

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH

CP (IB) -2803/MB/2019

Under Section 7 of the I&B Code, 2016

In the matter of

Bank of India,

Star House, C-5, G- Block, Bandra Kurla  
Complex, Mumbai - 400051

.... Petitioner

Vs.

TD Toll Road Private Limited

H Block, 1<sup>st</sup> Floor, Dhirubhai Ambani  
Knowledge City, Navi Mumbai- 400710

.... Corporate Debtor

Order delivered on 25.11.2019

Coram: Hon'ble Suchitra Kanuparthi, Member (Judicial)

Hon'ble V. Nallasenapathy, Member (Technical)

For the Petitioner: Adv. Vijay Hinge, Adv. Ravi Chandran, Adv. Deepti B.  
Mistry

For the Respondent: Adv. D. J. Kakalia, Adv. Sarosh Bharucha, Adv. Raghavi  
Sharma

*Per: V. Nallasenapathy, Member (T)*

ORDER

1. Bank of India (hereinafter called 'Petitioner') has sought the Corporate Insolvency Resolution Process of TD Toll Road Private Limited (hereinafter called the 'Corporate Debtor') on the ground, that the Corporate Debtor committed default on 16.07.2019 to the extent of ₹21,68,44,477/-as provided under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereafter called the 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The Corporate Debtor is Special Purpose Vehicle setup by Reliance Infrastructure Limited for the purpose of executing the project awarded to it by National Highways Authority of India for four laning of Trichy-Dindigul Road in Tamilnadu.

3. For execution of the said project, the Corporate Debtor approached the Petitioner and other Lenders for Rupee Loan. The Corporate Debtor, on 28.03.2018, executed a common Rupee Loan Agreement with the Petitioner along with Canara Bank, Corporation Bank, India Infrastructure Finance

Company Ltd. (IIFCL), Oriental Bank of Commerce and UCO Bank with Canara Bank acting as the lender's agent and security trustee.

4. The following is break-up of the Rupee Loan provided by various financial creditors including the Petitioner for an aggregate sum of ₹322.40 Crores:

Bank of India (Petitioner)- 25 Crores

Canara bank- 85.40 Crores

Corporation Bank- 65 Crores

IIFCL- 75 Crores

Oriental bank of Commerce- 32 Crores

UCO Bank- 40 Crores

5. The Petitioner enclosed the following documents in respect of the above said facilities granted by the Rupee Lenders:

- a. Common Loan Agreement dated 28.03.2008
- b. Security Trustee Agreement dated 28.03.2008
- c. Deed of Hypothecation dated 28.03.2008
- d. Consent and Agreement dated 28.03.2008
- e. Escrow Agreement dated 16.04.2008
- f. Recall Notice dated 12.11.2018 issued on behalf of the Applicant
- g. Certificate under Banker's Books Evidence Act, 1891
- h. Certificate under S. 2A(a) and S. 2A(b) of Bankers Book of Evidence Act, 1891 dated 17.07.2019

6. The Petitioner enclosed the statement of Loan Account of the Corporate Debtor which shows that a sum of ₹21,68,44,477 is due from the Corporate Debtor as claimed in the petition.

7. The Petitioner issued a notice on 12.11.2018 recalling the financial assistance granted to the Corporate Debtor and requiring to make the payment of due of ₹20,96,46,823/-. The said notice specifies that the date of classifying the account as Non-Performing Asset as 29.10.2018.

8. The above facts clearly reveal that the Corporate Debtor defaulted in making payment of the debt due to the Petitioner and the Counsel for the Corporate Debtor fairly agreed that the Corporate Debtor committed default. However, the Counsel for the Corporate Debtor raised the following contentions:

- a) The Corporate Debtor faced many difficulties in implementing the project due to which there is serious cash flow mismatch against the ballooning repayments towards the debt advanced by the Lenders under the Consortium Loan Agreement (CLA).

- b) The Corporate Debtor as provided under the RBI Circulars dated 12.02.2018 and modification dated 07.06.2019 is entitled to restructure the loan and accordingly on 13.08.2018 proposed a resolution plan to the Lenders, the Lenders appointed Ernst and Young merchant banking services to study the techno-economic viability of the project. The picture emerging from the meetings held by the Corporate Debtor with the lenders was that the party would jointly discuss and arrive at a resolution plan but all on a sudden, the Petitioner belying hopes of the Corporate Debtor filed this Petition.
- c) The Consortium members have entered into an Inter-Creditor Agreement recognising the fact that one consortium member, can by its unguided action, cause irreparable damage to the interest of entire consortium. The transaction document permits the member of the consortium to take any action pursuant to any alleged default collectively and not individually as has been done by the Petitioner herein.
- d) The Corporate Debtor cited the following provisions of the document in support of its contention that single member of the consortium cannot bring action against the Corporate Debtor independently:
- i. Clauses 7.2 and 7.3 of the Common Loan Agreement provides for the actions that may be taken by the "Rupee Lenders" (as distinct from a Rupee Lender acting singly) upon the occurrence of an Event of Default.
  - ii. Clauses 2.4 of the Inter-Creditor Agreement provides that all the Rupee Lenders will consult with one another with respect to any action taken or proposed to be taken which could affect inter alia the Project, the Corporate Debtor or the Security.
  - iii. Clauses 4.3 (a) of the Inter-Creditor Agreement provides that in the event of occurrence of an Event of Default, the Rupee Lenders shall have the right to proceed to enforce their claims against the Corporate Debtor but not before following the procedure prescribed in Clause 4.3(b) of the Inter-Creditor Agreement.
  - iv. Clause 4.3(b) of the Inter-Creditor Agreement provides for the procedure to be followed by a Rupee Lender intending to take any Enforcement Action against the Corporate Debtor. The procedure includes the issuance of a notice to all the other Rupee Lenders by the Rupee Lenders proposing to initiate the Enforcement Action, convening a meeting of all the Rupee Lenders and obtaining the approval of Rupee Lenders holding more than 75% of the then

outstanding amounts. The procedure contemplated under Clause 4.3(b) has admittedly not been followed.

- v. Clause 4.4 of the Inter-Creditor Agreement (specifically sub-clauses (a), (b) and (g)) which specifically precludes a Rupee Lender from inter alia accelerating the facilities advanced and taking any action for the winding-up, liquidation, insolvency, dissolution of the Corporate Debtor or any analogous action without following the procedure prescribed under the Inter-Creditor Agreement.
- e) The filing of this draconian proceeding before NCLT is expressly barred by the transaction document, the Petitioner can not contend that the Petition under Section 7 is outside the sweep of the classes cited supra, and it would be not only contrary to the express terms of the transaction document but would also illogical to the point of being legally absurd.
- f) Clause 4.4 (g) of the transaction document specifically prohibits any action for the winding up, liquidation, official management, receivership, bankruptcy, insolvency or dissolution of the borrower or any analogous process by a single member of the consortium.
- g) The Petitioner herein is a signatory to the transaction document and acted contrary to the express provisions therein.
- h) The Petitioner has initiated the present proceedings without the consent of other members of the consortium and in the midst of formulating the resolution plan by the members of the consortium to recover their dues.
- i) Even though, the Petitioner has statutory right to file petition under Section 7, that right is sub-servient to the contractual clauses contained in the Inter-Creditor Agreement despite the fact that the Corporate Debtor is not a party to the Inter-Creditor Agreement.
- j) The Petitioner refused to cooperate with the other members of the consortium and the Corporate Debtor and has taken this extreme step of putting the company under CIRP, whereas the other members of the consortium acknowledged the difficulties of the Corporate Debtor and tried to work out the solution to resolve the problem in accordance with the Inter-Creditor Agreement wherein the ways and means of solving the problem is carved in.
- k) Since, Section 12 A of the Code provides for the withdrawal of the petition with the approval of 90% voting share of COC, this tribunal can seek the views of the other consortium members before admission

of this petition more particularly when the other consortium members have consented to evaluate and implement the resolution plan.

- l) Even the object of the Code is to bring about the resolution of stressed assets in a time bound manner for maximization of value of such assets and to promote entrepreneurship, availability of credit and to balance the interest of all stakeholders. The action of the Petitioner in filing this petition is itself contrary to the Code when the other consortium members are ready to resolve this issue by a resolution known to RBI regulations.
- m) Relying on the newspaper report dated 16.09.2019 wherein the chairman of State Bank of India, Mr. Rajnish Kumar, who has cautioned the Lenders against undertaking selfish steps without coordinating with other creditors involving a common borrower, the Counsel for the Corporate Debtor submits that the Petitioner herein is doing the exact thing that is complained of by the chairman of the largest bank in India.
- n) Further relying on the newspaper report dated 12.09.2019, wherein the Hon'ble Minister of State for Finance Mr. Anurag Thakur asked the banks not to use IBC for every stressed asset but refer such matters to NCLT only when the resolution mechanism fails, the Counsel for the Corporate Debtor submits that this should be considered by the NCLT in this case where the resolution plan under RBI norms is under the active consideration of other members of the consortium.
- o) In the above said circumstances, it would be equitable to allow CIRP to be commenced against the Corporate Debtor.

9. Heard both the sides. This bench has gone through the reply and written submissions filed by the Corporate Debtor.

10. It is not the case of the Corporate Debtor that there is no default, but they are submitting that right of the Petitioner to bring action under the Code is subject to and controlled by Inter-Creditor Agreement wherein the Creditors has set out certain procedures before taking any action. In a nutshell, the Corporate Debtor is trying to say that the Code is subservient to the Inter-Creditor Agreement, comply with the conditions in the Inter-Creditor Agreement and ignore the Code at least for the time being.

11. The above contentions of the Corporate Debtor cannot be taken into account while considering the Petition for admission under section 7 of the code, in view of the decision of the Hon'ble Supreme Court of India in the case "*Innoventive Industries Ltd. Vs. ICICI Bank and Ors.* - (2018) 1 SCC 407" wherein it was observed as below:

"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

12. The issued raised by the Corporate Debtor in the reply as stated above cannot come in the way of admission of this Petition in view of the fact that the Petitioner has established debt and default beyond doubt as provided under Section 7 of the Code and in the light of law laid down by the Hon'ble Supreme Court in the Innoventive Industries Limited case mentioned supra.

13. Further, Section 238 of Insolvency & Bankruptcy Code, 2016 provides that the provision of this code shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. In view of the overriding effect of the Code, the Inter-Creditor Agreement that has been entered between the consortium members, at no stretch of imagination, will come in the way of admission of the petition under Section 7 of the Code when debt and default is proved beyond doubt. The petitioner having consented and executed the Inter Creditor Agreement has not waived its statutory rights by a contractual agreement, but have only envisaged a mechanism/procedure to jointly enforce the loan as a consortium.

14. This Adjudicating Authority, on perusal of the documents filed by the Petitioner, is of the view that the Corporate Debtor defaulted in repaying the loan availed and also placed the name of the Insolvency Resolution Professional to act as Interim Resolution Professional and there being no disciplinary proceedings pending against the proposed resolution professional, therefore the Application under sub-section (2) of Section 7 is taken as complete, accordingly this Bench hereby admits this Petition, prohibiting all of the following of item-I, namely:

- (I) (a) the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
  - (b) transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
  - (c) any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act);
  - (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- (II) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (III) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (IV) That the order of moratorium shall have effect from 25.11.2019 till the completion of the corporate insolvency resolution process or until this Bench

approves the resolution plan under Sub-section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, as the case may be.

(V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under Section 13 of the Code.

(VI) That this Bench hereby appoints Mr. S. Rajendran, having office at No. 188/87, 2<sup>nd</sup> Floor, Evalappan Mansion, Habibullah Road, T. Nagar, Chennai-600017, having email id: [cs.srajendran.associates@gmail.com](mailto:cs.srajendran.associates@gmail.com), having Registration No. IBBI/IPA-002/IP-N00098/2017-2018/10241 as Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

15. The Registry is hereby directed to communicate this order to both the parties and the Interim Resolution Professional immediately.

SD/-

V. Nallasenapathy  
Member (Technical)

SD/-

Suchitra Kanuparthi  
Member (Judicial)