

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI**  
**(APPELLATE JURISDICTION)**

**Company Appeal (AT) (CH) (INS) No. 38 of 2021**

**(Under Section 61 of the Insolvency & Bankruptcy Code, 2016)**

**Arising out of the Order dated 10.02.2021 passed in MA No.186/KOB/2020**  
**and IA(IBC)/16/KOB/2021 in MA/113/KOB/2020 in TIBA/09/KOB/2019**  
**passed by the Adjudicating Authority, (National Company Law Tribunal,**  
**Kochi Bench)**

**In the matter of:**

**R. Velu**

**Chairman, Monitoring Committee**

**Resolution Professional**

**For Palm Lagoon Backwater Resorts Private Limited,**

**New No.28, Old No.22, Menod Street,**

**Purasawalkam, Chennai – 600007.**

**...Appellant**

**V**

**Invent Assets Securitisation & Reconstruction Pvt Ltd**

**Bakhtawar, Suite 'B' Ground Floor,**

**Backbay Reclamation Scheme Block III,**

**229, Nariman Point,**

**Mumbai – 400021.**

**...Respondent**

**Present:**

**For Appellant : Mr. Vipin Warriar, Advocate**

**For Respondent : (No Appearance)**

**Coram : Mr. Justice M. Venugopal, The Acting Chairperson**

**Mr. Kanthi Narahari, Member (T)**

**JUDGMENT**  
**(VIRTUAL MODE)**

**Per: Kanthi Narahari Member (T)**

(1) The present Appeal is filed challenging the Order passed by the Adjudicating Authority (National Company Law Tribunal, Kochi Bench, Kochi) in MA No.186/KOB/2020 and IA(IBC)/16/KOB/2021 in MA/113/KOB/2020 in TIBA/09/KOB/2019 dated 10.02.2021, whereby the Adjudicating Authority dismissed the Applications filed by the Appellant and Respondent bearing MA No.186/KOB/2020 and IA(IBC)/16/KOB/2021 by a Common Order.

(2) Shri. Vipin Warriar, Learned Counsel appearing for the Appellant submitted that the present Appeal is filed challenging the Order passed by the Ld. Adjudicating Authority dated 10.02.2021 to the extent that the Application filed by the Appellant herein bearing MA No. 186/KOB/2020 which was filed for ordering Liquidation of the Corporate Debtor.

(3) The Learned Counsel submitted that the Appeal is preferred only to the extent that the Ld. Adjudicating Authority ought to have ordered for Liquidation of

the Corporate Debtor. In view of the reason that the Respondent herein being the Successful Resolution Applicant failed to implement the plan.

(4) The Learned Counsel for the Appellant narrated the brief facts. He submitted that the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor i.e., Palm Lagoon Backwater Resorts Private Limited was initiated pursuant to the Order passed by the Adjudicating Authority dated 20<sup>th</sup> September 2019. After compliance of due procedure as per Law, the Resolution Plan submitted by the Resolution Applicant was approved by the Committee of Creditors (CoC) with a voting share of 100 per cent on 19.08.2020. The Ld. Adjudicating Authority approved the said Resolution Plan by an Order dated 10.03.2020. As per the approved Resolution Plan, the Respondent was required to pay a sum of Rs. 25,00,000/- after adjusting Performance Guarantee of Rs. 25,00,000/- [total Rs. 50,00,000/-] being first instalment by 24.09.2020 and the balance of Rs. 50,00,000/- was to be paid by 02.10.2020. The entire Resolution Plan amount was to be paid within 15 days of receipt of Order by the Respondent. While so, the Respondent sent an e-mail dated 23<sup>rd</sup> September 2020 to the members of Monitoring Committee that he wanted additional 30 days' time to deposit a sum of Rs. 25,00,000/- after adjusting Performance Guarantee of Rs. 25,00,000/- and 45 days for the balance of Rs. 50,00,000/-. However, the members of Monitoring

Committee instead of rescheduling payment as sought by the Respondent, asked the Respondent to make part payment of Rs. 25,00,000/- by 29<sup>th</sup> September 2020.

(5) While matters stood thus, the Learned Counsel for the Appellant submitted that the Respondent did not implement the plan. The Appellant on 21.10.2020 sent an e-mail to the Financial Creditor and the Respondent requesting them to come to a conclusion on payment terms of the approved plan. However, an e-mail dated 23<sup>rd</sup> October 2020 received from the Respondent i.e., Successful Resolution Applicant seeking withdrawal of the approved Resolution Plan and refund of Performance Guarantee of Rs. 25,00,000. However, the issue of withdrawal of Plan by the Respondent was discussed in the Monitoring Committee Meetings and resolved that once the Resolution Plan has been approved by the Ld. Adjudicating Authority the same cannot be withdrawn. However, the Respondent claimed that the withdrawal is on account of recent RBI rejection of UVARC Plan. In view of withdrawal of Plan by the Respondent, the Appellant filed an Application before the Ld. Adjudicating Authority bearing MA No. 186/KOB/2020 seeking Liquidation of the Corporate Debtor on the basis of the recommendations by the Financial Creditor in the Monitoring Committee Meeting held on 30<sup>th</sup> October 2020.

(6) The Learned Counsel for the Appellant submitted that the Hon'ble Adjudicating Authority ought to have considered that non-implementation of the

Resolution Plan, thereby the Hon'ble Adjudicating Authority ought to have liquidated the Company in exercise of powers conferring on it under Section 33(3) of Insolvency and Bankruptcy Code, 2016 (I & B Code, 2016). He requested the Bench to allow the Appeal to the extent that the rejection of the Appellant's MA need to be set aside and direct the Hon'ble Adjudicating Authority to pass Order of Liquidation in terms of Section 33(3) and Section 33(4) of the I & B Code, 2016.

(7) Heard the Learned Counsel for the Appellant and none appeared for the Respondent. On the filing of the instant Appeal this 'Tribunal' directed to issue Notice to the Respondent through 'Speed Post' returnable by 10.06.2021 and directed to send Notice to the e-mail address of the Respondent. As per the directions of this 'Tribunal' the 'Office of the Registry' sent Notice to the Respondent and this 'Tribunal' on 10.06.2021 recorded that Notice was served upon the Respondent on 27.05.2021. However, there is no appearance for the Respondent at the time of calling of the matter. This 'Tribunal' also directed the Learned Counsel for the Appellant to inform the Learned Counsel for the Respondent who had appeared before the Adjudicating Authority (National Company Law Tribunal, Kochi Bench).

(8) As per the direction of this 'Tribunal' the Learned Counsel for the Appellant informed the Learned Counsel for the Respondent appeared before the Adjudicating Authority and filed an 'Affidavit of Service' dated 16.07.2021 wherein

the said 'Affidavit' was filed by K. Lokesh Kumar S/o R. Kubera Sampath and stated that as per the direction of this 'Tribunal' it was informed to the Learned Counsel for the Respondent on 10.06.2021 by sending an e-mail to Kevin Thomas [kevinthomas657@gmail.com](mailto:kevinthomas657@gmail.com). In the aforesaid e-mail the Order of this 'Tribunal' dated 10.06.2021 extracted verbatim in the e-mail.

(9) Upon the 'Service of Notice' on the sole Respondent and to the Counsel appeared before the Ld. Adjudicating Authority, this 'Tribunal' comes to a conclusion that 'Service of Notice' was effected on the Respondent and also the Counsel on record for the Respondent before the Ld. Adjudicating Authority. Having effect of 'Service of Notice', none appeared for the Respondent nor present any of its representatives in person. Accordingly, this 'Tribunal' passed the following Order on the basis of Materials available before this 'Tribunal'.

(10) It is an admitted fact that the Corporate Debtor i.e., Palm Lagoon Backwater Resorts Private Limited was under the CIRP pursuant to an Application filed by the Asset Reconstruction Company (India) Limited under Section 7 of the IBC 2016 before the NCLT Chennai Bench. Later, upon the Constitution of the NCLT, Kochi Bench the said case was transferred to the Kochi Bench and renumbered as TIBA/9/KOB/2019. The Adjudicating Authority (NCLT, Kochi Bench) admitted the Application on 20<sup>th</sup> September 2019 and appointed the

Appellant as IRP and later appointed him as RP. Upon publishing the invitation of expression of interest, the Respondent herein submitted the plan on 31.01.2020 and the CoC approved the said plan on 19.08.2020 and the Adjudicating Authority (NCLT, Kochi Bench) approved the said plan vide Order dated 10.09.2020.

(11) The grievance of the Appellant is that the Respondent being the Successful Resolution Applicant failed to implement the plan as submitted by it which was approved by the Ld. Adjudicating Authority vide Order dated 10<sup>th</sup> September 2020.

(12) This ‘Tribunal’ has gone through the Order dated 10<sup>th</sup> September 2020, whereby the Ld. Adjudicating Authority approved the said plan. The Respondent (Resolution Applicant) in its plan requested the Ld. Adjudicating Authority to approve the Resolution Plan submitted by it and sought declaration that the same is binding on the Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders involved in the Resolution Plan. Further, in Para 16 of the Order dated 10.09.2020, the Ld. Adjudicating Authority reproduced the relief as sought by the Resolution Applicant with regard to approval of the Resolution Plan stating that “The total payment under the Resolution Plan shall be made within 15 days from the date of approval of Resolution Plan by the Tribunal”.

(13) In the Plan submitted by the Respondent at page 106 of the Appeal Paper Book(s), internal page 44 of the Order dated 10.09.2020, the contents of the Plan (Para (b) Final payment) wherein it is stated “The Resolution Applicant shall make payment of the balance 50% of the resolution plan amount i.e., a sum of Rs. 50,00,000/- within 15 days from the effective date to the RP in the designated account which shall be utilised towards full and final payment to the secured financial creditors”.

(14) Further, the Ld. Adjudicating Authority in its Order dated 10<sup>th</sup> September 2020 at Para 19, page 140 of the Appeal Paper Book(s) internal page 78, stated “Further, in case of non-compliance of this order or withdrawal of Resolution Plan by the Resolution Applicant, the CoC shall forfeit the EMD amount paid by the Resolution Applicant”. With the above directions the plan was approved by the Ld. Adjudicating Authority.

(15) While matter stood thus, the Respondent vide its e-mail dated 23<sup>rd</sup> October 2020 addressed to the Appellant stated that it is impossible for the Resolution Applicant to execute the Resolution Plan and requested the Appellant to permit them to withdraw the Resolution Plan for the reason that they do not want to act in contravention of any guidelines and regulation laid down by RBI and SARFAESI Act 2002. Upon the receipt of the e-mail by the Appellant, the



Monitoring Committee of the Corporate Debtor in their meeting held on 30<sup>th</sup> October 2020 discussed the issue and decided to file an Application before the Ld. Adjudicating Authority for liquidation of the Company. In view of the decision taken in the Monitoring Committee meeting held on 30<sup>th</sup> October 2020, the Appellant filed the Application before the Ld. Adjudicating Authority bearing MA No. 186/KOB/2020.

(16) While so, the Respondent herein also filed an IA No. 16/2021 praying the Adjudicating Authority to recall the Order of the 'Tribunal' dated 10.09.2020 in MA/113/2020 and permit the Applicant to withdraw the Resolution Plan submitted on 31.01.2020 in respect of the Corporate Debtor. The Ld. Adjudicating Authority heard both the Applications and passed the Common Order dated 10<sup>th</sup> February 2021. The Ld. Adjudicating Authority observed in Para 29 and 30 which is extracted hereunder :-

*29. From the above it is clear that when a Resolution Plan is admitted, in case the party withdraws its Resolution Plan by not remitting the requisite amount, surely the EMD amount paid will be forfeited as per the aforesaid provisions in the IBBI Regulations. Hence, this 'Tribunal' cannot direct the Resolution Professional to refund the EMD of the Resolution Applicant.*

*30. Since the Resolution Applicant has withdrawn the Resolution Plan for the reasons stated in their request for withdrawal of Resolution Plan and that the EMD amount is still available with the Resolution Professional, it is a matter for the parties to approach the appropriate forum seeking directions as per the IBBI Regulations. As stated earlier this Tribunal cannot either order liquidation or to direct the refund of the EMD, as this Tribunal has become functus officio after approval of a Resolution Plan with the consent of both the parties.*

(17) The issue felt for consideration before this Tribunal is whether the prayer of the Appellant with regard to liquidating the Corporate Debtor ought to have considered or not. The Ld. Adjudicating Authority observed that the ‘Tribunal’ (NCLT) cannot either order Liquidation or to direct the refund of the EMD, as the Tribunal has become Functus Officio after approval of the Resolution Plan with the consent of both the parties.

(18) Admittedly the CIRP was initiated on 20<sup>th</sup> September 2019. 270 days completed on 23<sup>rd</sup> August 2020 and 330 days completed by the end of October 2020. The Application filed by the Appellant bearing MA No.186/KOB/2020 in the month of November 2020 i.e., after completion of 330 days. In the Application, the

Appellant prayed at Para 17 [Page 62 of the Appeal Paper Book(s)] internal page 23 of the Application wherein it is prayed “That this Hon’ble Adjudicating Authority may be pleased to pass an order to liquidate the Corporate Debtor or such other order as may be desired in view of the fact that RA is not willing to implement the approved resolution plan”. Apart from the above prayer the Appellant also sought other reliefs as prayed in Para 17. The fact is that the 330 days have been completed and the Respondent did not implement the plan and filed an Application before the Ld. Adjudicating Authority bearing IA No. 16/2021 praying the ‘Tribunal’ to permit the Respondent/Applicant in IA No. 16/2021 to withdraw the Resolution Plan and set aside the Order of the Ld. Adjudicating Authority dated 10<sup>th</sup> September 2020 whereby the plan of the Respondent/Applicant was approved.

(19) The Ld. Adjudicating Authority at para 27 observed that it cannot exercise its powers under Section 60(5) of the I & B Code, 2016 and recall its own Orders. Therefore, the Adjudicating Authority did not recall its Order dated 10<sup>th</sup> September 2020 regarding approval of the Resolution Plan, and cannot direct the RP to refund the EMD of the Respondent/Resolution Applicant.

(20) Having observed by the Ld. Adjudicating Authority that it cannot recall the Order of approval of the Resolution Plan and cannot direct the refund of the EMD and having rejected the Application filed by the Respondent bearing

IA No. 16/2021, the Ld. Adjudicating Authority ought to have considered the prayer as made by the Appellant with regard the passing of Liquidation Order in view of non-implementation of the Resolution Plan by the Resolution Applicant and completion of 330 days. If 330 days completes and the Resolution Applicant failed to implement the plan, the Adjudicating Authority ought to have passed the Order of Liquidation as per the provision of the I & B Code, 2016.

(21) This ‘Tribunal’ is not going into the aspect with regard to the forfeiture of the performance security and withdrawal of the plan. This ‘Tribunal’ confines to the reliefs sought by the Appellant before the Ld. Adjudicating Authority which was not adhere to. Section 31 of the I & B Code, 2016 empowers the Adjudicating Authority to approve of the Resolution Plan. Chapter III of the I & B Code, 2016 empowers the Adjudicating Authority with regard to Liquidation Process. Sub Section 3 of Section 33 of the I & B Code, 2016 reads thus :-

*“Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).”*

(22) As per the above provision of Law, the Resolution Plan approved by the Adjudicating Authority is contravened by the concerned Corporate Debtor, “**any person**” other than the Corporate Debtor may make an Application to the Adjudicating Authority for a Liquidation Order. Sub Section 4 of Section 33 of the I & B Code, 2016 reads thus :-

*“On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).”*

(23) In the present case, according to Sub Section 3 of Section 33 this ‘Tribunal’ is of the view that the Appellant rightly moved the Application under Section 60(5) read with Section 33 of the I & B Code, 2016 praying the Adjudicating Authority to pass an Order of Liquidation of the Corporate Debtor for the reason that the Respondent/Resolution Applicant did not implement the plan as mandated by the Code. Further, the Respondent/ Resolution Applicant failed to comply the conditions as stipulated in the plan and directions given by the Adjudicating Authority. This ‘Tribunal’ is of the view that the Appellant has rightly moved the

Application before the Adjudicating Authority, praying the Adjudicating Authority to pass an Order of Liquidation of the Corporate Debtor for the aforesaid reasons.

(24) As discussed above, this ‘Tribunal’ is of the view that the Respondent failed to implement the plan in its totality and on completion of 330 days, the Company ought to have liquidated by passing appropriate orders. Section 12 of the I & B Code, 2016 stipulates the time limit for completion of insolvency resolution process, proviso to Sub Section 3 of Section 12 states that “Provided further that the Corporate Insolvency Resolution Process shall mandatorily be completed within a period of 330 days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor.”

(25) As per the above provision of Law, this ‘Tribunal’ comes to a conclusion that 330 days have expired and upon non-implementation of the plan by the Resolution Applicant, the Adjudicating Authority ought to have passed the Order of Liquidation of the Corporate Debtor. For the aforesaid reasons, this ‘Tribunal’ pass the following Order.

(a) The Adjudicating Authority (NCLT, Kochi Bench) is directed to pass Order of Liquidation as prayed in MA No.186/KOB/2020 in terms of Section 33(3) and 33(4) of the I & B Code, 2016 and other applicable provisions of law in this regard.

(b) Accordingly, the Impugned Order dated 10.02.2021 is set aside to the extent as mentioned above.

(26) The Appeal succeeds in part to the extent as directed above. No Orders as to costs.

**[Justice M. Venugopal]**  
**The Acting Chairperson**

**[Kanthi Narahari]**  
**Member (Technical)**

**Chennai**  
**21.09.2021**  
**GS**