

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-1140(ND)/2018

IN THE MATTER OF:

ICICI Bank Limited

.....Financial Creditor

v.

Gwalior Bypass Project Limited

.....Corporate Debtor

**SECTION: UNDER SECTION 7 OF THE INSOLVENCY AND
BANKRUPTCY CODE, 2016**

JUDGMENT DELIVERED ON 29.05.2019

CORAM:

**CHIEF JUSTICE (RTD.) M.M. KUMAR
HON'BLE PRESIDENT**

**DR. DEEPTI MUKESH
HON'BLE MEMBER (J)**

PRESENT:

For the Financial Creditor: Mr. Arun Kathpalia, Sr. Advocate with
Mr. K. Datta, Ms. Padmaja Kaul, Mr.
Yugank Goel, Mr. Aishwarya
Chaudhary, Advocates

For the Respondent: Mr. Vijay Kr. Singh, Mr. Anand P.
Singh, Advocates for Corporate Debtor

M.M.KUMAR, PRESIDENT

JUDGMENT

The ICICI Bank Limited (for brevity 'Financial Creditor') has filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a prayer for triggering the Corporate Insolvency Resolution Process in the

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matter of Gwalior Bypass Project Limited (for brevity 'the Corporate Debtor').

2. The Corporate Debtor-Gwalior Bypass Project Limited is a company registered under the provisions of the Companies Act, 1956 and was incorporated on 23.06.2006. The identification number of the Corporate Debtor is U70109DL2006PLC150027 and its registered office is situated at B-292, Chandra Kanta Complex, Shop No. 2 and 3, Near Metro Pillar No. 161, New Ashok Nagar, New Delhi-110096.

3. The Financial Creditor has proposed the name of Resolution Professional, Mr. Rajesh Samson with the address Deloitte Touche Tohmastu India LLP, 7th Floor, Building 10, Tower B, DLF Cyber City Complex, DLF City Phase-II, Gurugram, Haryana-122002 and email id – rajeshsamson@deloitte.com. His registration number is IBBI/IPA-001/IP-P00240/2017-18/10469. He has filed his written communication which satisfies the requirement of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with the certificate of registration.

4. It is submitted by the Petitioner that it had disbursed loans aggregating to INR 91.5 crores to the Respondent-Corporate

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Debtor on 08.09.2014, 09.12.2014 and 08.01.2015 vide three separate Rupee Loan Facility Agreements.

5. It is pertinent to mention that the loan facilities availed by the Respondent-Corporate Debtor were secured by executing various mortgages/charge created documents as mentioned in detail in Part-V of the petition.

6. The Financial Creditor has also placed on record a list of all the financial facilities granted by the Financial Creditor to the Corporate Debtor along with the copies of the said Financial Debt Contracts. It is submitted by the Petitioner-Financial creditor that the account of the Corporate Debtor was classified as Special Mention Account (SMA)-2 by the Petitioner under the Reserve Bank of India's framework for Revitalizing Distressed Assets on 02.03.2015.

7. It is also submitted by the Petitioner-Financial creditor that the account of the Corporate Debtor was classified as NPA by the petitioner –Financial Creditor on 15.04.2016.

8. In view of the repeated defaults on the part of the Corporate Debtor to comply with the repayment of the principal and interest dues under the aforesaid facilities, the Financial Creditor issued

Recall cum invocation of Guarantees Notice dated 19.08.2016 to the Corporate Debtor and Personal Guarantor. However, all in vain; inspite of the notice they failed to clear the unpaid debt/liability.

9. The precise case of the Petitioner is that the total amount in default as on 27.08.2018 due to the Financial Creditor by the Corporate Debtor is Rs. 128,70,55,301.55. A tabular chart depicting working of the amount in default is annexed (Annexure A-31).

10. Learned counsel for the Corporate Debtor has opposed the admission of the petition and has advanced the following arguments:-


1. The Corporate Debtor has not committed any default.
2. The Financial Creditor has no locus standi to file the present application under Section 7 of the Code.
3. The Corporate Debtor is a Special Performance Vehicle (SPV) held by consortium of Era Infra Engineering Ltd. (EIEL) and Ramky Infrastructure Pvt. Ltd. & Shri Ram Chits Pvt. Ltd. The Corporate Debtor is a 'stepdown

subsidiary' of EIEL i.e. the holding company and holds 99.903% preferential shares in the Corporate Debtor.

4. The EIEL is presently under CIR Process pursuant to an order dated 08.05.2018 passed by this Tribunal in C.P. (IB) No. 190(PB)/2017 and Mr. Rajiv Chakraborty was appointed as an Interim Resolution Professional.
5. The Corporate Debtor was entrusted with the responsibility of construction of new 4-Lane Gwalior Bypass Project of the length of 42.03 Kms. in the State of Madhya Pradesh under the North-South Corridor Phase II. In this regard concession agreement was executed between the Corporate Debtor and the National High Authority of India ('NHAI'). However, NHAI committed defaults in making payment of annuities in terms of the agreement including other contravention of the terms of the agreement, which resulted into significant delay in execution of the project that resulted in huge loss to the Corporate Debtor. The Corporate Debtor is to receive due annuities from the NHAI till 2027 at rate of Rs. 53.06 crores every year (twice a year) and it will discharge its obligation to its

creditors including the Financial Creditor from the amount to be received from the NHAI. Thus, the claim, if any, of the Financial Creditor is safe. Elaborating its submissions, the Respondent contends that it has substantial claim against the NHAI and therefore, entertaining the application would be against the object of the Code.

6. Prior to approaching this Tribunal, a proceeding for issuance of interim recovery certificate has already initiated by the Financial Creditor before the Debt Recovery Tribunal, New Delhi. However, said proceeding was dismissed by the DRT, New Delhi but in appeal Debt Recovery Appellate Tribunal was set aside the order of DRT, New Delhi and directed for issuance of recovery certificate for an amount of Rs. 91,15,35,000/- .
7. The Corporate Debtor initiated arbitration against National Highway Authority of India in which an award dated 14.08.2018 amounting to more than Rs. 500 crores has already been passed in favour of the Corporate Debtor.



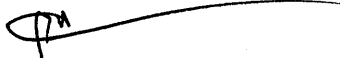
11. A rejoinder to the reply has been filed by the Financial Creditor reiterating the submissions made in the petition and controverting the assertions in the reply.

12. Learned counsel for the petitioner has argued that all requirements of Section 7 for the initiation of Corporate Insolvency Resolution Process by a Financial Creditor stand fulfilled. In that regard, he has submitted that the petition as prescribed by Rule 4 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 (2) of IBC is complete in all respects. He has further submitted that the details of the default along with the dates have been stated in part IV and the additional documents have been submitted subsequently along with all the minute details. There is overwhelming evidence available to prove default and name of the resolution professional has been specified who does not suffer any disqualification.

13. Under sub-section 5(a) of section 7 of the code, the application filed by the petitioner financial creditor has to be admitted on satisfaction that:

(i) Default has occurred;

(ii) Application is complete, and




(iii) No disciplinary proceeding against the proposed IRP is pending.

14. In view of the above we find that there was an advancement of loan and default on part of the respondent- corporate debtor is established. Even Otherwise there is overwhelming documentary evidence on record which support those findings.

15. The Corporate Debtor asserts that it has various claims and litigations pending against the public sector undertakings like National Highways Authority of India and many others. It has filed arbitration proceedings and those proceedings are likely to result in payment of huge amounts. We are afraid that we cannot accept the pending claim petition as a basis for rejecting the prayer for triggering the Corporate Insolvency Resolution Process in respect of the Corporate Debtor. There is no provision in the Code to create such a bar. Accordingly, we reject the aforesaid objection.

16. Having heard the learned counsels for the Financial Creditor and Corporate Debtor and having perused the paper book with their able assistance we find that the provisions of Section 7 (2) and Section 7 (5) of IBC have been complied with as discussed in



detail in the case of ECL Finance Limited vs. Digamber Buildcon Pvt Ltd (IB- 1039(PB)/2018).

17. After a conjoint reading of the aforesaid provision along with Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, we are satisfied that a default has occurred and the application under sub section 2 of Section 7 is complete. The IRP proposed does not have any disciplinary proceedings pending against him.

18. As a sequel to the above discussion, this petition is admitted and Mr. Rajesh Samson is appointed as the Interim Resolution Professional.

19. We also declare moratorium in terms of Section 14 of the Code. It is made clear that the provisions of moratorium are not to apply to transactions which might be notified by the Central Government. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by



Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

20. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional shall immediately (3 days) make public announcement with regard to admission of this application under Section 7 of the Code. The public announcement is required to be made in all territories/areas where the business have been transacted by the Corporate Debtor so that all stakeholders may have noticed of the fact that Corporate Insolvency Resolution Process has been triggered in respect of the Corporate Debtor.

21. We direct the Financial Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by the Committee of Creditors



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as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

22. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.

Sd/-
(M.M.KUMAR) 29.05.19
PRESIDENT

Sd/-
(DR. DEEPTI MUKESH)
MEMBER (J)

VINEET
29.05.2019

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.A. NO. 229(PB)/2019
IN
C.P. NO. IB-1140(ND)/2018

IN THE MATTER OF:

ICICI Bank Limited

.....Financial Creditor

v.

Gwalior Bypass Project Limited

.....Corporate Debtor

**SECTION: AN APPLICATION FOR INTERVENTION/
IMPLEADMENT**

ORDER DELIVERED ON 29.05.2019

CORAM:

CHIEF JUSTICE (RTD.) M.M. KUMAR
HON'BLE PRESIDENT

DR. DEEPTI MUKESH
HON'BLE MEMBER (J)

PRESENT:

For the Financial Creditor: Mr. Arun Kathpalia, Sr. Advocate with
Mr. K. Datta, Ms. Padmaja Kaul, Mr.
Yugank Goel, Mr. Aishwarya
Chaudhary, Advocates

For the Respondent: Mr. Vijay Kr. Singh, Mr. Anand P.
Singh, Advocates for Corporate Debtor

Mr. Abhinav Vashisth, Senior Advocate
with Mr. Chitranshul A. Sinha, Ms.
Priya Singh, Ms. Sonali Khanna,
Advocates for Intervenor/L&T
Infrastructure Finance Company Ltd.

M.M.KUMAR, PRESIDENT

ORDER

C.A. No. 229(PB)/2019

After the order was reserved, an application C.A. No. 229(PB)/2019 has been filed by L&T Infrastructure Finance Company Limited with a prayer to intervene in the matter and for its impleadment as a party-respondent. In order to highlight its entitlement, the applicant has asserted that it is a Public Financial Institution within the meaning of Section 2 (72) of the Companies Act, 2013 and it is *inter alia* engaged in the business of capital raising, corporate and project advisory services, debt advisory and debt arranging. It is the sole/senior recognized lender approved by the National Highway Authority of India (for brevity 'NHAI') for the project undertaken by the Gwalior Bypass Project Limited-Corporate Debtor.

2. Notice of the application was issued and accepted by the non applicant-ICICI Bank Limited and the Edelweiss Asset Reconstruction Company Ltd. Their counsel stated that filing of the reply was not necessary. Accordingly, we have heard the learned counsels for the parties.



C.A. No. 229(PB)/2019 IN C.P. No. (IB)-1140(PB)/2018
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3. Mr. Vashisht, learned Senior counsel for the intervener has argued that a concession agreement was entered into between the NHAI and the Gwalior Bypass Project Limited-Corporate Debtor and there is a complete prohibition by virtue of clause 35(2) of the concession agreement on the Corporate Debtor. It was not to create nor it was to permit subsistence of any encumbrance over or otherwise transfer or dispose of all or any of its rights and benefits under the concession agreement or any Project Agreements to which Concessionaire is a party except with prior consent in writing of NHAI; and NHAI was entitled to decline the consent without assigning any reason whatsoever. According to the learned counsel, the agreement dated 08.09.2014 advancing loan by the ICICI Bank Ltd. to the Corporate Debtor amounting to Rs. 91.5 Crores is wholly in contravention of clause 35.2 of the concession agreement dated 09.10.2006. The Corporate Debtor is also restrained from standing as a guarantor.

4. He has also referred to letters dated 12.03.2014, 28.07.2014, 01.09.2015, 10.12.2014 & 23.12.2014 and has argued that the applicant has issued bonds in the form of non-

convertible debentures of 100 crores and by virtue of flagrant breach committed by the Corporate Debtor, the annuity payment would stop flowing particularly if Corporate Insolvency Resolution Process is issued.

5. Mr. Datta and Mr. Babbar, learned counsel for the non applicants-ICICI Bank Ltd. and Edelweiss Asset Reconstruction Company Ltd. have argued that no intervention application is maintainable at the stage of admission of a petition under Section 7 of the Code. However, addressing argument on behalf of ICICI Bank Ltd., Mr. Datta has pointed out that if the clauses in the loan agreement dated 08.09.2014 advancing loan to the Corporate Debtor are examined in juxtaposition to the Debenture Trustee Agreement entered into between the applicant and Corporate Debtor dated 23.12.2014 then it would be evident that second charge has been created by deed of hypothecation dated 07.01.2015 on the property of M/s. Edelweiss Landmarks Limited as per the document Annexure A/6 placed on record of the instant case namely C.P. (IB) No. 1140(ND)/2018. According to the learned counsel there is no impact as no charge is created on the property of the Corporate Debtor. According to Mr. K.

Datta the argument that the charge has been created which would adversely effect the payment of annuity to the applicant-L&T Infrastructure Finance Company Limited is absolutely misplaced.

6. In respect of Edelweiss Asset Reconstruction Company Ltd., Mr. Vashisht has additionally argued that there is a guarantee executed in 2018 in respect of Corporate Debtor which is in clear breach of the covenants under the caption 'Negative Covenants' which prohibits creation of any security interest on the property of the Corporate Debtor. In that regard our attention has been drawn to the Debenture Trust Deed dated 24.12.2014 and clause 3 under the caption 'Negative Covenants' (volume IV pg. 677).

7. Having heard the learned counsel for the parties we are of the considered opinion that firstly there is express prohibition on entertaining an application by any third party to intervene at the stage of admission of a petition filed under Section 7 of the Code. In that regard we may place reliance on the judgment of Hon'ble the Appellate Tribunal rendered in the case of **IDBI Bank Ltd. Vs. Odisha Slurry Pipeline Infrastructure Ltd.**, Company Appeal (AT) (Insolvency) No. 51 of 2019 decided on 15.01.2019.

8. Even otherwise no security interest has been created by the ICICI Bank Limited by entering into a loan agreement dated 08.09.2014 as the deed of hypothecation has been executed by M/s. Edelweiss Landmarks Limited which is Annexure A/6 on the petition namely C.P. (IB) No. 1140(ND)/2018. This would in any case not be covered by the provisions of clause 35.2 (pg. 82) of the concession agreement dated 09.10.2016. Moreover, the ICICI Bank Ltd. is not a party to any of the agreements like concession agreement dated 09.10.2016 or Debenture Trust Deed dated 24.12.2014 executed between the Corporate Debtor and the applicant/L&T Infrastructure Finance Company Ltd.

9. The argument of Mr. Vashisht that the ICICI Bank Ltd. being a Public Bank as a part of due diligence, should have ensured to avoid any agreement which is in contravention of the concession agreement dated 09.10.2016 or Debenture Trust Deed dated 24.12.2014. Such an argument would not meet our approval because firstly the ICICI Bank Ltd. as a part of its due diligence is not bound to take notice of the agreement between the Corporate Debtor and the applicant/L&T Infrastructure Finance Company Ltd. If it has entered into the agreement with

the Corporate Debtor despite the due diligence it has been done at their own peril. Moreover, there is no violation of covenant/clause 35.2 on the concession agreement dated 09.10.2006 as no security interest has been created on the assets of the Corporate Debtor which effect its created interest on the M/s. Edelweiss Landmarks Limited. It is also pertinent to mention that no question of violation of Debenture Trust Deed dated 24.12.2014 would arise as it is subsequent to the date of the loan agreement dated 08.09.2014 entered into between the ICICI Bank Ltd. and the Corporate Debtor.

10. In so far as the case of Edelweiss Asset Reconstruction Company Ltd. is concerned, even if a breach of covenant/clause 35.2 is considered or clause 3 under the caption 'Negative Covenants' is regarded firstly the application cannot be maintained and secondly it is the Corporate Debtor who is responsible for its act by breach of obligation undertaken by it. No fault can be found with the Edelweiss Asset Reconstruction Company Ltd. particularly when it is not a party to the agreement between the L&T Infrastructure Finance Company Ltd. and the Corporate Debtor or NHAI and the Corporate Debtor. To bound

them on the argument of due diligence would not be sustainable as a thirty party is deemed to have acted at its own peril.

11. As a sequel to the above discussion this application fails and the same is dismissed as not maintainable as well as on merit.

Sd/-
(M.M.KUMAR) 29.05.2019
PRESIDENT

Sd/-
(DR. DEEPTI MUKESH)
MEMBER (J)

VINEET
29.05.2019

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.A. NO. 1055(PB)/2018

IN

C.P. NO. IB-1140(ND)/2018

IN THE MATTER OF:

ICICI Bank Limited

.....Financial Creditor

v.

Gwalior Bypass Project Limited

.....Corporate Debtor

**SECTION: AN APPLICATION FOR INTERVENTION/
IMPLEADMENT UNDER RULE 11 OF THE NCLT RULES, 2016
R/W SECTION 25 & 65 OF THE INSOLVENCY AND
BANKRUPTCY CODE, 2016**

ORDER DELIVERED ON 29.05.2019

CORAM:

CHIEF JUSTICE (RTD.) M.M. KUMAR

HON'BLE PRESIDENT

DR. DEEPTI MUKESH

HON'BLE MEMBER (J)

PRESENT:

For the Financial Creditor: Mr. Arun Kathpalia, Sr. Advocate with
Mr. K. Datta, Ms. Padmaja Kaul, Mr.
Yugank Goel, Mr. Aishwarya
Chaudhary, Advocates

For the Respondent: Mr. Vijay Kr. Singh, Mr. Anand P.
Singh, Advocates for Corporate Debtor

Mr. U.K. Chaudhary, Sr. Advocate with
Mr. Himanshu Handa & Mr. Raunak
Singh, Advocates for RP/Intervenor

M.M.KUMAR, PRESIDENT

ORDER

C.A. No. 1055(PB)/2018

During pendency of present proceedings, an application
being C.A. No. 1055(PB)/2018 read with additional affidavit

C.A. No. 1055(PB)/2018 IN C.P. No. (IB)-1140(PB)/2018

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(dated 10.01.2019) has been filed by the Resolution Professional, Mr. Rajiv Chakraborty appointed for EIEL, the holding company of the Corporate Debtor. The principal prayer in the application is to implead him as Respondent. It is necessary to state here that afterwards a similar kind of application based on same set of facts seeking identical prayer, has been filed by Mr. Rajiv Chakraborty being C.A. No. 198(PB)/2019. We heard the arguments in the said application and dismissed the same vide order dated 25.04.2019 with the reasoning which read as under:

“The application is wholly misconceived. The orders have already been reserved which are likely to be pronounced in all the matters. There may not be common Resolution Professional for one holding company and its subsidiary.

The application stands dismissed.”

Since we have already dismissed the application which was based on same set of facts and with similar prayer, we need not go into the controversy all over again as the question stands already answered. Accordingly, the application is dismissed.

Sd/-
(M.M.KUMAR)
PRESIDENT
29.05.2019

Dr Sd/-
(DR. DEEPTI MUKESH)
MEMBER (J)

VINEET
29.05.2019