

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT III, MUMBAI BENCH**

Under **Section 33(3)** and **Section 60(5)** of the Insolvency and
Bankruptcy Code, 2016 read with Rule 11 of the national Company
Law Tribunal Rules, 2016

**I.A. No. 2767 of 2022
In
C.P.(I.B.) No. 4301 of 2018**

Filed By

Edelweiss Asset Reconstruction Company Limited,

Acting in the capacity a Trustee, as EARC SC Trust 364

(Being one of the Financial Creditor of the Corporate Debtor)

Having its registered address at :

Edelweiss House, Off CSAT Road, Kalina,

Santacruz (E), Mumbai: 400 089

.... Financial Creditor/ Applicant

In the Matter Between

BMW Financial Services Private Limited

....Financial Creditor

V/s

S.K. Wheels Private Limited

.... Corporate Debtor

Order Reserved on: 25.01.2023

Order Pronounced on: 13.02.2023

Coram: Shri H.V. Subba Rao, Hon'ble Member (Judicial)

Smt. Madhu Sinha, Hon'ble Member (Technical)

Appearance:

For the Applicant: Mr. Nausher Kohli, Ms. Sudeshna Guha Roy, Ms, Samiridhi Lodha, Mr. Alabh Lal and Mr. Rozat Akolawala, i/b Bharucha & Partners. (Advocates)

Per: Smt. Madhu Sinha, Member (Technical)

ORDER

1. This Application is filed by Edelweiss Asset Reconstruction Company Limited, seeking liquidation of S.K Wheels Private Limited (hereinafter referred as the "**Corporate Debtor**") under Section 33(3) and Section 60(5) of the Insolvency and Bankruptcy Code read with rule 11 of the National Company Law Tribunal, praying for following reliefs:

- a. *Pass an order under Section 33(3) of the Code directing initiation of the Liquidation of the Corporate Debtor and appoint a Liquidator of the Corporate Debtor;*
- b. *Pass an order appointing Mr. Sachin Shrinivas Bhattad having Registration No. Reg No. : IBBI/IPA-001/IP-P00680/2017-2018/11159 herein as the Liquidator of the Corporate Debtor;*

- c. *Pass appropriate orders, as deemed fit under Section 74(3) against the Resolution Applicant , for wilfully failing to comply with the Resolution Plan;*
- d. *In the alternative prayer clause(a) and (b) and only in the event this Hon'ble Tribunal doesn't grant the prayer of liquidation , pass an order:*
 - i. *Classifying Applicant as a Financial Creditor who did not vote in favour of the Resolution Plan in terms of Regulations 38(1)(b) of CIRP Regulation; and*
 - ii. *Direct Resolution Applicant to pay the pro-rata Liquidation Value of Applicant's claim amounting to Rs. 8,06,03,853 (Rupees Eight Crores Six Lakhs Three Thousand Eight Hundred and Fifty Three Only) in priority to other financial creditors in terms of Section 30(2)(b) read with Regulation 38(1)(b) of the CIRP regulations.*
- e. *Pass any other orders as this Hon'ble Tribunal may deem fit.*

2. The Applicant states that, initially BMW Financial Services Private Limited (one of the Financial Creditor of the Corporate Debtor) filed a Company Petition bearing no. 4301 of 2018 under Section 7 of the Insolvency and Bankruptcy Code, 2016 against the Corporate Debtor. Resultantly, this Hon'ble Tribunal by an order dated 29.03.2019, initiated the Corporate Insolvency Resolution Process (herein after

referred as “**CIRP**”) against the Corporate Debtor and appointed Mr. Vishal Ghisulal as the Interim Resolution Professional, who was subsequently appointed as the Resolution Professional by the Committee of Creditors (hereinafter referred as “**COC**”).

3. The Applicant submits that, after the commencement of the CIRP, during the 4th COC meeting, held on 11.07.2019, the Resolution Professional informed the COC that an Expression Of Interest (**EOI**) was received by the Resolution Applicant i.e., Mr. Anil Kumar who was an erstwhile Promoter of the Corporate Debtor met the eligibility criteria under Section 29A (h) of the Code read with Section 240A(1) of the Code to submit a Resolution Plan.
4. Further, the Applicant states that during the 12th meeting COC meeting, held on 23.01.2020, the Resolution Applicant after receiving suggestions from the stakeholders, submitted a revised Resolution Plan. Accordingly, on 17.02.2020, the afore-mentioned Resolution Plan was approved by 75.78% voting of the COC. This Resolution Plan by the Resolution Applicant assured the members of the COC that an amount Rs. 132.86 Crores will be paid towards the full and final settlement of all the liabilities of the Corporate Debtor. These payments were to be carried out in a staggered manner, wherein an upfront amount of Rs. 10.07 Crores will be paid all the stakeholders within 60 days of the approval of the Resolution Plan by this Hon’ble Tribunal. In accordance to this, the Applicant was entitled to receive Rs. 29.3 crores towards full

and final settlement of its admitted claim, wherein upfront payment of Rs. 50 Lakhs was to be paid within a period of 60 days from the approval of the Resolution Plan and the balance amount was to be paid over the period of 5 years.

5. Subsequently, this Hon'ble Tribunal vide an Order dated 09.11.2021 under Section 31 (1) of the Insolvency and Bankruptcy Code, 2016 approved the Resolution Plan submitted by the Resolution Applicant.
6. With terms of the approval of the Resolution Plan, an Implementation and Monitoring Committee (hereinafter referred as "**IMC**") was constituted towards the implementation of the Resolution Plan.
7. The Applicant states that, on 01.12.2021, during the 1st IMC meeting, the Resolution Professional was appointed as the Supervisor of the IMC, the Cosmos Bank was appointed as an Authorised Representative of the Financial Creditors and the Resolution Applicant representing the Corporate Debtor, discussed the way forward with respect to implementing the Resolution Plan.
8. The Applicant further states that as assured under the Resolution Plan, the Resolution Applicant was obligated to make an upfront payment of Rs. 10.07 crores to the respective stakeholders within 60 days i.e. on or before 08.01.2022. However, the Resolution Applicant defaulted in making the payment.

9. During the 2nd IMC meeting held on 11.02.2022, it was discovered that the Resolution Applicant had breached the provisions of the Resolution Plan and the Code by defaulting in making the upfront payments. Further, the Resolution Professional also informed that the Resolution Applicant had also entered into an Agreement for the development of Turbhe Project with one of the developers, without obtaining any consent from the Cosmos Bank or any other members by further admitting making payments to some Unsecured Financial Creditors in preference to other financial creditors and also CIRP costs.
10. Therefore, on the account of the breaches committed by the Resolution Applicant, the Resolution Professional issued a show cause notice to calling upon him to make the payments guaranteed under the Resolution Plan. However, no payments were made by the Resolution Applicant, despite of multiple extensions of the timeline for making the payments. Considering the repeated failures by the Resolution Applicant, the Applicant and the Cosmos Bank, communicated to the Resolution Professional to file an Application for Liquidation of the Corporate Debtor.
11. The Applicant submits that on 04.03.2022 the IMC passed a resolution to liquidate the Corporate Debtor. Consequently, the Resolution Professional filed an Interim Application bearing no: 1054 of 2022 in the captioned Petition before this Hon'ble Tribunal under Section 33(3)

of the of the Code, seeking the liquidation of the Corporate Debtor.

(Liquidation Application).

12. In the meantime, the Resolution Applicant filed an Interim Application bearing no. 840 Of 2022 in the captioned Petition seeking an extension of the timelines for the Implementation of the Resolution Plan
(Extension Application)

13. Thereafter, this Hon'ble Tribunal vide a common order dated 04.05.2022, in light of the above stated facts, dismissed the Extension Application on the ground that such extension sought by the Resolution Applicant would amount to modification of the Resolution Plan and is impermissible under the Code. In apropos to the Liquidation Application, the Bench directed the Resolution Professional to convene a meeting of the COC and file an appropriate Application for liquidation with the mandate of the COC.

14. The Applicant states that during the 4th IMC meeting, held on 08.07.2022, the Resolution Applicant again sought an extension to make an upfront payment by 30.09.2022. The IMC agreed to take a resolution in front of the erstwhile members of the COC, wherein on the 59.73% of the members of voted to not to liquidate, while 28.23% including the Applicant voted in favour of liquidation. The Applicant further states that, the IMC (erstwhile members of the COC) by not

allowing the Liquidation of the Corporate Debtor are considering the extension sought by the Resolution Applicant

15. The Applicant further submits that this decision of the erstwhile member of the COC would amount to a modification of an approved Resolution Plan which is impermissible under the Code. Furthermore, in spite of various opportunities, the Resolution Applicant has consistently failed to meet his obligations under the Resolution Plan therefore, the other creditors have lost the faith in the Resolution Applicant to meet his obligations.

16. The Applicant also states that as per the Section 33(3) of the Code, the Applicant's interest is prejudicially affected by the Resolution Applicant's failure to perform its payment obligations under the Resolution Plan. The Applicant has lost faith in the Resolution Plan and accordingly it is in the best interest of all the stakeholders to liquidate the Corporate Debtor.

FINDINGS:

17. We have heard the submissions made by the Learned Counsel for the Applicant. From the submissions made and from perusal of the documents, it is apparent from the previous orders passed by this Adjudicating Authority that the Corporate Debtor was put in CIRP vide order dated 29.03.2019. As far as the contravention of the Resolution

Plan is concerned, this Hon'ble Tribunal had given a concrete finding in the Interim Application bearing no. 840 of 2022 under the captioned Company Petition, filed by the Resolution Applicant on the ground of Covid -19, before this Bench seeking extension of time for payments as per the Resolution Plan. At this juncture, this Bench had relied on the law laid down by the Supreme Court in ***Ebix Singapore Private Limited Vs. Committee of Creditors of Educomp solutions Limited & Anr. (Civil Appeal No. 3224 of 2020 with other appeals)*** and rejected the Application considering that once the Resolution Plan is approved by the COC, it cannot be allowed to be withdrawn or modified by the Successful Resolution Applicant by approaching the Adjudication Authority. Furthermore, the Bench had also observed that the Resolution Applicant had defaulted on multiple counts to make payments as proposed in the Resolution Plan and making all attempts to regain the company through the back door without implementing the Resolution Plan. It is noteworthy to mention here that even after the approval of the Resolution Plan, it is observed that no infusion of funds was made by the Resolution Applicant till date. Pursuant to this, the only issue that needs to be decided is as follows:

- a. *Whether, the Adjudicating Authority should liquidate the Corporate Debtor under section 33(3) of the IBC in a case of contravention/ non- implementation of the Resolution Plan*

*without the mandate of the Implementation and Monitoring
Committee (IMC) ?*

18. It is pertinent to note that the first tranche of the payment was to be paid by 08.01.2022. It is fact borne on record, that till date the Resolution Applicant defaulted in payment even after the expiry of the payment term for more than a year. The Corporate Debtor further sought an extension in the 4th IMC meeting held on 08.07.2022, stating that the first upfront payment will be made by 30.09.2022, this was put on Resolution by the IMC and 59.73% voted not to liquidate the Corporate Debtor. However, the Resolution Applicant again failed to adhere the timeline assured, which is evidenced by an email dated 21.09.2022, sent by the Applicant to the IMC members. The stand taken by the IMC members not to liquidate will lead to the modification of the Resolution Plan which is impermissible in Code.
19. In view of the above-mentioned facts, it is established beyond the doubt that the continuous defaults committed by the Resolution Applicant are his willful acts leading to the contravention and stalling the implementation of the Resolution Plan. On the grounds of blatant violation as discussed, the Tribunal has left with no choice except to put the Corporate Debtor Company into Liquidation as per the Code as well as also to protect the asset of the Corporate Debtor from further deterioration. Further the

Resolution Applicant has breached the Resolution Plan not only by contravening the timelines but also defeating the purpose and objectives envisaged under IBC Code. Therefore, the Resolution Applicant will attract penal provision envisaged under Section 74 of the Code. In reference to this, the NCLAT in ***Company Appeal (AT) (Insolvency) No. 442 of 2019, Liberty House Group Pte Ltd. Vs. Mr. Dinkar T. Venkatasubramanian & Ors.***, rightly held that the non-implementation of the Resolution Plan constitutes an offence under Section 74 of the Insolvency Bankruptcy Code, 2016.

20. In view of the above facts, this Bench feels that this is a fit case for ordering Liquidation of the Corporate Debtor and also appoints **Mr. Sachin Shrinivas Bhattad** having Registration No. Reg No.: IBBI/IPA-001/IP-P00680/2017-2018/11159, herein as the Liquidator as prayed in the application to carry out the Liquidation process of the Corporate Debtor subject to the following terms of the directions:

ORDER

The above I.A. No. 2767 of 2022 is **allowed** and the Corporate Debtor, **S. K. Wheels Private Limited** is ordered to be liquidated.

- a. The Liquidator shall strictly act in accordance with the provision of IBC, 2016 and the attendant Rules including Rules and regulations including Insolvency and Bankruptcy (Liquidation Process) Regulations, 2017 as amended up to date.
- b. That the Liquidator for conduct of the liquidation proceedings would be entitled to the fees as provided in Regulation 4(2)(b) of the IBBI (Liquidation Process Regulations), 2016.
- c. The Liquidator appointed under section 34(1) of the Code will have all 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 with the liquidator.
- d. The Liquidator shall issue the public announcement that the Corporate Debtor is in liquidation. In relation to officers/ employees and workers of the Corporate Debtor, taking into consideration Section 33(7) of IBC, 2016, this order shall be deemed to be a notice of discharge.
- e. The Liquidator shall investigate the financial affairs of the Corporate Debtor particularly, in relation to preferential transactions/ undervalued transactions and such other like

transactions including fraudulent preferences and file suitable application before this Adjudicating Authority.

- f. The Registry is directed to communicate this order to the Registrar of Companies, Mumbai and to the Insolvency and Bankruptcy Board of India
- g. In terms of section 178 of the Income Tax Act, 1961, the Liquidator shall give necessary intimation to the Income Tax Department. In relation to other fiscal and regulatory authorities which govern the Corporate Debtor, the Liquidator shall also duly intimate about the order of liquidation.
- h. The order of moratorium passed under Section 14 of the Insolvency and Bankruptcy Code, 2016 shall cease to have its effect and that a fresh Moratorium under section 33(5) of the Insolvency and Bankruptcy Code shall commence.
- i. The Liquidator is directed to proceed with the process of liquidation in a manner laid down in Chapter III of Part II of the Insolvency and Bankruptcy Code, 2016.
- j. The Liquidator is directed to investigate the financial affairs of the Corporate Debtor in terms of the provisions of Section 35(1) of IBC, 2016 read with relevant rules and regulations

and also file its response for disposal of any pending Company Applications during the process of liquidation.

- k. The Liquidator shall submit a Preliminary report to this Tribunal within 75 (seventy-five) days from the liquidation commencement date as per regulation 13 of the Insolvency and Bankruptcy (Liquidation Process) Regulations, 2016. Further such other or further report as are required to be filed under the relevant Regulations, in addition, shall also be duly filed by him with this Adjudicating Authority.
- l. Copy of this order be sent to the Financial creditors, Corporate Debtor, Resolution Professional, Resolution Applicant and the Liquidator for taking necessary steps and for extending the necessary co-operation in relation to the Liquidation process of the Corporate Debtor, viz., company-in-liquidation., 2016.
- m. In view of the conduct of the Resolution Applicant, a penalty of Rs. 2,00,000/- to be imposed against Resolution Applicant i.e., Mr. Anil Kumar for contravention of the approved Resolution Plan in terms of section 74(3) of the Code.

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COURT III, MUMBAI BENCH

I.A. No. 2767 of 2022
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n. With the above directions, this application i.e. I.A. No. 2767 of 2022 is hereby allowed and disposed of.

SD/-

MADHU SINHA
MEMBER (TECHNICAL)

SD/-

H.V. SUBBA RAO
MEMBER (JUDICIAL)

//Renuka //LRA//