

**Coram: Vijai Pratap Singh, Member (J)**

In the matter of:

-Versus-

Binani Cement Ltd. ....Corporate Debtor/Respondent

1. Rishav Banerjee, Advocate
2. Souvik Mazumdar, Advocate
3. Abhijit Das, Advocate

1. Pratap Kumar Chatterjee, Advocate
2. Ranjan Bachawat, Advocate
3. Debnath Ghosh, Advocate
4. Sanjay Ginodia, Advocate
5. Swapna Choubey, Advocate
6. Pubali Sinha, Advocate
7. Aarti Goyal Agarwal, Advocate

(Delivered on 25<sup>th</sup> July 2017)

The Applicant Bank of Baroda (BOB) has filed an application under Sec.7 of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against Binani Cement Ltd., a debtor.

pd

behalf of BOB on the basis of authorization letter dated 9/10/2015 annexed as Annexure 1.

3. The Corporate Debtor Binani Cement Ltd., Identification No. is U26941WB1996PLC076612. The registration number of the proposed interim resolution professional is Mr. Vijaykumar V. Iyer, Registration No. IBBI/IPA-001/IP-00526/2016-17/1370 of Deloitte Touche Tohmatsu India LLP Indiabulls Finance Centre, Tower 3, 27<sup>th</sup> Floor, Senapati Bapat Marg, Elphinstone Road (West), Mumbai – 400 013, email [viyer@DELOITTE.com](mailto:viyer@DELOITTE.com).

4. The applicant has stated that he has granted certain term loan and working capital facilities to the corporate debtor from time to time which were re-structured on the terms and conditions set out under the Master Restructuring Agreement dated 13/12/2014 entered into, inter alia, the Corporate Debtor, BOB and certain other lenders (collectively JLF Lenders) as amended by a supplemental term loan agreement dated 6/2/2015 and a supplemental working capital agreement dated 6/2/2015 together with the original MRA and Supplemental TL agreement. Copies of the original MRA, Supplemental TL agreement and the Supplemental WC agreement have been annexed with the petition as Annexure 3, Annexure 4 and Annexure 5 respectively.

5. The original MRA contemplated the restructuring of various credit facilities granted to the Corporate Debtor by the JLF Lenders which includes credit facilities granted by the applicant BOB. Under the MRA, BOB's exposure to the corporate debtor is as follows:-

- i) Facility A (Term Loan) principal amount is Rs.225,00,00,000/-.
- ii) Facility B (Priority Loan - Sales Tax Loan) Rs.39,41,00,000.
- iii) Facility C (Working Capital Term Loan) Rs.36,88,00,000.
- iv) Facility D (Funded Interest Loans) Rs.31,11,00,000.
- v) Facility E (Working Capital Facilities) Rs.24,26,00,000.



6. Date of disbursement under the BOB Facilities mentioned in Annexure 6 at page 268 of the petition which indicates that the petitioner has disbursed total facility of Rs.328,83,48,375/- under different facilities on different dates within 12/8/2010 to 29/1/2015.

7. The petitioner has also given the details of defaulted amount along with the date of default relating to each of BOB facilities in a chart form, being Annexure 7 of the petition, which indicates that regarding BOB facility 1, facility 2, facility 3, facility 4 corporate debtor has defaulted on 31/10/2015 i.e. 547 days default in each of the facilities; and facility 5 corporate debtor has defaulted on 25/1/2016 i.e. 461 days default. The total overdue amount of default as on 30/4/2017 comes to Rs.97,71,34,082/-.

8. The petitioner has also filed copies of statement of bank account of the corporate debtor in support of its claim which are annexed to the petition as Annexure 7.

9. The petitioner has filed guarantee agreement dated 25/2/2015 annexed to the petition as Annexure 8. The petitioner has also filed copies of the minutes of the meeting of the JLF held on 20/1/2017 as Annexure 9, copies of the corporate guarantee agreement dated 25/2/2015 as Annexure 10, copies of personal guarantee agreement dated 17/3/2015, copies of joint deed of hypothecation dated 6/2/2015 executed by the Company for the benefit of the JLF Annexure 12, details of immovable property Annexure 13, copies of joint deed of hypothecation Annexure 17, certificate of registration of charges issued by the Registrar of Companies Annexure 18, copy of status classification report relating to corporate debtor issued by Trans Union CIBIL dated 28/4/2017, copies of CRILC report relating to corporate debtor as on 31/12/2015 Annexure 20, copies of entries maintained by BOB in accordance with Banker's Books of Evidence Act, 1891 Annexure 21, copies of account overdue letters and the financial statements between 11/4/2016 and 13/5/2016 Annexure 22, copies of

financial statement of corporate debtor for the financial year ending 31/3/2016, an affidavit in support of the application to prove the fact of extending loan to the corporate debtor under different accounts and due amount on the corporate debtor and default committed by the corporate debtor on different dates in different account.

10. The petitioner has also proposed the name of Mr. Vijaykumar V. Iyer to act as interim resolution professional whose details are mentioned above. The petition has been verified by Mr. ram autar Pal, Assistant General Manager, Bank of Baroda. The petitioner has stated that he has been authorized on the basis of power of attorney given to him. The petition has filed power of attorney of Bank of Baroda in favour of Mr. Jayeshkumar Vasantray Mehta. It is also mentioned in the said power of attorney that "I am authorized to do and perform by virtue of the said Power of Attorney dated 16/2/2015 in the same manner and as effectually as the Bank or as I might now do them or any of them or the said Mr. R.A. Pal, could have done them or any of them if he had in my stead received authority thereto under the said Power of Attorney dated 16/2/2015. I, Mr. Jayeshkumar Vasantray Mehta the Bank hereby agree to ratify and confirm whatsoever and Mr. R.A. Pal shall lawfully do or cause to be done by virtue of this Deed."

11. In accordance with para 22 power of attorney holder has been authorized to settle and adjust all and all manner of account and accounts wherein the Bank may be in any manner interested or concerned.

12. Under para 24 of the said Power of Attorney it has also specifically mentioned that the power of attorney has been given to act on behalf of the Bank in all matters incidental to or arising out of the bankruptcy or insolvency or any compromise or arrangement with the creditors or any person or persons indebted or under liability to the bank or claimed by the Bank to be or in the winding up of any Company so indebted or under liability or claimed so to be.



13. The petitioner has also filed Master Restructuring Agreement, which is Annexure 3 along with the petition, which shows that several Banks have lended Rs.3042.93 crore to the corporate debtor out of which BOB's lending is Rs.325 crore and fund based outstanding amount is Rs.225 crore. Regarding the priority loan, BOB has lended Rs.39.41 crore and under working capital term loan, BOB lending is Rs.36.88 crore and funded interest loan in the BOB lending is Rs.31.11 crore, under working facility agreement BOB lending is Rs.24.26 crore. It appears that other banks have also lending money to the corporate debtor details of which are mentioned in the MRA Annexure 3.

14. As per the law laid down by the Hon'ble NCLAT in the case of Innovative Industries Ltd. vs. ICICI Bank notice was issued to corporate debtor and after getting the notice corporate debtor made a representation for dismissing the petition.

15. The corporate debtor has filed objection mainly on the ground that no specific power of attorney has been granted by the applicant BOB for initiation of corporate insolvency process. The corporate debtor has stated that the petition has been verified by Shri Ram Autar Pal on the basis of a Power of Attorney executed by Mr. Jayeshkumar Vasantray Mehta on 9/10/2015. Such power of attorney was executed prior to coming into effect of the Code and cannot form the basis for filing proceedings under the Code.

16. The corporate debtor has raised objection that Power of Attorney dated 9/10/2015 is based on Power of Attorney dated 16/2/2015 executed by the applicant in favour of Mr. Jayeshkumar Vasantray Mehta. However, copy of the Power of Attorney dated 16/2/2015 has not been disclosed. It is not known whether the said Mr. Jayeshkumar Vasantray Mehta had any authority to initiate proceedings under the Code or to sub-delegate the power received by him. He has also stated that at the time of execution of said two Powers of Attorney dated 16/2/2015 and 9/10/2015, the Code was not in existence. The

applicant could not have envisaged promulgation of the Code of 2016 in the year 2015 and, therefore, could not have conferred any authority on any person to initiate proceedings under the Code.

17. The corporate debtor relied on the orders passed in CP No.37/2017 [ICICI Bank Ltd. vs. Palogix Infrastructure Pvt. Ltd.] wherein Hon'ble Court held that a specific authorization to initiate corporate insolvency process is needed.

18. The corporate debtor has also stated that Mr. Jayeshkumar Vasantray Mehta has no authority to initiate proceedings or authorise anyone to initiate proceedings under Sec.7 of the Code and on behalf of the applicant. Mr. Jayeshkumar Vasantray Mehta has no authority to file the petition and the petition is liable to be dismissed under the law.

19. Regarding the objection raised by the corporate debtor it has to be clarified that the petitioner has filed the Power of Attorney executed in favour of Mr. Jayeshkumar Vasantray Mehta which is executed on 16/2/2015 wherein it is mentioned "that the Bank doth hereby nominate, constitute and appoint Mr. Jayeshkumar Vasantray Mehta to be the true and lawful Attorney of the Bank for the Bank and in the name of the Bank to do and perform all or any of the acts, deeds, matters and things and exercise all or any of the powers and authorities set out in the Schedule hereto and the Bank doth hereby undertake and agree to ratify and confirm all or whatsoever the said Attorney may lawfully do or cause to be done in or about the premises by virtue of these presents and for better doing, performing and executing all the acts, deeds, matters and **things the Bank doth hereby further unto the said Attorney full power and authority to substitute and appoint one or more attorney or attorneys to exercise for the Bank as the Bank's attorney or attorneys, as the case may be all or any of the powers and authorities stated in the Schedule and to revoke such appointment from time to time to substitute or appoint in place of such attorney or attorneys as the said authority shall from time to**



**time think fit and the Bank doth hereby lastly declare that the powers and authorities contained herein are not by way of substitution or in revocation of any power of attorney conferred on the said Attorney."**

20. On the basis of power of attorney executed by financial creditor in favour of Mr. Jayeshkumar Vasantray Mehta, it appears that he was authorized to appoint one or more attorney to exercise for the bank as the bank attorney as the case may be.

21. The second power of attorney which has been executed by Mr. Jayeshkumar Vasantray Mehta in favour of Ram Autar Pal is also filed which is dated 9/10/2015 which shows that Mr. Jayeshkumar Vasantray Mehta, Deputy General Manager, Bank of Baroda has executed power of attorney in favour of Ram Autar Pal. On the basis of authority given to him under the power of attorney dated 16/2/2015 by financial creditor. It is pertinent to mention that BOB initially executed power of attorney in favour of Mr. Jayeshkumar Vasantray Mehta and through the said power of attorney he was authorized to appoints one or more attorney to act on behalf of BOB and on the basis of this authorization Mr. Jayeshkumar Vasantray Mehta has executed the power of attorney dated 9/10/2015. **It also appears from the power of attorney that BOB has authorized him to sign on behalf of BOB in all matters incidental to or arising out of bankruptcy or insolvency or any composition or arrangements with the creditors or any person or persons indebted or under liability to the Bank or claimed by the Bank to be or in the winding up of any company so indebted or under liability or claimed to be so.**

22. Therefore, this fact of the case is different than the case decided by this Bench in ICICI Bank Ltd. vs. Palogix Infrastructure Pvt. Ltd. In this case under general power of attorney specific power is given to the power of attorney holder to execute one or more power of attorney for signing and presenting the petition for and on behalf of the BOB. Further, the authority has also given power for

taking any action relating to matters incidental to or arising out of the bankruptcy or insolvency matters. Therefore, it appears that through the general power of attorney of financial creditor, which was executed in favour of Mr. Jayeshkumar Vasantray Mehta. Mr. Jayeshkumar Vasantray Mehta was further authorized to execute one or more power of attorney for and on behalf of the bank and he was further authorized to take any action in the matter arising out of the bankruptcy or incidental to insolvency. It is clear that on the basis of the said authorization Mr. Jayeshkumar Vasantray Mehta executed power of attorney in favour of Ram Autar Pal who has filed this petition.

23. It is pertinent to mention that the said power of attorneys were executed before coming into effect of Insolvency and Bankruptcy Code, 2016 but it is clear that on this basis it cannot be said that the authority given by the said power of attorney will be ineffective because specific authority was given to attorney holder for all matters incidental to or arising out of Insolvency and Bankruptcy. Therefore, on the basis of earlier decision in the case of ICICI Bank Ltd. it cannot be said that Ram Autar Pal was not authorized to initiate and file an application corporate insolvency resolution process and verify the present petition.

24. The corporate debtor has also raised objection that Vakalatnama signed by the applicant is not as per NCLT Rules 2016. He has further stated in the reply that Vakalatnama authorizing advocate to file the said application is in the name of a firm of lawyer and not in the name of individual advocate as is required under the NCLT Rules, 2016. On the basis of record it is clear that the Vakalatnama has been filed by the petitioner with the petition is proper and it shows that BOB has executed and appointed S.N. Sen & B.M. Law & Co., Lawyers and Advocates to act in the matter and Shri Souvik Majumdar, Advocate has accepted the Vakalatnama by putting his signature as partner of S.N. Sen & B.M. Law & Co., Lawyers and Advocates to act in the proceedings. It is clear that BOB has given Vakalatnama in the name of the firm S.N. Sen &



B.M. Law & Co. and Shri Souvik Majumdar has accepted the same as a partner of the firm. So it cannot be said that the Vakalatnama is not proper.

25. The corporate creditor has further raised objection that no notice was issued by the adjudicating authority or National Company Law Tribunal. It is made clear that the notice was issued on the corporate debtor and affidavit of service was filed by the financial creditor that notice was served on the corporate debtor through Speed Post on 16/6/2017. It is pertinent to mention herein that the petition was filed in NCLT on 16/6/2017 and after that petitioner served copy of the petition on the corporate debtor and filed affidavit of service along with receipt of Postal Department and Track Report, which shows that the copy of the petition was served on the corporate debtor on 16/6/2017 through Speed Post.

26. Further, the order was passed on 5/7/2017, the Respondent appeared through Ld. Counsel and made a request for adjournment and the case was adjourned to 10/7/2017. Again on 10/7/2017 Ld. Counsel for the financial creditor was present and argued the matter. Ld. Counsel for the corporate debtor requested for time to file affidavit. The corporate debtor was granted time to file the affidavit by the next date. The matter was heard on 12/7/2017 and reserved for order.

27. In this case the corporate debtor was present since the first hearing of the case and he filed reply and opportunity of hearing was given to him and after that detailed argument was heard by the Ld. Counsel of the corporate debtor and thereafter the case was reserved for order.

28. In the case of Innoventive Industries Ltd. vs. ICICI Bank & Anr. the Hon'ble NCLAT has laid down that limited notice be given to the corporate debtor and further up held the validity of Sec.7 of Insolvency and Bankruptcy Act, 2016. There is no specific pro forma prescribed in the Code to give notice to the corporate debtor. As per direction of the Hon'ble NCLAT, limited notice is to be

given but in a case where corporate debtor was served and he was represented by Ld. Lawyer and filed detailed reply and opportunity of hearing was given to him, so it cannot be said that further notice was required in this case. So, the objection raised by the corporate debtor has no force.

29. On the basis of documents filed by the financial creditor, it is clear that corporate debtor has committed default in making payment of Rs. 97,71,34,082/- and, therefore, the financial creditor has filed the application under Sec.7 of the Code for initiating corporate insolvency resolution process. So, the petition deserves to be admitted. Financial creditor has proposed the name of Mr. Vijaykumar V. Iyer as IRP who is competent to work as IRP. Therefore, he also deserves to be appointed as Interim Resolution Professional.

### **ORDER**

The petition filed by the financial creditor under Sec.7 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Resolution Process and declare a moratorium and public announcement as stated in Sec.13 of the IBC, 2016.

Moratorium is declared for the purposes referred to in Sec.14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in clause (b) of sub-section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

- 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 Securitization 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.

30. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

31. The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

32. The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

33. Necessary public announcement as per Sec.15 of the IBC, 2016 may be made.

34. Mr. Vijaykumar V. Iyer, Registration No.IBBI/IPA-001/IP-00526/2016-17/1370 of Deloitte Touche Tohmatsu India LLP Indiabulls Finance Centre, Tower 3, 27<sup>th</sup> Floor, Senapati Bapat Marg, Elphinstone Road (West), Mumbai – 400 013, email [viyer@DELOITTE.com](mailto:viyer@DELOITTE.com) is appointed as Interim Resolution

Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.

35. Mr. Vijaykumar V. Iyer has submitted his consent in Form 2 under Rule 9 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

36. The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors.

37. Let the copy of the order be sent to the Applicant/Financial Creditor as well as Corporate Debtor and IRP.

List the matter on 11<sup>th</sup> August 2017.

Sd/-  
**Vijai Pratap Singh,**  
Member (J)

Signed on 25<sup>th</sup> July 2017