

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, COURT-I
KOLKATA**

**IA (IB) No. 633/KB/2021
And
I.A. (IB) No. 743/KB/2022
in
CP (IB) No. 455/KB/2018**

Subrata Sarkar

... Operational Creditor

Versus

KND Engineering Technologies Limited

... Corporate Debtor

-And-

IA (IB) No. 633/KB/2021

**Application under section 33(3) read with section 74 of Insolvency &
Bankruptcy Code, 2016**

In the matter of:

Indian Bank

... Applicant

Versus

1. KND Engineering Technologies
2. PND Infrastructure Private Limited
3. Mr. Pessi Nanbhoy Dadina
4. Mr. Krishna Chakraborty
5. Mr. Ashish Kumar Manna

... Respondents

-And-

I.A. (IB) No. 743/KB/2022

**Application under section 60(5) of Insolvency & Bankruptcy Code, 2016
read with Rue 11 of the National Company Law Tribunal Rules, 2016.**

In the matter of:

1. KND Engineering Technologies Limited

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH-COURT-I

IA (IB) No. 633/KB/2021 and I.A. (IB) No. 743/KB/2022
In Re Liquidation of KND Engineering Technologies Ltd.

2. PND Infrastructure Private Limited

... Applicant

Versus

1. Indian Bank
2. Mr. Vishal Sharma

... Respondents

Order pronounced on: 06/12/2023

Coram:

Shri Rohit Kapoor, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (through hybrid mode):

For Resolution Applicant

1. Ms. Urmila Chakrabarty, Advocate
2. Mr. Yash Vardhan Deora, Advocate

For Indian Bank

1. Mr. Joy Saha, Senior Advocate
2. Mr. Debashish Chakrabarti, Advocate
3. Mr. Snehashish Chakraborty, Advocate

COMMON ORDER

Per: Balraj Joshi, Member (Technical)

1. This court convened *via* hybrid mode.
2. I.A. (IB) No. 633/KB/2021 and I.A. (IB) No. 743/KB/2022 are being decided through a common order as I.A. (IB) No. 633/KB/2021 is an application filed praying for liquidation of the Corporate Debtor and I.A. (IB) No. 743/KB/2022 has been filed as an objection to I.A. (IB) No. 633/KB/2021.

Brief facts

3. This Adjudicating Authority *vide* its order dated 30 August 2018 directed initiation of the Corporate Insolvency Resolution Process (“*CIRP*”) of KND Engineering Technologies Limited (“Corporate Debtor”), on a Petition filed by the Subrata Sarkar (“Operational Creditor”) against KND Engineering Technologies Limited under section 9 of the Insolvency and Bankruptcy Code, 2016 (*the Code*) and appointed Mr. Ram Ratan Modi as the Interim Resolution Professional (“*IRP*”).
4. In terms of section 15 of the Code, public announcement was made and the Committee of Creditors (“CoC”) was formed with *viz.* Indian Bank (“erstwhile Allahabad Bank”) and Katpadi Commodore Private Limited.
5. In the CoC meeting held on 26 September 2018, the CoC resolved to appoint Mr. Vishal Sharma as the Resolution Professional. C.A. (IB) 925/KB/2018 was filed praying for replacement of the Interim Resolution Professional, the C.A. was allowed by this Adjudicating Authority on 05 November 2018 and Mr. Vishal Sharma was appointed as the Resolution Professional.
6. The Resolution Plan of PND Infrastructure Private Limited was approved by the CoC in its 16th CoC Meeting held on 21 May 2019. The Resolution Plan was approved by this Adjudicating Authority on 12 June 2019.

I.A. (IB) No. 633/KB/2021

7. This is an application filed by Indian Bank, one of the members of the Committee of Creditors seeking liquidation of the Corporate Debtor, *viz.*, KND Engineering Technologies Limited, on the ground that the Successful Resolution Applicant has committed a serious breach of the non-derogable terms of the approved Resolution Plan.

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*In Re Liquidation of KND Engineering Technologies Ltd.***

8. The Applicant has sought for the following reliefs:
- a. An order directing that the Corporate Debtor be sent into liquidation.*
 - b. An order appointing Mrs. Mamta Binani (IBBI/IPA-002/IP-N00086/2017-2018/10227) as the Liquidator.*
 - c. An order directing drawing up of appropriate proceedings against the Respondents herein and imposition of appropriate penalty on the Respondents herein.*
 - d. And/or to pass such other order or orders as this Hon'ble Tribunal may deem fit and proper.*

I.A. (IB) No. 743/KB/2022

9. I.A. (IB) No. 743/KB/2022 has been by the Successful Resolution Applicant praying for the following:
- a. Direction upon the Respondent No. 1 Bank to produce the valuation reports prepared by Novara Consultancy Pvt. Ltd. and United Surveyors and Valuers;*
 - b. In the alternative, the Respondent No. 2 should be directed to appoint two registered Valuers to conduct fresh valuation of the assets and properties of the Corporate Debtor;*
 - c. An order directing refixation of the liquidation value of the Corporate Debtor as the old liquidation value of Rs.26,54,34,919/- has become unworkable and unviable in view of the changed circumstances;*
 - d. The Respondent No.1 Bank should be directed to consider the one-time settlement proposal of Rs.20Crore (including Rs.2.3Crore already paid) given by the Applicants which is well above the current liquidation value of the Corporate Debtor;*

- e. Direction upon the Respondent No. 2 to call for and convene CoC meetings and place the OTS proposal made by the Applicants for the consideration and voting of the CoC;
- f. Necessary directions thereby not admitting the Corporate Debtor into liquidation;
- g. An order be passed directing the respondents to cooperate and strive for the revival of the MSME Corporate Debtor.

Submissions of the learned Counsel appearing for Indian Bank

- 10. The learned Counsel submitted that as per the approved Resolution Plan, the secured Financial Creditor was to receive Rs.30Crore over a period of 24 months from the effective date.
- 11. The Successful Resolution Applicant paid Rs.96Lakh but thereafter failed to make the remaining payments to the Bank.
- 12. It is submitted that by an order dated 08 June 2022, this Adjudicating Authority directed the successful Resolution Applicant to pay the balance amount to the Applicant as agreed in the Resolution Plan within two months.
- 13. The successful Resolution Applicant failed to make the payment as directed by the Adjudicating Authority. The Applicant sent several demand notices to the Successful Resolution Applicant but to no avail.
- 14. The learned Counsel submitted that any contravention and/or modifications in terms of the Resolution Plan is impermissible in the eyes of the law once the Resolution Plan has been submitted and approved by the Adjudicating Authority and it shall lead to liquidation of the Corporate Debtor. Reliance was placed on the judgment of the Hon'ble Supreme Court in *Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited & Anr., (2002)*

2 SCC 401 (paras 221 to 223) and *Yavar Dhala v. JM Financial Asset Reconstruction Company Limited & Ors., 2019 SCC OnLine NCLAT 666* (para 4).

15. Hence, the Applicant has filed an application under section 33(3) read with section 74(3) of the Code, before the Adjudicating Authority for liquidation of the Corporate Debtor on account of the breach in terms of the resolution plan by the successful Resolution Applicant.
16. The learned Counsel submitted that the Successful Resolution Applicant has filed I.A. (IB) No. 743/KB/2022 seeking directions upon the Applicant i.e. Indian bank to consider the settlement proposal of Rs.20 Crore given by the Successful Resolution Applicant after the approval of the Resolution Plan. It is submitted that the said I.A. is not sustainable both in law and in facts.
17. IA (IB) No. 743/KB/2022 has been filed by the Successful Resolution Applicant principally for consideration of settlement proposal of Rs.20 Crore on 24 July 2022. It is submitted that the Resolution Plan has already been approved on 12 June 2019 wherein the Successful Resolution Applicant agreed to pay a sum of Rs.30Crore to the Secured Financial Creditor. The learned Counsel submitted that when a Resolution Plan has already been approved, it becomes a binding and irrevocable between the CoC and the Successful Resolution Applicant. Hence there can be no changes in the terms of the resolution plan once the same has been approved.
18. The Indian Bank being the sole CoC Member has already rejected the settlement proposal of Rs.20 Crore given by the Successful Resolution Applicant and the same has been categorically recorded in the order passed by this Adjudicating Authority on 08 July 2022. Hence, once the OTS has been rejected, the Successful Resolution Applicant cannot vouch for the same cause again by filing a separate application asking

for consideration of the said settlement proposal which has already been rejected by the bank.

19. Further in the said order dated 08 July 2022, this Adjudicating Authority has also held that "it would have been impermissible for the Applicant to enter into a One Time Settlement as it would have amounted to the modification of the approved resolution plan, which would not have been permissible".
20. Further, it is now a settled law that no settlement proposal can be entertained by the CoC after the resolution plan has been approved and is in force. The learned Counsel placed reliance on the judgment passed by the Hon'ble NCLAT in *Hem Singh Bharana v. Pawan Doot Estate Put Ltd through Darshan Singh & Ors. (2023) SCC Online NCLAT 34* (Para 22).
21. Hence due to such facts and circumstances and considering the legal provisions and the authorities cited above, liquidation proceedings be initiated against the Corporate Debtor.
22. The Applicant has proposed the name of Mrs. Mamta Binani, having registration no. IBBI/IPA-002/IP-N00086/2017-2018/10227 and Mrs. Mamta Binani given her consent to act as Liquidator, in terms of section 34(1) of the Code.

Submissions of the learned Senior Counsel appearing for the Successful Resolution Applicant

23. The learned Counsel submitted that this Adjudicating Authority had approved the Resolution Plan of the Successful Resolution Applicant on 12 June 2019.

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24. The Corporate Debtor is a MSME and the Successful Resolution Applicant is involved in infrastructural projects and real estate activities with owned/leased properties and real estate activities.
25. It is submitted that the liquidation value was Rs.26,54,34,919/- and the Successful Resolution Applicant had proposed to pay Rs.31,18,90,031/-. According to the repayment schedule, Rs.30,00,00,000/- was to be paid to the secured Financial Creditors within two years from the date of approval of the Resolution Plan.
26. As per the approved Resolution Plan, the Successful Resolution Applicant paid the following stakeholders in full:
- a. Unsecured Financial Creditors- Rs.5,00,000/-
 - b. Operational Creditors (other than workmen and employees)- Rs.7,11,543/-
 - c. Operational Creditors (workmen and employees)- Rs.49,09,813/-
 - d. Public Shareholders- Rs.12,00,000/-
27. It is further submitted that out of Rs.30Crore to be paid to the secured Financial Creditor, the Successful Resolution Applicant has paid a sum of Rs.2.22 Crore and has also returned Bank Guarantees to Indian Bank after July 2019 for a total sum of Rs.70.92 Lakh.
28. It is submitted that as per the Resolution Plan, majority of the repayment was on the basis of disposal of the properties that were mortgaged to the Bank.
29. The learned Senior Counsel further submitted that one of the Directors of the Successful Resolution Applicant fell ill and succumbed to her illness on 15 December 2019 which affected the work of the

Successful Resolution Applicant and the Corporate Debtor as the deceased played a huge role in the functions of the Successful Resolution Applicant.

30. Thereafter due to the Covid-19 pandemic and the nation-wide lockdown, the properties listed in the approved Resolution Plan dropped drastically, especially the commercial properties which were to be sold and no buyers could be found at the price for the properties.
31. The Corporate Debtor has issued a letter dated 21 May 2021 with a proposal for settlement of the cash credit amount with the Indian Bank and also deposited an amount of Rs.1.50Crore *vide* Demand Draft No. 002646 dated 21 May 2021.
32. The Successful Resolution Applicant has approached the Bank for settlement on several occasions and also submitted an OTS proposal which was rejected by the Bank on the ground that there is commonality among the Directors of the Successful Resolution Applicant and the Corporate Debtor and hence is ineligible in terms of section 29A of the Code. The learned Counsel submitted that the Corporate Debtor is a MSME and hence the promoters of the Corporate Debtor can propose a Resolution Plan.
33. The Respondents filed a Supplementary affidavit affirmed on 17 February 2022 stating that a settlement proposal for Rs.20Crore to be paid within 120 days on 02 February 2022. It is further submitted by the Respondents that the Regional Office of the Bank has recommended the offer to its higher authority.

Analysis and Findings

34. We have considered the submission made by the learned Senior Counsel on behalf of the Applicant and the learned Senior Counsel

appearing on behalf of the Successful Resolution Applicant and perused the record.

35. The Resolution Plan was approved in June 2019 by this Adjudicating Authority, approximately four years have elapsed since then. The Successful Resolution Applicant admittedly is in violation of the terms of the Resolution Plan, it has defaulted in payment of the proposed amount to the Financial Creditor.
36. The Financial Creditor has been prejudiced due to the actions of the Successful Resolution Applicant and has made an application before this Adjudicating Authority, hence I.A. (IB) No. 633/KB/2021 is maintainable.
37. From the above submissions, there is no doubt that the Successful Resolution Applicant has made part payments but has defaulted to pay the total amount for the past four years. There has been no prayer made for modification of the Resolution Plan before this Adjudicating Authority and once the Resolution Plan is approved, the terms of the Resolution Plan cannot be modified by the creditors or the Monitoring Committee of the Corporate Debtor.
38. We seek to place reliance on the judgment of the Hon'ble Supreme Court in *Kridhan Infrastructure Private Limited v. Venkatesan Sankaranarayan & Ors.*¹, wherein the Hon'ble Supreme Court upheld the decision of the NCLT and ordered liquidation of the Corporate Debtor due to failure in implementation of the Resolution Plan.
39. The Successful Resolution Applicant had proposed deferred payment of Rs.30Crore to the Financial Creditor within a period of two years but defaulted to pay the total amount. This action by the Resolution Applicant would constitute a flagrant violation of the Resolution Plan

¹ (2021) ibclaw.in 36 SC

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and would subject the Resolution Applicant to the penalties outlined in section 74 of the Code.

40. Section 33(3) of the Code enjoins the Adjudicating Authority to pass an order for liquidation of the Corporate Debtor when there is a contravention of the approved Resolution Plan.
41. Now coming to the prayers made by the Successful Resolution Applicant, we are of the view that the Successful Resolution Applicant should have approached this Bench when it was unable to adhere to the timeline as proposed in the Resolution Plan. It has done so only after the Financial Creditor filed an application before us, praying for liquidation.
42. We note that Successful Resolution Applicant did give proposals for payments but neither the Financial Creditor nor the Monitoring Committee had any power to renegotiate the terms of the Resolution Plan after it is approved by this Adjudicating Authority, hence, once the Successful Resolution Applicant defaulted in payment and desired to change the terms of the Resolution Plan, it should have approached the Bench for the same. Be that as it may, the Successful Resolution Applicant was given ample time and opportunity to make the payments. But no payment was made by the Successful Resolution Applicant.
43. Hence, we do not find any merit in the prayers made in I.A. (IB) No. 743/KB/2023, and deem it fit to order liquidation of the Corporate Debtor. Further, the payments made by the Successful Resolution Applicant in terms of the Resolution Plan shall be forfeited.
44. This Bench, therefore, hereby orders as follows: -
 - a. Prayers as sought for in I.A. (IB) No. 633/KB/2021 filed by Indian Bank, the sole member of the CoC, is allowed and KND Engineering Technologies Limited, the Corporate Debtor herein, is ordered to be liquidated in terms of section 33(3) of the Code read with sub-section (1) thereof;

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- b. **Mrs. Mamta Binani**, having registration no. IBBI/IPA-002/IP-N00086/2017-2018/10227], is hereby appointed as Liquidator is hereby appointed as Liquidator as provided under section 34(1) of the Code subject to a valid Authorisation for Assignment (AFA) issued by the Insolvency Professional Agency (IPA) of which she is a professional member,
- c. The Liquidator shall initiate liquidation process as envisaged under Chapter-III of the Code and the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016.
- d. Public Notice shall be issued in the newspapers stating that the Corporate Debtor is in liquidation.
- e. All the powers of the Board of Directors, and of key managerial persons, shall cease to exist in accordance with section 34(2) of the Code. All these powers shall henceforth vest in the Liquidator.
- f. The personnel of the Corporate Debtor are directed to extend all assistance and co-operation to the Liquidator as required by him in managing the liquidation process of the Corporate Debtor.
- g. On initiation of the liquidation process but subject to section 52 of the Code, no suit or other legal proceeding shall be instituted by or against the Corporate Debtor save and except the liberty to the liquidator to institute suit or other legal proceeding on behalf of the Corporate Debtor with prior approval of this Adjudicating Authority, as provided in section 33(5) of the Code read with its proviso.
- h. In accordance with section 33(7) of the Code, this liquidation order shall be deemed to be a notice of discharge to the officers, employees and workmen of the Corporate Debtor except to the

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extent of the business of the Corporate Debtor continued during the liquidation process by the Liquidator.

- i. In terms of section 33(1)(b)(iii), the Liquidator shall file a copy of this Order with the Registrar of Companies, West Bengal, within whose jurisdiction the Corporate Applicant is registered. Additionally, the Registry shall also forward a copy of this Order to the Registrar of Companies, Bihar.

45. The application bearing **IA (IB) No. 633/KB/2021** shall stand disposed of in accordance with the above directions. ***I.A. (IB) No. 743/KB/2022 is hereby rejected.***

46. List the main **CP (IB) No. 455/KB/2018** for reporting progress on **15.01.2024**

47. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

48. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Balraj Joshi
Member [Technical]

Rohit Kapoor
Member [Judicial]

Order pronounced on the 6th day of December, 2023

GGRB[LRA]