

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-190(PB)/2017

IN THE MATTER OF:

Union Bank of IndiaFinancial Creditor
v.
M/s. Era Infra Engineering LimitedCorporate Debtor

**SECTION: Under Section 7 of The Insolvency and Bankruptcy
Code, 2016**

Judgment delivered on 08.05.2018

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR
Hon'ble President

SHRI S.K. MOHAPATRA
Hon'ble Member (T)

PRESENTS:

For the Financial Creditor: Mr. Nesar Ahmad, PCS
Mr. Hitesh Joshi, PCS
Mr. Ahsan Ahmad, Advocate with Mr.
Rajesh Kumar, AGM

For the Respondent: Mr. Kapil Sankhla, Ms. Meghna
Sankhla, Mr. Mayank Wadhwa, Mr.
Sumit Purohit and Ms. Akshara
Chauhan, Advocates



M.M. KUMAR, PRESIDENT

JUDGMENT

The Union Bank of India (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 Insolvency Resolution Process in the matter of M/s. Era Infra Engineering Limited (for brevity 'the Corporate Debtor'). It is appropriate to mention that the 'Financial Creditor' was incorporated on 11.11.1919 and was assigned CIN No. U99999MH191PTC000615. It has its registered office at 239, Vidhan Bhavan, Nariman Point, Mumbai-400021.

2. Mr. Naveen Jain, Deputy General Manager has been authorized by the Power of Attorney No. 30034 dated 15.12.2014 (Annexure-AI) to submit and sign the petition.

3. The Corporate Debtor-M/s. Era Infra Engineering Limited is a company registered under the provisions of the Companies Act, 1956 and was incorporated on 03.09.1990. The identification number of the Corporate Debtor is L74899DL1990PLC041350 and its registered office is situated at 1107, Indraprakash

Building, 21, Barakhamba Road, New Delhi-110001. Its authorised share capital is Rs. 750,000,000.00 and the paid up share capital is Rs. 663,199,000.00 as per the details given in master data tendered before the Registrar of Companies by the Corporate Debtor itself. Copies of Memorandum of Association, Articles of Association and the master data have been placed on record (Annexure-A-II).

4. As per the averments of the Financial Creditor, the Corporate Debtor being an EPC contractor is engaged in execution of large construction projects like construction of highways, airports and industrial projects and since 1990 has been availing credit from the Financial Creditor and the latest being in the year 2012 wherein a Working Capital Term Loan of Rs. 100 crores on standalone basis was sanctioned vide sanction letter bearing No. IFB:CR:602.12. Pursuant to the sanction the loan was also disbursed to the Corporate Debtor on 31.12.2012. The amount of term loan along with interest was repayable in 14 instalments as agreed to between the parties.



5. According to the particulars of the debt disclosed in part IV of Form-1 prescribed under sub rule 1 of Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 the total amount sanctioned to the Corporate Debtor on several dates is to the extent of Rs. 1506.33 crores. The details of the amount disbursed have been furnished (Annexure-A V).

6. In column 2 of part IV the amount claimed to be in default and the date on which the default occurred have been stated in clear terms. According to the averments made by the Financial Creditor- Union Bank of India the aforesaid facilities availed by the Corporate Debtor are overdue and total amount in default is to the extent of Rs. 681.04 crores and in addition External Commercial Borrowing of USD 11,971,939.13 as on 31.05.2017 is also in default. Copies of statement of account & calculation of days of default at each instance have been placed on record (Annexure-A VI & A VII).

7. In relation to the facilities granted, the Financial Creditor has given in Part V of Form 1, securities created by the Corporate Debtor and held by the Financial Creditor under pari-passu

charge as well as in relation to certain securities which it is having a first charge with the consortium of lenders as well as the personal guarantees given by the promoters of the Corporate Debtor along with Corporate Guarantees given. Copies of valuation reports dated 01.02.2014, 14.04.2014, 20.08.2014, 28.04.2016 and 15.09.2016 given by different Valuers with respect to the securities held by the Financial Creditor have been placed on record (Annexure -A IX).

8. The Financial Creditor has also placed on record certificates of charge creation/modification from Registrar of Companies in favour of the Financial Creditor. A copy of the said document has been placed on record (Annexure- A X).

9. The Financial Creditor 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 Contracts. Copies of the said documents have been placed on record (Annexure- A XII).

10. A record of default is also available with the Central Repository of Information on Large Credits (CRILC) as per its asset classification report of the Corporate Debtor dated 16.06.2017 (Annexure A-XI). Likewise, Entries in Bankers Book in accordance with the Bankers Books Evidence Act, 1891 has also been placed on record (Annexure-A VIII).

11. The Corporate Debtor filed reply/objections to the instant application by asserting that the amount of Rs. 681.04 crores together with External Commercial Borrowing amounting to USD 1197393.13 claimed to be in default by the Corporate Debtor is not correct. It denies the statement of account (Annexure A-VI) & asserted that same has not been filed in accordance with the provisions of Bankers' Books Evidence Act, 1891, therefore, cannot be considered for the purpose of ascertaining the existence of default within the meaning of Section 7(4) of the Code. Further, the same has not been even counter signed by the authorized officer or the Financial Creditor at all places. Further the said statement besides being illegible has hand written entries at several places which is not in accordance with the Bankers Book Evidence Act.



12. The Corporate Debtor further asserted that the present application under Section 7 of the Code, 2016 has been filed through Power of Attorney dated 15.12.2014 by Mr. Naveen Jain, Deputy General Manager but the provisions of Section 7 of the Code came into force w.e.f. 01.12.2016. Thus, the Power of attorney has been executed prior to the Code having come into force and there is no specific authority or resolution passed by the Financial Creditor in favour of Mr. Naveen Jain to sign the present application. Thus, the present application is without valid authority and therefore, no order for initiating CIR Process can be passed against the Corporate Debtor.

13. The Corporate Debtor has raised further objection that the aforesaid Power of Attorney is defective as the same has not been executed on a stamp paper, thus the same is inadmissible in evidence. Further, no resolution of the Board of the Financial Creditor has been placed on record to substantiate that the Financial Creditor has passed any resolution authorizing Shri S.K. Singh and Shri Deba Jyoti Gupta to execute the Power of Attorney in favour of Mr. Naveen Jain.



14. The Corporate Debtor further asserted that the Corporate Debtor is a company, primarily, engaged in infrastructure development projects and in joint venture has undertaken several high value infrastructure projects namely National Highways Authority of India (NHAI); National Thermal Power Corporation (NTPC); Delhi Metro Rail Corporation (DMRC), etc. which are currently under execution at different stages. Thus, the initiation of CIR process would jeopardize the execution of the aforesaid on-going projects undertaken by the Corporate Debtor in its individual or in joint venture with other companies.

15. Another objection raised by the Corporate Debtor is that the object of the Code is to maximize the asset of an entity. The initiation of CIR Process would not serve and achieve the object of the Code, 2016.

16. The Corporate Debtor has also raised the issue that at present it is involved in various arbitration matters wherein it has claimed substantial amounts and the Financial Creditor is well aware of those proceedings. A few of these proceedings are at their fag end and the awards are likely to be passed soon. Under

such circumstances any adverse order passed by this Tribunal would be detrimental to the financial conditions of the Corporate Debtor.

17. The Corporate Debtor has submitted that without going into the merit or the substance of the amount (further not admitting the amounts claimed in the present petition) it has always been the endeavour of the Corporate Debtor to repay the amounts that are outstanding against it. It has already provided the details of the amounts which are under arbitration or claimed by them and further the factum of the on-going projects of the Corporate Debtor which would also bring back sufficient funds for repayment of the amounts.

18. It has also been argued that the Corporate Debtor had repeatedly offered Resolution Plans to the Consortium Banks wherein it was specifically stated that the Corporate Debtor is awaiting adjudication of several Arbitrations wherein it is likely to be awarded claims worth thousands of crores. However, the Consortium Banks have not been bothered to reply to such Resolution Plans. Several meetings were held with the Monitoring

Committee with the Joint Lenders of the Consortium Banks which is apparent from the minutes of Meetings (Annexure R-2).

19. A rejoinder to the reply/objections has been filed by the Financial Creditor reiterating the submissions made in the application and controverting the assertions in the reply/objections. Along with a rejoinder a copy of certificate dated 26.03.2018 issued by the Financial Creditor under Banker's Books Evidence Act, 1891 and a copy of the Board Resolution of the Financial Creditor dated 06.12.2008 along with Special Power of Attorney dated 11.08.2017 in favour of Mr. Naveen Jain have been placed on record (Annexure R/1 & R/2).

20. Thereafter, affidavit on behalf of the Financial Creditor has been filed for placing additional documents on record wherein a copy of no objection certificate given by earlier Interim Resolution Professional namely Mr. Dhavit Anjaria proposed by the Financial Creditor has withdrawn his candidature for appointment as IRP due to personal circumstances. A certified true copy of no objection certificate of Mr. Dhavit Anjaria has been placed on record (Annexure A I). The Financial Creditor also

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filed consent received from Mr. Rajiv Chakraborty along with Form 2 as well as eligibility certificate whereby his name has been proposed to act as an Interim Resolution Professional. A certified true copy of Form 2 along with eligibility certificate has been placed on record (Annexure A II). Certified true copy of latest Credit Information Bureau (India) Limited (CIBIL) Central Repository of Information on Large Credits (CRILC) reports, Board Resolution in favour of Mr. Naveen Jain authorizing him to take all actions under the Code, 2016 against the Corporate Debtor and Banker's Book Evidence Certificate have been placed on record (Annexure A III, A IV & A V).

21. Having heard learned counsels for the parties and having perused the paper book with their able assistance we may first examine the provisions of Section 7 (2) and Section 7 (5) of IBC which read as under:-

“Initiation of corporate insolvency resolution process by financial creditor.

7 (1)

7 (2) The financial creditor shall make an application under sub-section (1) in such form and manner



and accompanied with such fee as may be prescribed.

7 (3)

7 (4)

7 (5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b)"

22. A conjoint reading of the aforesaid provision would show that form and manner of the application has to be the one as prescribed. It is evident from the record that the application has been filed on the proforma prescribed under Rule 4 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 of IBC. We are satisfied that a default has occurred and the application under

sub section 2 of Section 7 is complete; and no disciplinary proceedings are pending against the proposed Interim Resolution Professional. Thus, the application warrant admission.

23. As a sequel to the above discussion, this petition is admitted and Mr. Rajiv Chakraborty, 12 Sukhdev Vihar, 1st Floor, New Delhi-110025, e-mail id chakrabortyrajiv72@gmail.com, Registration No. IBBI/IPA-001/IP-P00602/2017-2018/11053 is appointed as an Interim Resolution Professional.

24. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional shall immediately make public announcement with regard to admission of this application under Section 7 of the Code. We also declare moratorium in terms of Section 14 of the Code. A necessary consequence of the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) and thus the following prohibitions are imposed which must be followed by all and sundry:

“(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;
- (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.”

25. It is made clear that the provisions of moratorium shall not 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. (see the Regulations)

26. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *interalia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of Corporate Insolvency Resolution Process. His conduct should be above board & independent; and he should work with utmost integrity and honesty. It is further made clear that all the personnel connected with the Corporate Debtor, erstwhile directors, promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the affairs of the Corporate Debtor. In case there is any violation by the ex-management or its ex-directors the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the

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Code and perform all his functions strictly in accordance with the provisions of the Code.

27. It is appropriate to mention that this matter was referred to Three Members' Bench as winding up petitions under Section 433(e) of the Companies Act, 1956 were pending adjudication before Hon'ble Delhi High Court. The view taken by the Three Members' Bench in its order dated 16.02.2018 is based on a judgment of the learned Appellate Tribunal rendered in the cases of ***M/s. Unigreen Global Private Limited v. Punjab National Bank & Ors.***, Company Appeal (AT) (Insolvency) No. 81 of 2017 decided on 01.12.2017 as well as in the case of ***Forech India Private Limited v. Edelweiss Assets Reconstruction Company Ltd. & Anr.***, Company Appeal (AT) (Insolvency) No. 202 of 2017 decided on 23.11.2017. It has now been settled that the bar to institute proceeding under Section 11 of the Code would be attracted only if a winding up petition is admitted and a Provisional Liquidator is appointed. There is no petition so far admitted nor any Provisional Liquidator has been appointed. Therefore, bar created by Section 11 of the Code according to the judgments ***M/s. Unigreen Global Private Limited (supra)*** &



Forech India Private Limited (supra) and Three Member's Bench judgment rendered in a case of **Union Bank of India v. Era Infra Engineering Limited**, (IB)-190(PB)/2017 decided on 16.02.2018 would not be attracted.

28. While resisting the admission of the petition learned counsel for the Corporate Debtor has raised the argument that there are discrepancies in the xerox copy of the account furnished. According to the learned counsel the handwritten additions and omissions are against the specific provisions of The Bankers' Books Evidence Act, 1891 and therefore, such an account is liable to be rejected.

29. We are not persuaded to accept this argument because Section 4 of the Bankers' Books Evidence Act, 1891 provide for mode of proof of entries in bankers' books and the same read as under:-

"Section 4. Mode of proof of entries in bankers'

books.- Subject to the provisions of this Act, a certified copy of any entry in a banker's books shall in all legal proceedings be received as *prima facie* evidence of the



existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.”

30. A perusal of the aforesaid provision would show that a certified copy of entry in a banker's books is to be regarded as *prima facie* evidence in all legal proceedings with regard to the existence of such entry. It must be admitted as evidence of the matters, transactions and accounts therein recorded in every case. It has come on record that a certificate of entries in a banker's books in accordance with the Banker's Books Evidence Act, 1891 has been placed before us as Annexure A-VIII. Moreover, there is a record of default available with the Central Repository of Information on Large Credits (CRILC) as per its asset classification report of the Corporate Debtor dated 16.06.2017. In any case no serious dispute with regard to the amount payable has been raised before us. Therefore, we find no substance in the aforesaid argument and reject the same.



31. The other argument that Mr. Naveen Jain is not authorized to sign the pleadings and file the application before us has also lost its sheen because with the rejoinder a copy of the certificate dated 26.03.2018 issued by the Financial Creditor under Bankers' Books Evidence Act, 1891 and a copy of the Board Resolution of the Financial Creditor dated 06.12.2008 along with special power of attorney dated 11.08.2017 in favour of Mr. Naveen Jain have been placed on record. The filing of the aforesaid documents completely answer the objections raised by the Corporate Debtor. It is evident that by virtue of special power of attorney dated 11.08.2017 Mr. Naveen Jain has been authorized to file such like application before any Court/Tribunal. Accordingly, we find that the aforesaid objection is frivolous and is devoid of merit. Accordingly, the same is rejected.

32. The last objection raised is that the Corporate Debtor has various claims and litigations pending against the public sector undertakings like National Highways Authority of India, Railway 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.

33. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional at the earliest but not later than seven days from today.

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(M.M. KUMAR)
PRESIDENT

-sd-

(S.K. MOHAPATRA)
MEMBER(TECHNICAL)

08.05.2018

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