

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 676 of 2019

(Arising out of Order dated 29th May, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench in C.A. No.229(PB)/2009 in C.P.No.IB-1140(ND)/2018)

IN THE MATTER OF:

L&T Infrastructure Finance Company Ltd.,
Brindavan, Plot No.177, C.S.T. Road,
Kalina, Santacruz (East),
Mumbai, Maharashtra-400098

.... Appellant

Vs

1. Gwalior Bypass Project Ltd.,
Through its Interim Resolution
Professional, Mr. Rajesh Samson
370-371/2, Sahi Hospital Road,
Jangpura, Bhogal, New Delhi-110014.

2. ICICI Bank Limited,
ICICI Bank Tower, Near Chakli Circle,
Old Padra Road Vadodara,
Gujarat – 390007.

.... Respondents

With

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Old Padra Road Vadodara,
Gujarat – 390007.

3. National Highways Authority of India,
Room No.509, Transport Bhawan 1,
Parliament Street, New Delhi-110001.

.... Respondents

Present:

For Appellant:

**Mr. Abhinav Vasisht, Senior Advocate with
Mr. C.A. Sinha, Ms. Akshita Sachdeva, Ms.
Sonali Khanna and Mr. Anshuman
Chaturvedi, Advocates**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

ICICI Bank Limited filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') for 'Corporate Insolvency Resolution Process' against 'Gwalior Bypass Project Limited'- ('Corporate Debtor'). After hearing the Applicant-ICICI Bank Limited and 'Corporate Debtor', when the matter was reserved for orders, the Appellant – L&T Infrastructure Finance Company Ltd. filed a petition for intervention for impleadment as a party-Respondent.

2. The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi by impugned order dated 29th May, 2019 rejected the petition for intervention not being a necessary party.

3. The Adjudicating Authority by another order dated 29th May, 2019 admitted the application under Section 7 preferred by the ICICI Bank Limited and initiated 'Corporate Insolvency Resolution Process' against 'Gwalior Bypass Project Limited'-('Corporate Debtor').

4. The order of rejection dated 29th May, 2019 and order of admission of application under Section 7 dated 29th May, 2019 are under challenge in these Appeals.

5. According to the Appellant, 'Gwalior Bypass Project Ltd.'- ('Corporate Debtor') is a 'Special Purpose Vehicle' (SPV) for construction, development, finance, operation and maintenance of the work of construction of New Four

Lane, Gwalior Bypass on NH-75 in the State of Madhya Pradesh. It is 'stepdown subsidiary' of 'Era Infrastructure Engineering Ltd.' As per Regulation of National Highway Authority of India ('NHAI' for short) in projects involving public interests led to a ring-fenced financing, in order to protect the 'Special Purpose Vehicle's' asset from being encumbered.

6. It is stated that on 9th October, 2006, a Concession Agreement was executed between NHAI and 'Corporate Debtor' for construction, development, operation and maintenance, in terms of which the concessionaire was barred from creating any encumbrance, lien or from creating any rights or benefits under this Agreement or any Project Agreement except with prior consent in writing from NHAI.

7. Further, case of the Appellant is that the 'Corporate Debtor' approached the Appellant L&T Infrastructure Finance Company Ltd. for re-financing the erstwhile loan advanced by IDFC (erstwhile lender) by subscribing to secured, rated, redeemable, non-convertible debentures proposed to be issued by the 'Corporate Debtor', which was sanctioned vide letter dated 12th March, 2014 issued by the Appellant for subscribing non-convertible debentures aggregating to Rs.260 crores.

8. The said sanction letter was later superseded and replaced by a modified sanction letter dated 10th December, 2014 towards subscription of non-convertible debentures aggregating to Rs.241.55 crores. Thereafter, on 24th December, 2014, a Debenture Trust Deed was executed between the 'Corporate Debtor' and Trustees (IL&FS) entailing *inter alia* the rights, powers and obligations of the Trustees, terms and conditions of the Debentures, security and asset cover, representation and warranties of the Companies. The Debenture Trust Deed specifically barred an act whereby the payment of the Appellant's debt may be hindered or delayed. The said facilities by way of non-convertible debentures were sanctioned by the Appellant based on no objection letters dated 21st July, 2014, 21st October, 2014 and 11th March, 2015 issued by NHAI in favour of the 'Corporate Debtor' in terms of Clause 9 of Schedule 3 of the Debentures Trust Deed. It is alleged that in the

meantime, the ICICI Bank sanctioned certain loan facilities to the tune of Rs.91.5 crore to the 'Corporate Debtor'. The sanction in favour of the 'Corporate Debtor' took place in the absence of any approval of NHAI, as mandated in terms of the Concession Agreement dated 9th October, 2006.

9. Therefore, according to the Counsel for the Appellant sanction of loan by ICICI Bank having not been approved by NHAI, the Bank by filing application under Section 7 cannot deprive the Appellant from occupying position of sole/ senior lender. It is stated that the 'L&T Infrastructure Finance Company Ltd.' (Appellant) is occupying the position of sole/ senior lender approved by NHAI of its rights and interests as accorded under the financing document, based on a pre-mature and unenforceable claim, the validity of which is disputed and pending adjudication before the Hon'ble Debt Recovery Tribunal – II, New Delhi in O.A. No.805/2016. It is stated that a notice has been issued in the said case to all the parties including the Appellant.

10. It was submitted that the impugned order has the effect of relegating the rights and interest of the Appellant to that of a minority financial creditor with 38.76% voting share, as opposed to 61.24% share of 2nd Respondent – ICICI Bank, blatantly disregarding Appellant's sole/ senior and secured lender status vis-à-vis the 'Corporate Debtor'. It was also submitted that by using the provisions of the I&B Code, the ICICI Bank indirectly manipulated in collusion with the 'Corporate Debtor'

11. We have heard learned Counsel for the parties and perused the record.

12. In absence of any prohibition, it is always open to 'Financial Creditor' to file an application under Section 7 of the I&B Code for initiating 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor', if the 'Financial Creditor' owes debt and the 'Corporate Debtor' defaults in payment.

13. In the case of **“Innoventive Industries Ltd. v. ICICI Bank,” - (2018) 1 SCC 407**, the Hon’ble Supreme Court while dealing with the application under Section 7, 8 and 9 of the I&B Code observed: -

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

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.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

14. From the aforesaid decision of the Hon’ble Supreme Court, it will be evident that the Adjudicating Authority is required to notice as to whether the application is complete or not and if there is debt and the ‘Corporate

Debtor' defaulted in payment and the amount is more than Rs.1 lakh, it is bound to admit an application under Section 7. Though, it is open to the 'Corporate Debtor' to object admission of application under Section 7 on the ground that the 'debt is not payable in law or in fact', but the application under Section 7 can be triggered even if the debt is disputed by the 'Corporate Debtor' and the amount of default is more than Rs.1 lakh.

15. As per the decision of this Appellate Tribunal in '**Innoventive Industries Limited vs. ICICI Bank & Anr. – (Company Appeal (AT) (Ins.) Nos.1 and 2 of 2017, decided on 15th May, 2017**', a limited notice is required to be given to the 'Corporate Debtor' before admitting an application under Section 7. In such case, the 'Corporate Debtor' may raise objection and may point out that there is no debt payable in law or in fact or that the default has not been committed. It is also open to the 'Corporate Debtor' to take plea that the Applicant is not a 'Financial Creditor' or 'Operational Creditor'. The 'Corporate Debtor' may also settle the claim with the 'Financial Creditor' or 'Operational Creditor' before admission of an application under Section 7 or 9.

16. In view of the aforesaid position of law, we hold that the Appellant being not a Member/ Shareholder of the 'Corporate Debtor', and has claimed to be a 'Financial Creditor' of the 'Corporate Debtor' has no right to intervene to oppose admission of the application under Section 7 preferred by the ICICI Bank against the 'Corporate Debtor'.

17. After admission of the application under Section 7, if the Appellant claims that it is one of the 'Financial Creditor', it can file claim before the 'Resolution Professional', but it cannot challenge the order of admission in absence of any challenge by the 'Corporate Debtor', on the ground that it has first charge on the asset of the 'Corporate Debtor' or has superior claim over the claim of the other 'Financial Creditors'.

18. In view of the aforesaid position of law, no relief can be granted to the Appellant. Both the Appeals are accordingly dismissed. No cost.

[Justice S. J. Mukhopadhaya]
Chairperson

(Justice A.I.S. Cheema)
Member (Judicial)

(Kanthi Narahari)
Member (Technical)

NEW DELHI

19th August, 2019

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