

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 822 of 2019

(Arising out of Order dated 19th July, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Special Bench, Chennai in IBA/138/2019)

IN THE MATTER OF:

Dr. Esther Malini Victor

...Appellant

Vs.

Oriental Bank of Commerce & Ors.

...Respondents

Present: For Appellant: - Mr. Arun Kathpalia, Senior Advocate with Mr. Mahesh Agarwal, Mr. Rishi Agarwal, Mr. Himanshu Satija, Ms. Shruti Arora, Ms. Aashna and Mr. Arshit Anand, Advocates.

For Respondents:- Mr. Ankit Raj, Advocate.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by Director of 'M/s. L&T Halol Shamlaji Tollway Limited'- ('Corporate Debtor') against the order dated 19th July, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Chennai Bench, admitting the application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) preferred by 'M/s. Oriental Bank of Commerce'- ('Financial Creditor').

2. The main plea taken by the Appellant is that there was no default on the part of the 'Corporate Debtor' and therefore, the application under Section 7 was not maintainable.

3. Learned counsel appearing on behalf of the Appellant submitted that a 'Master Restructuring Agreement' was reached on 14th February, 2017 between 'M/s. L&T Halol Shamlaji Tollway Limited'- ('Corporate Debtor') and all the lenders, namely— 'Allahabad Bank' and 'IDBI Trusteeship Services Limited', 'Oriental Bank of Commerce' etc., for restructuring terms of payment of loan. The 'Allahabad Bank' is the "Lenders' Agent" of financial institutions/ Banks including, 'Oriental Bank of Commerce'-(Financial Creditor). 'IDBI Trusteeship Services Limited' is a company acting in its capacity as 'security trustee' for the lenders, including 'Oriental Bank of Commerce'.

4. It was submitted that the Government of Gujarat had authorised the 'Gujarat State Road Development Corporation' to implement the work of augmenting the existing road including newly proposed 'Godhra by-pass' on the Halol-Godhra-Shamlaji State Highway No.5 for particular section.

5. The work was allotted to the 'Corporate Debtor' and pursuant to the 'Concession Agreement', the 'Gujarat State Road Development Corporation' has granted a concession by way of an exclusive right, license and authority during the subsistence of the 'Concession

Agreement' to 'construct', 'operate' and 'maintain' the Project subject to and in accordance with the terms and conditions set forth in the 'Concession Agreement'.

6. Further case of the Appellant is that for the purpose of the aforesaid project, 'L&T Halol- Shamlaji Tollway Private Limited' (as Borrower) reached 'Common Loan Agreement' with 'Allahabad Bank' (as 'Lenders Agent') and 'IDBI Trusteeship Services Limited' (as 'Security Trustee') on 28th August, 2009.

7. Pursuant to the said 'Common Loan Agreement', the amount was disbursed in different phases which was subsequently amended vide 'Master Restructuring Agreement' reached on 14th February, 2017 between 'M/s. L&T Halol Shamlaji Tollway Limited'- ('Corporate Debtor') and the 'Allahabad Bank' (as "Lenders' Agent") and 'IDBI Trusteeship Services Limited' (as "Security Trustee").

8. It was submitted that in terms of the said agreement, no default has been committed by the 'Corporate Debtor' as in terms of 'Master Restructuring Agreement', the amount is repayable on subsequent dates.

9. The aforesaid plea was also taken by the 'Corporate Debtor' before the Adjudicating Authority which has noticed the 'Terms and Conditions' of both the 'Common Loan Agreement' (dated 28th August, 2009), as

amended vide 'Master Restructuring Agreement' (dated 14th February, 2017).

10. Article VII of the 'Common Loan Agreement' suggests 'Events of Default and Remedies'. In addition to the events of default set out in Article VII of the 'Common Loan Agreement', certain additional events were constituted as 'Event(s) of Default' by 'Master Restructuring Agreement', which reads as follows:

"7.1 In addition to the events of default set out in Article VII of the Common Loan Agreement, the following additional events shall constitute Event(s) of Default on the occurrence of which, the Security Trustee/ Lenders' Agent/ Lenders shall be entitled to exercise any and all rights hereunder as contained in this Agreement, in the manner contained in Clause 8 (Consequences of Event of Default) below.

(a) Payment Default

The Borrower does not pay any amount(s) constituting the outstanding amounts or any portion thereof in relation to the Part B Debt on the respective Due Date for payment of such amount(s).

(b) Breach or default of the Facility Documents

The Borrower and/ or the Promoter commit(s) a breach of or is/ are in default of any covenant, condition, representation, warranty, obligation or provision contained in any of the Facility Documents, which is not capable of being remedied or where such breach in the opinion of the Lenders, is capable of being remedied, the same is not remedied within a period of 90 (Ninety) calendar days from the date of a notice being received from the Lenders in this regard.

(c) Concessions

In the event that the concessions sought in terms of the letter dated November 8, 2016 addressed by the Lenders' Agent to the GSRDC are not provided within 90 (Ninety) calendar days of the Effective Date, in a form and manner acceptable to the Lenders."

11. 'Consequences of Event of Default' has also been stipulated in clause 8.1 of the 'Master Restructuring Agreement' as quoted below:

"8. CONSEQUENCES OF EVENT OF DEFAULT

8.1 Upon occurrence of any Event of Default, (such event being hereinafter referred to as **“Enforcement Event”**), the Lenders’ Agent or Security Trustee (acting on the instructions of any of the Majority Lenders) shall be entitled to exercise all or any of the powers mentioned below:

- (a) the Lenders shall have a right to reverse any waivers or concessions that has been granted as a part of this Agreement and upon such reversal, revert back to the provisions of the Existing Facility Documents;
- (b) accelerate the Facility and declare the obligations of the Borrower in relation to the Facility, immediately due and payable;
- (c) enforce the Security Interests which have been created to secure the obligations of the Borrower in relation to the Facility in the manner stipulated under the Facility Documents;
- (d) stipulate any further terms and conditions as the Lenders deem fit with respect to Facility Documents;
- (e) upon the occurrence of an Enforcement Event, the Majority Lenders (acting through any of the

Lenders or otherwise) shall have a right to appoint a nominee/ whole time director(s) on the Board of Directors of the Borrower and any costs incurred by the Lenders/ Lenders' Agent/ Security Trustee in relation to such appointment shall be borne by the Borrower and the Borrower shall do all acts, deeds and things necessary in this regard, including but not limited to making necessary alterations to its memorandum of association/ articles of association as may be required; and

(f) exercise any other rights that the Lenders may have under Applicable Law, any other law for the time being in force, the Facility Documents and/or the Project Documents.”

12. The other facts brought to the notice of the Adjudicating Authority has been referred to in the impugned order are as follows:

“3. Besides this, lead Bank of Consortium, Allahabad Bank on 08.11.2016 wrote a letter to the Managing Director of Gujarat State Road Development Corporation Limited (GSRDCL) stating that the revival package will be based on adoption/ implementation of measures proposed by Banks

and GSRDCL, which are- conversion of debt to the tune of Rs.410 crores into equity and GSRDCL to take share of Rs.210 Crores out of the proposed equity of Rs.410 crores by 31.12.2017; reduction of interest to 10% and extension of repayment based on proposed cash flow; any measure like Entry restriction or full toll on SH-59 or Monthly annuity equivalent to Rs.8,00,000 per day with annual growth of 5% annually; deferment of Revenue Share and extension of agreement by 7 years.

4. *The Financial Creditor counsel has further stated that since the Corporate Debtor had taken monies from various Scheduled Banks including this Applicant for laying road, as this Corporate Debtor failed to service the loan, GSRDCL was asked to take share of Rs.210 Crores equity by 31.12.2017 out of proposed conversion of debt of Rs.410Crores into equity. On having this Corporate Debtor given an impression to the Banks stating that GSRDCL would take share of Rs.210 cores of equity out of proposed equity of Rs.410 crores, the lenders on 14.02.2017 agreed in the Master Restructuring Agreement for clause 7.1 (Event of*

Default) and 8 (Consequences of Event of Default) mentioning that in the event concessions sought in terms of the letter dated 08.11.2016, the Lenders' Agent (Allahabad Bank) addressed to the GSRDCL are not provided within 90 calendar days from the Effective Date (i.e. Strategic Debt Restructuring Agreement dated 14.02.2014) in a format and manner acceptable to the lenders, the lenders can proceed against the Corporate Debtor basing on the original documents executed between the parties. In Clause 8 of the consequences of events of default, it has been stated that the lenders have a right to reverse any waivers or offers or concessions that has been granted as part of this Agreement and upon such reversal, revert back to the provisions of the Existing Facility Document i.e. the document initially executed by the Corporate Debtor in favour of the Creditor as well as other banks. The Financial Creditor counsel has stated that though this Corporate Debtor servicing part of the debt, as GSRDCL has not taken equity share of Rs.210 crores out of Rs.410 crores debt converted into equity by this Restructuring

Agreement within 90 days from the effective date, this Financial Creditor has every right to reverse the waivers and concessions that were provided under Master Re-structuring Agreement dated 14.02.2017 and to proceed against this Corporate Debtor basing on the original debt obligations declaring Part A debt and Part B as due and payable.”

13. It was brought to the notice of the Adjudicating Authority that the ‘Financial Creditor’ in the Recall Notice given on 12th September, 2018 intimated the ‘Corporate Debtor’ that it failed to comply with the concession mentioned in the ‘Master Restructuring Agreement’ dated 14th February, 2017. The Bank had issued Recall Notice demanding repayment of Part-B debt of Rs.78,27,62,198/- within specified date, but the ‘Corporate Debtor’ failed to repay the loan as demanded by the ‘Financial Creditor’.

14. From the facts as referred and noticed above, we find that the ‘Corporate Debtor’ in terms of Clause 7.1 of ‘Event(s) of Default’ of ‘Master Restructuring Agreement’ failed to ensure that the ‘Gujarat State Road Development Corporation Limited’ has purchased equity share of Rs.210 Crores out of Rs.410 Crores debt converted into equity within 90 days in terms of ‘Restructuring Agreement’ thereby defaulted in terms of the

Agreement. We find debt and default is proved and the Adjudicating Authority did not commit error in admitting Section 7 application under 'I&B Code'.

15. We find no merit in this appeal. It is accordingly dismissed. No cost.

(Justice S.J. Mukhopadhaya)
Chairperson

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

(Kanthi Narahari)
Member(Technical)

NEW DELHI
28th August, 2019

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