

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH**

**MA 1173/2018  
in C.P. No. 3638(MB)/2018**

Under Section 241 and 242 of the  
Companies Act, 2013

In the matter of

**Union of India,  
Ministry of Corporate Affairs**

... Petitioner

v/s.

**Infrastructure Leasing And  
Financial Services Limited** ... R1  
Mr. Hari Sankaran ... R2  
Mr. Arun K. Saha ... R3  
Mr. Sunil Behari Mathur ... R4  
Mr. Ravindra Chandra Bhargava ... R5  
Mr. Michael Philip Pinto ... R6  
Mr. Jaithirth Rao ... R7  
Ms. Rina Kamath ... R8  
Mr. Ravi Ramaswamy Parthsarathy... R9  
Mr. Maharudra Manohar Wagle ... R10  
Ms. Varsha Shivaji Sawant ... R11

Order delivered on 12.10.2018

Coram: Hon'ble Shri. V.P. Singh, Member (Judicial)  
Hon'ble Shri. Ravikumar Duraisamy, Member (Technical)

For the Petitioner : Shri Sanjay Shorey,  
Director (Legal & Prosecution)  
Shri Manmohan Juneja,  
Regional Director (WR), MCA.  
Shri Rakesh Tiwari (RoC, Mumbai)  
Shri. Parvez Naikwadi  
(Asstt. Director, MCA).  
Shri. S. Ramakantha,  
Jt. Director (WR), MCA.  
Shri. Anil Yadav,  
Dy. Registrar of Companies, Mumbai.

For the Respondent: Mr. Ravi Kadam, Sr. Counsel a/w  
Mr. L. Viswanathan }  
Mr. Hariharan Kumar }  
Mr. Sharad Mathkar, Adv. } i/b Cyril Amarchand  
Mr. L. Viswanathan, Adv. } Mangaldas  
Mr. Aditya Sikka, Adv. } for Resp.- 1  
Ms. Priyanka Mitra, Adv. }

Mr. Mustafa Doctor, Sr. Counsel a/w  
Mr. Akash Karmarkar  
i/b Khaitan & Co. – for Intervener.

*Per V.P. Singh, Member(Judicial)*

**ORDER**

MA 1173/2018 has been filed by the Union of India about the CP 3638/2018 in the matter of Union of India v. IL&FS Ltd.

2. The Petitioner filed this application seeking comprehensive moratorium qua R1 Company and the group Companies of R1 for three months or such other period against the following acts:

- (i) The institution or continuation of suits or any other proceedings by any party against R1 Company and any of the group companies in any Court of Law/Tribunal/Arbitration Panel or Arbitration Authority; and
- (ii) Any action by any party to foreclose, recover or enforce any security interest created over the assets of R1 Company and / or any of the group companies including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (iii) The acceleration, premature withdrawal or other withdrawal, invocation of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits, guarantees, letter of support, commitment or comfort and other financial facilities or obligations vailed by R1 Company and /or the group companies whether in respect of the principal or interest or hedge liability or any other amount contained therein.

3. Union of India has stated that by the present application the applicant seeks moratorium for a period of 3 months against the institution or continuation of suits or any other proceedings by any

party against R1 Company or any of the group Companies in any Court of Law/Tribunal/Arbitration Panel or Arbitration Authority and further protection against any action by any party to foreclose, recover or enforce any security interest created over the assets of R1 Company or any other group Company. A moratorium has also been sought against the acceleration/premature withdrawal or other withdrawal, invocation of any term loan, corporate loan, bridge loan, commercial debt, fixed deposits, guarantees, letter of support, commitment or comfort and other financial facilities or obligations availed by R1 Company or the group Companies whether in respect of the principal/interest or hedge liabilities.

4. It is further stated in the application that R1 Company operates as holding company across various business through more than 348 group companies primarily spanning across among other things roads, power, engineering, financial services, maritime and urban development sectors. Some of the key group companies of R1 Company are

- (a) IL&FS Transportation Networks Ltd. (ITNL) which, through further step down special purpose vehicles, has business, activities ranging from developer, sponsor, construction manager and operator of surface transportation infrastructure taking greenfield projects from conceptualisation through commissioning to operations and management of such projects. ITNL develops projects on build operate and transfer basis and is the largest vertical holding about 40% of the total assets of the Group Companies.
- (b) IL&FS Financial Services Ltd. (IFIN), which contributes approximately 14.16% of the assets of the group) is a systemically important Non-Banking Financial Company (NBFC) registered with the Reserve Bank of India. IFIN

contributes about 14.16% to the assets of R1's group Companies.

- (c) IL&FS Energy Development Company Ltd. (IEDCL) operates in the power sector through its step down subsidiaries and develops, owns and operates power generation and transmission assets in India and abroad. IL&FS Tamilnadu Power Company Ltd. (ITPCL) is another subsidiary of R1 Company and is engaged in implementation of the thermal power project at Cuddalore.
- (d) Noida Toll Bridge Limited is a listed subsidiary of R1 Company with 50.42% equity share capital. IL&FS Engineering Construction Co. Ltd. is into multinational infrastructural development and construction business.

5. It is further submitted that R1 Company and the group Companies are facing a liquidity crunch with no immediate source of funding. The said liquidity crunch has led to an inability to service the debt obligations across the R1 Company's group companies. Briefly stated, the cause of liquidity crunch arises from the chain of events which triggered across various group companies of R1 Company such as ITNL, IFIN and IEDCL simultaneously depleting the surplus funds of the corresponding group companies as also R1 Company.

6. The R1 Company has stated that ITNL has been in default on its debt obligations since 30.06.2018. R1 Company has been in default on its debt obligations since 25.08.2018. The key subsidiary of R1 Company (engaged in the financial services vertical) has been in default since 12.09.2018 and IEDCL has defaulted on its payment obligations since 22.08.2018.

7. It has further stated that apart from the defaults mentioned above, the steady decline of R1 Company became apparent from the consolidated balance sheet of R1 Company for the year 2017-18. Pertinently, net loss of Rs. 2,670 crores was reported for the year 2017-2018 and borrowings of about Rs. 91,000 crores against Rs. 6,950 crores in equity share capital and reserves. There was significant increase in the amount of receivables due from various group companies of R1 Company and IFIN.

8. It has further stated that the decline in financial health of R1 Company has also noticed by the credit rating agencies which drastically downgraded the credit rating of R1 Company, ITNL and IFIN. Subsequently, on 30.09.2018 Dept. of Economic Affairs noted the tremors that were felt with the defaults by R1 Company and its group companies in the financial market in the country. The said note further indicated that given the critical importance of R1 Company and the group Companies in the financial markets were heading towards catastrophe. Under the circumstances, Union Govt. of India moved an application before this Tribunal under Section 241(2) of the Companies Act, 2013 seeking suspension of the then existing Board of Directors of R1 Company and appointment of fresh Board of Directors for R1 Company. This Tribunal by an order dated 1.10.2018 has suspended existing Board of Directors of R1 Company and authorised reconstitution of Board of Directors with six persons nominated by the Union of India. By further order dated 03.10.2018 this Tribunal granted permission to appoint seventh director. Further, by order dated 5.10.2018, this Tribunal issued certain protective and enabling orders in respect of its newly appointed directors.

9. Union of India has stated that the newly appointed Board is likely to face certain problems relating to R1 Company and its group companies spanning across various sectors with each sector having

their technicalities. There may be a need to rationalise/rethink business processes and strategies that may ensure effective and more efficient manner of functioning. Assets would need to be assessed, rationalized and steps taken to make a roadmap to preserving the fair value of assets, rebuilding trust of different stakeholders by providing a fair resolution mechanism. The Board will need to look at all possible options to resolve the complexities involved to ensure fair value and best interest of different stakeholders including but not limited to sale of assets and recovery of claims.

10. It is further stated that presently legal framework does not facilitate making of the necessary application under the Insolvency and Bankruptcy Code, 2016 (IBC) for resolution of R1 Company as IBC does not address resolution relating to financial service providers. Further, while the Central Government has the power under section 227 of IBC to notify certain categories of financial service providers who may be subject to the provisions of the IBC, no such notification has been issued by the Central Government till date. This manifests the intention the financial service providers are to be kept out of the purview of the IBC and that a separate framework is required for the resolution of such entities. The Financial Resolution and Deposit Insurance Bill, 2017 (FDI) was tabled in the Lok Sabha on 10.08.2017 is specifically for the resolution of the financial institutions including NBFCs Where as the FRDI Bill itself has been withdrawn in July 2018. The statement of Objects & Reasons of the Bill demonstrates the necessity for providing a separate framework for financial service providers.

11. Further, the IBC does not provide for a joint resolution of group of companies as in the present case. The resolution of R1 Company and its group companies as a whole is inextricably linked to the resolution of each of these companies. The Companies Act, 2013

has also been amended and there is no power to wind up a company on account of defaulting on its debt and the only recourse is to initiate insolvency proceedings under the IBC, though this option is not available in respect of financial service providers.

12. The Petitioner has contended that to effectively implement the directions of this Tribunal, the newly appointed Board of Directors required that status quo be preserved qua the business and assets of R1 Company and its group companies.

13. It is further submitted that in the light of the financial crisis which R1 Company was undergoing, the Applicant is given to understand that large numbers of creditors have threatened and some creditors have instituted legal proceedings against R1 Company and its group Companies. Some proceedings sprouted against the R1 Company and its group companies. A Petition u/s 45 QA of the Reserve Bank of India Act, 1931 has been lodged by Small Industries Development Bank of India Ltd., against IFIN before this Tribunal. Further a Petition u/s 241-242 read with Section 210 and 213 of the Companies Act, 2013 has been filed by one Enso Rail Infrastructures Pvt. Ltd. among other things against IL&FS Rail Ltd. Further proceedings by creditors and other persons are apprehended in Courts/tribunals pan India. As per the details and particulars provided to the Applicant on a best efforts basis by R1 Company.

14. By a letter dated 11.10.2018 the Applicant has been informed by the R2 and the R1 Company and its group companies have received letters or written communication from approximately 49 different creditors including bond-holders, many of whom have accelerated payments under financial facilities extended and demanded payment forthwith under threat of legal proceedings against R1 Company and the corresponding group companies. Some

financial institution creditors who are banks of R1 Company or the group companies have accelerated payment under the financial facilities extended for diverse reasons and claimed that the default has entitled the corresponding banks/financial institution to set off balances lying in the current and other accounts and/or deposits maintained by R1 Company / corresponding group companies against the outstanding amounts under the right of bankers lien.

15. It is further contended that it is necessary to declare moratorium qua R1 Company and group companies prohibiting the institution or continuation of any legal proceedings before any Court, Tribunal, Arbitral Panel or Authority.

16. We have heard the arguments of Mr Ravi Kadam, Sr. Counsel, Mr Sanjay Shorey (Director – Legal & Prosecution) and arguments advanced by the Sr. Counsel for Intervener Mr Mustafa Doctor and perused the record.

17. It appears that Petitioner is seeking moratorium qua R1 Company and the group Companies, to protect the institution and continuation of any legal institution or continuation of any legal proceedings before any Court, Tribunal, Arbitral Panel or Authority. The reliefs sought by Petitioner resembles with the moratorium provided u/s 14 of the Insolvency & Bankruptcy Code which provides that if the petition is admitted u/s 14 of the IBC, then moratorium order shall come into effect for the following purposes:

- (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 (54 of 2002);
- (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.

18. Now applicant UOI is seeking moratorium order in this case on the basis that R1 Company is financial service provider and IBC do not apply for the financial service providers. Therefore, they have moved the application u/s 241(2) of the Companies Act, 2013 for seeking moratorium order. It is further stated in the Application that present legal framework does not facilitate making the necessary application under the IBC for resolution of R1 Company as the IBC does not address resolution relating to financial service providers. It has also stated that Central Government has the power u/s 227 of the IBC to notify certain categories of the financial service providers who may be subject to the provision of the IBC. Since no such notification has been issued by the Central Government till date, therefore, Petitioner has moved this application u/s 241 and 242 of the Companies Act, 2013. It is further stated that IBC does not provide joint resolution of the group companies as in the present case. Therefore, the resolution of R1 Company and its group companies as a whole is inextricably linked to the resolution of each of these companies, and there is no power to wind up a company on account of it defaulting on its debt. Thus, the only recourse is to initiate the insolvency proceedings under IBC for this is not available in respect of financial service providers.

19. The contention of the Petitioner is mainly that the R1 Company is a financial service provider and for resolution of R1 Company and its group companies for restructuring of debt, Insolvency and Bankruptcy Code is not applicable and there is no provision for filing a petition for winding up of company on the ground of inability to pay its debt under Companies Act, 2013 . Therefore, winding up petition is also barred in case of default by the company. Thus, the only option for resolution plan would have been the proceeding under IBC to initiate insolvency proceedings, but this option is not available in the present case because R 1 company is a financial service provider.

20. We are of the considered view that if the Petition is filed under IBC for initiating insolvency proceeding then after admission of the petition and on initiation of insolvency proceedings moratorium order under IBC becomes applicable. The Union of India's contention is that since it has not notified the financial service provider, therefore IBC is not applicable to the financial service providers for want of notification from Govt. of India. Thus they have no option except to approach this Tribunal for seeking declaration of moratorium for restructuring of debts of R1 and its group companies.

21. When a moratorium order u/s 14 of IBC is provided, then it prohibits institution or continuation of any legal proceedings against the Corporate Debtor, including execution of any judgment/decreed or order in any Court of law, Arbitration Panel or other Tribunal, Arbitration Authority. The moratorium order under IBC further prevent transferring, encumbering, alienating or disposing of or by the corporate debtor or any action to foreclose, recover or enforce any security interest during moratorium period. But the statutes provide such moratorium under the Insolvency and bankruptcy code

2016. But no such provision of moratorium is provided under Companies Act, 2013 to protect the financial service providers in case of restructuring of its debt.

22. It is also pertinent to mention that some of the group companies are already undergoing Corporate Insolvency Resolution Process. Further the bench is of the opinion that under IBC for each company an application has to be made to initiate CIRP and a blanket moratorium order cannot be passed against all the 348 companies in the absence of 348 application/ petitions.

23. The moratorium orders which can be passed under the IBC cannot be extended under section 241-242 of the Companies Act, 2013. Powers under section 242 of the Companies Act, 2013 can be exercised by NCLT only in case the affairs of the company have been or being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in the manner prejudicial to the interests of the company. In such circumstances the Tribunal may, with a view to bringing to an end the matters complained of make such orders as it things fit. In this case this tribunal has exercised this power under section 242 of the Companies Act 2013 on being satisfied that the affairs of the company is mismanaged, therefore the then existing board of R1 Company was suspended, and the nominated directors were appointed on the recommendation of the Government.

24. It is pertinent to mention that section 241 of the Companies Act, 2013 provides that if on any application made u/s 241, the Tribunal is of the opinion that the company's affairs have/ are conducted in a manner prejudicial, oppressive to any member/members or prejudicial to public interest or in any manner prejudicial to the interests of the company , then the tribunal may

with a view to bring to an end of the matters complained of make such orders as it think fit.

25. The provision of section 242 provides that it can be invoked **when the matter is complained of** u/s 241 of Companies Act, 2013. In this case, the remedy has already been granted after being satisfied that the affairs of the company are mismanaged. The suspension of the existing board was under the powers of section 242 of the Companies Act 2013. However, it is to be clarified that section 241 or 242 of the Companies Act, 2013 can be no way compared with the provision of moratorium order given u/s 14 of the IBC. It is also important to mention that section 238 of the IBC provides overriding effects against any law which is inconsistent with the provision of Insolvency And Bankruptcy Code. But the Companies Act, 2013 does not have such overriding effect and we also do not find any inconsistency with the IBC .

26. In the circumstances, we are of the considered view that the moratorium which has been sought by the Union of India by an application u/s 242 of the Companies act 2013 cannot be granted. In the circumstances MA No. 1173/2018 in CP 3638/2018 with prayer for issuing moratorium is rejected. MA disposed of accordingly.

SD/-

**RAVIKUMAR DURAISAMY  
MEMBER (TECHNICAL)**

SD/-

**V.P. SINGH  
MEMBER (JUDICIAL)**