

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
SPECIAL BENCH-II, CHENNAI**

IA/308/IB/2020

in

CP/536/IB/2017

*(filed under Sections 33 (3) & Section 74 of the Insolvency and
Bankruptcy Code, 2016 read with rule 11 & 14 of the NCLT Rules, 2016)*

In the matter of **M/s. Infonet Asia Private Limited**

D. EBENEZAR INBARAJ

Resolution Professional of

M/s. Infonet Asia Private Limited

... Applicant

-Vs-

Mr. THIRUGNANA SAMBANDAM

No. 74, Swamy Naicken Street,

Chintadripet,

Chennai – 02

...Respondent/Resolution Applicant

CORAM:

**JUSTICE (RETD.) S. RAMATHILAGAM, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)**

For Applicant : M L Ganesh, Advocate

For Respondent : G V Mohan Kumar, Advocate

Order pronounced on 8th June, 2022

ORDER

Per: SAMEER KAKAR, MEMBER (TECHNICAL)

Under Consideration is an application filed by the Resolution Professional viz., Mr. D. Ebenezar Inbaraj, under Section 33(3) & 74 of the Insolvency and Bankruptcy Code, 2016, (in short 'IBC, 2016') read with rule 11 & 14 of the NCLT Rules, 2016 .

2. The prayers made by the Applicant in the Application are as follows:-

- a. Liquidate the Corporate Debtor in a manner laid down under Chapter III & II of the code;
- b. That this Hon'ble Adjudicating Authority may please to pass an order that the existing Resolution Professional Mr. D. Ebenezer Inbaraj having Registration No: IBBI/IPA-002/IPA-001-IP-P00754/2017-18/11286) may be appointed as Liquidator;
- c. To impose costs on the Respondent for contravention under section 74 of IBC, 2016.
- d. To pass such other or further orders as this Hon'ble Tribunal may deem fit and proper in the Interest of Justice.

3. In an Application filed by an Operational Creditor under Section 9 of IBC, 2016 this Tribunal vide its order dated 02.08.2017 had initiated the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor and appointed an Interim Resolution Professional. Since the Corporate Debtor is an MSME, the promoter of the Corporate Debtor submitted a Resolution Plan to the tune of Rs. 4.27 Crore upon 100% approval of the CoC. Accordingly, this Tribunal vide its order dated 19.12.2019 passed in IA/1397/2019 has approved the said Resolution Plan filed by the promoter of the Corporate Debtor. As per the approved Resolution Plan, the successful Resolution Applicant was required to pay a sum of Rs. 50 Lakh in two terms as 35 lakh within 7 days from the date of approval of the CoC and 15 lakh within 15 days from the date of approval of the CoC. Out of which only Rs. 35 Lakh was brought in paid to financial creditors. Further, the balance amount proposed was also to be paid within a period of 3 months from the date of approval of the resolution plan

by this Adjudicating Authority. i.e., within 3 months from 19.12.2019 and as such the last date was 19.03.2020.

4. In terms of the Resolution Plan a monitoring Committee was constituted towards the implementation of the plan.

5. The Applicant herein is the Chairman of the Monitoring Committee as per clause 6.2 of the approved resolution plan. The Learned Counsel for the applicant has averred that the approved Resolution Plan provides 94% payment towards settlement of the Financial Creditors; however, the same was contravened. Further, the Learned Counsel for the applicant had further averred that, neither the proposed amount nor the time frame as agreed was fulfilled by the Resolution Applicant.

6. The Learned Counsel for the applicant has further averred that notwithstanding anything above, the Resolution Applicant had agreed for the proposed payment within 3 months along with interest from 01.11.2019 during the meeting on 31.01.2020.

7. The Learned Counsel for the applicant had filed a status report dated 22.11.2021 before this Adjudicating Authority from which it is manifest that the respondent herein had contravened the resolution plan as approved by the CoC unanimously. Further, the applicant herein at that outset had addressed an email dated

13.02.2020 to comply the terms of the resolution plan within 7 days or otherwise the same shall be brought before this Adjudicating Authority. Since, no tenable action or response was received from the resolution applicant the instant application for liquidation of the corporate debtor is filed.

8. In the meantime, the Respondent herein has filed a counter statement in response to the instant application whereby explaining his difficulties to mobilize the funds as proposed in the plan and has sought additional time for a period of 6 months for implementation of the plan due to difficulties faced in mobilizing and disbursement of funds.

9. During the course of hearing, upon the submissions made by the Learned Counsel for the respondent regarding extension of time for payment of the proposed amount, directions were given to the respondent herein vide daily order dated 21.02.2022 to file an undertaking affidavit in order to ensure the balance payment 04.04.2020. Consequently, the Successful Resolution Applicant filed an undertaking affidavit before this Adjudicating Authority on the same day i.e., 21.02.2022. The contents of the undertaking affidavit dated 21.02.2022 is extracted hereunder:

"I, Thirugnana Sambandam, Son of A.K. Elumalai aged 54 years, having office at 74, Swamy Naicken Street, Chintadripet, Chennai – 600 002, do hereby solemnly affirm and sincerely state as follows:

1. *I am the respondent in the above matter and am duly authorised to make this affidavit on its behalf.*
2. *As per the Order of this Tribunal dated 21.02.2022, I am filing this Undertaking Affidavit.*
3. *It is submitted that in the above subject matter, I undertake to settle the outstanding demands within six weeks from today (within 04.04.2022) as submitted before this Hon'ble Tribunal.*
4. *Therefore, in light of the same, the respondent hereby undertakes to settle the out-standing demands and report to this Tribunal on the next date of hearing.*
5. *Pass any such order or further orders as this Hon'ble Tribunal may deem fit in the light of the equality, justice and good conscience."*

10. The above extracted undertaking as given by the successful resolution applicant was breached and no further payments were made.

11. We have heard the submissions made by the Learned Counsel for both the parties. From the submissions made and from perusal of the documents, including the written submission of the Applicant it is necessary to ascertain whether the approved resolution plan was contravened by the Successful resolution applicant. It is apparent from the submissions and the previous orders passed by this Adjudicating Authority that the Corporate Debtor is a MSME and that the Resolution Applicant is the director of the Corporate Debtor. In the present case, it is an admitted fact that only payment of Rs. 35 lakh have been made, which is a meagre 8.19% of the total proposed value.



12. At this juncture, the Order of Hon'ble Supreme Court in Kridhan Infrastructure Pvt. Ltd. in Civil Appeal No 3299 of 2020.

Para 11 is quoted hereunder:

"The appellant has been unable to raise the funds. The fact of the matter, as it emerges from Mr Vishwanathan's submissions, is that the appellant will be unable to raise funds from the Term Lenders who are insisting that the status of the Company should change from a company under liquidation to an active status. The order of liquidation has not been set aside. Ultimately, what the request of the appellant reduces itself to, is that it would raise funds on a mortgage of the assets of the Company and unless the Company is brought out of liquidation, it would not be in a position to raise the funds. This is unacceptable. At this stage, the order of liquidation has only been stayed, but a final view was, thus, to be taken by this Court. Sufficient opportunities were granted to the appellant earlier during the pendency of the proceedings both before the NCLT and NCLAT. The orders of the NCLT and NCLAT make it abundantly clear that despite the grant of sufficient time, the appellant has not been able to comply with the terms of the Resolution Plan. Since 9 October 2020, despite the passage of almost five months, the appellant has not been able to deposit an amount of Rs 50 crores. Time is a crucial facet of the scheme under the IBC. To allow such proceedings to lapse into an indefinite delay will plainly defeat the object of the statute. A good faith effort to resolve a corporate insolvency is a preferred course. However a resolution applicant must be fair in its dealings as well. The appellant has failed to abide by its obligations. In that view of the matter, we see no reason or justification to entertain the Civil Appeal any further. The consequence envisaged under the order of this Court shall accordingly ensue in terms of the forfeiture of the amount of Rs 20 crores. As a consequence of this order, the management shall revert to the liquidator for taking steps in accordance with law. The Civil Appeal is accordingly dismissed."

13. The facts of the present case and that of Kridhan Infrastructure Pvt. Ltd. are almost similar, in both the cases, the Resolution Applicant have failed to bring in the proposed sum as envisaged in the Resolution Plan, in both the cases, in both the cases hardly few amounts were paid to the lenders.

14. We nonetheless bow down after going through the above order of Hon'ble Supreme Court and refrain to use our inherent powers in the present case by extending the time for the payment of the proposed sum to the successful Resolution Application.

15. In so far as the contravention of the Resolution Plan is concerned, we observe as follows: It is seen that the Resolution Plan in respect of the Corporate Debtor was approved by this Adjudicating Authority vide order dated 27.12.2019 passed in MA/936/2019. As per the approved Resolution Plan, the successful Resolution Applicant who is the Promoter of the Corporate Debtor is required to pay to the Financial Creditor a sum of Rs.50 lakh within a period of 15 days from the date of approval of the CoC i.e., from 04.11.2019 in two tranches and the balance Rs. 3.70 Crore within 3 months from the effective date i.e., 19.12.2019. It is a fact borne on record that even after the expiry of about 2 and a half years, only Rs. 35 lakh was paid. The Promoters of the Corporate Debtor has not pumped in the said amount of Rs.4.27 Crore. This act on the part of the Resolution Applicant would amount to blatant violation of the Resolution Plan and would attract penal provisions as contemplated under Section 74 of IBC, 2016.

16. In the present case, it is required to be noted that the balance Resolution Plan amount was required to be paid within 3

months from the date of approval of the plan by this Adjudicating Authority. The Learned Counsel for the Promoters of the Corporate Debtor has taken a plea that due to Covid – 19, they were unable to adhere to the timelines. The said plea raised by the Learned Counsel is unsustainable in view of the fact that another period of 6 weeks was also given to the respondent as mentioned supra, to adhere with the approved plan. As such it is not right on the part of the Resolution Applicant to take such a ground for non-payment of the Resolution Plan amount.

17. It is also required to be noted that, after the approval of the Resolution Plan, and after expiry of more than 2 and half years, it is seen that the Promoters of the Corporate Debtor has till date paid only a sum of Rs.35 lakh, as part of their contribution as such the total payments so far made is only a meagre 8.19% of the total Resolution Plan amount. Apart from the same, there is no infusion of funds shown by the Promoter of the Corporate Debtor/ Resolution Applicants.

18. Further, the moment the Resolution Applicant has failed to pay the Resolution Plan amount, the Monitoring Committee is required to immediately move an Application for Liquidation of the Corporate Debtor and the Monitoring Committee has no powers to negotiate or to grant time to the Successful Resolution Applicant for payment of the Resolution Plan amount.

19. It is evident that there is a blatant violation of the Resolution Plan by the Corporate Debtor in terms of Section 33(3) of IBC, 2016 and thus by operation of law and in terms of Section 33(4) of IBC, 2016 once this Adjudicating Authority is satisfied that the Corporate Debtor has contravened the provisions of the Resolution Plan, it shall pass an order of Liquidation as referred to in sub-clause (i), (ii) and (iii) of clause (b) of sub-section (1) of Section 33 of IBC, 2016. Thus, it is required to be noted that the IBC, 2016 never contemplates for accepting any modification to the Resolution Plan.

20. Comparative study of IBC and other recovery law would posit the fact that once OTS is violated the Bankers get entitled to claim entire outstanding dues. In the present case, in order to revive the company, various reliefs and concessions were granted in the commercial wisdom of the CoC. Furthermore, MSME being the backbone of economy, Section 240A of IBC, 2016 was introduced to support the MSME units. However, that cannot be extended to the ridiculous extent of defeating the very purpose of IBC, 2016 and allowed to defeat the creditors at large. This case is a clear misuse of the provisions of Section 240A of IBC, 2016 and inspite of sufficient opportunity being granted, more than two and half years days have lapsed and the Resolution Applicant till date is unable to implement the approved Resolution Plan. Hence this

Adjudicating Authority is left with no option than to order for Liquidation of the Corporate Debtor.

21. At this juncture, we find it apt to reproduce Section 33(3) and (4) of the Insolvency & Bankruptcy Code, 2016, which states as under:-

(3) Where the resolution plan approved by the Adjudicating Authority (under section 31 or under sub-section (1) of section 54L,) 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), (iii) of clause (b) sub-section (1).

(4) 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).

22. As already discussed *supra*, a concrete finding has been given by this Adjudicating Authority that the successful Resolution Applicants have contravened the Resolution Plan and the same is also brought to our knowledge by the Chairman of the Monitoring Committee in terms of Section 33(3) of IBC, 2016. In view of the contravention of the Resolution Plan by the Corporate Debtor and its director, we hereby order Liquidation of the Corporate Debtor. Keeping in mind the provisions of Section 33(4) of IBC, 2016 and the resolution plan has not been implemented and has been blatantly violated as discussed *supra*, this Tribunal is left with no

other choice but to order for liquidation of the Corporate Debtor as from this day. This Tribunal also appoints **Mr. D. Ebenezar Inbaraj** 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.

- a) The Liquidator shall strictly act in accordance with the provisions of IBC, 2016 and the attendant Rules and regulations including Insolvency and Bankruptcy (Liquidation Process) Regulations, 2017 as amended upto date enjoined upon him.
- b) 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.
- c) 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.
- d) The Registry is directed to communicate this order to the Registrar of Companies, Chennai and to the Insolvency and Bankruptcy Board of India;
- e) 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.



- f) 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.
- g) 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.
- h) 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.
- i) 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.
- j) Copy of this order be sent to the Financial creditors, Corporate Debtor 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.

23. The Liquidator is directed take steps under Regulation 2B of the IBBI (Liquidation Process) Regulations, 2016 for exploring the possibility of inviting a Scheme under Section 230 of the Companies Act, 2013 and also for sale of the Corporate Debtor as



a going concern as stipulated under Regulation 32(e) and (f) of the IBBI (Liquidation Process) Regulations, 2016.

24. Additionally, the Successful Resolution Applicant and its officers responsible if any be proceeded against for contravention of the approved resolution plan in terms of section 74(3) read with section 236 of the Insolvency & Bankruptcy Code, 2016. To facilitate this, the *Registry* of this Tribunal is directed to forward a copy of this order to the Insolvency & Bankruptcy Board of India (IBBI) and the Secretary, Ministry of Corporate Affairs, who are the agencies authorized in terms of section 236(2) of the Insolvency & Bankruptcy Code, 2016 to initiate appropriate complaint before the Special Court as envisaged under section 236(1) of the Insolvency & Bankruptcy Code, 2016.

25. Accordingly, IA/308/IB/2020 stands **disposed of**.

-SD-

SAMEER KAKAR
MEMBER (TECHNICAL)

-SD-

JUSTICE (Retd.) S. RAMATHILAGAM
(MEMBER JUDICIAL)

*Order Pronounced under Rule 151, NCLT Rules, 2016
by Hon'ble Justice (Retd.) S. Ramathilagam, Member
Judicial on behalf of the bench consisting
of Hon'ble Justice (Retd.) S. Ramathilagam,
Member Judicial & Shri. Sameer Kakar, Member
Technical.*