. Ltd. arising out of the Section 9 petition filed in NCLT, Chandigarh Bench would ultimately entail accrual of the liquidation estate of the present Corporate Debtor as well and will thus result into value maximization, meeting the very objectives of the Code.

- 16.** We therefore allow the present application and grant *ex-post facto* approval with respect to initiating the legal proceedings in terms of filing a Section 9 petition for initiating CIRP against the aforesaid debtor, namely, OPPO Mobiles India Pvt. Ltd.
- 17.** IA No.187 of 2024 stands disposed of accordingly.

-Sd-

**(Ashish Verma)
Member (Technical)**

-Sd-

**(Praveen Gupta)
Member (Judicial)**

Date- 4th July, 2024