

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

**I.A. No. 59 of 2021 with
I.A. No. 516, 517, 543 & 795 of 2022
in Company Appeal (AT) No. 346 of 2018**

IN THE MATTER OF:

Union of India

....Appellant

Vs.

**Infrastructure Leasing and Financial
Services Ltd. & Ors**

...Respondents

Present:

Mr. Ramji Srinivasan, Sr. Advocate with Mr. Raunak Dhillon, Mr. Abhijeet Das, Mr. Adarsh Saxena, Mr. Vikash Kumar Jha, Mr. Shubhankar Jain, Ms. Isha Malik, Mr. Nihaad Dewan, Mr. Ritu Vishwakarma, Ms. Drishti Das, Ms. Ananya Choudhury, Advocates for ILFS/ ITPCL.

Ms. Meenakshi Arora, Sr. Advocate with Mr. Divyansh Khurana, Advocate for SEPCO and Shandong.

Mr. Amit Anand Tiwari, Mr. Ranjit Prakash, Ms. Vishalakshi Singh & Ms. Devyani Gupta, Advocates for SEPCO.

Mr. Atul Sharma, Mr. Abhishek Sharma, Ms. Ashly Cherian and Ms. Harshita Agarwal, Advocates for CDTE and DTEI.

Mr. Sanjay Bajaj, Advocate for Punjab National Bank.

Mr. Sanjeev Sen, Advocate for PTC India Financial Services Limited.

ORDER

ASHOK BHUSHAN, J.

These Applications being interrelated have been heard together and are being disposed off by this common order. We may first notice the brief contents of the Applications and the prayers made therein.

Cont'd.../

I.A. No. 59 of 2021

2. I.A. No. 59 of 2021 has been filed by ILFS Ltd. seeking approval of this Tribunal to allow restructuring proposal of IL&FS Tamil Nadu Power Company Ltd. (hereinafter referred to as 'ITPCL') in terms of the term sheet received from the Consortium of Banks which has been referred to as 'ITPCL Restructuring Plan'. The Applicant sought for implementing the Restructuring Plan for conversion of ITPCL from 'Amber' to 'Green'. The application placed that ITPCL Restructuring Plan has been prepared in accordance with Circular dated 07.06.2019 issued by the Reserve Bank of India (RBI) titled as 'Prudential Framework for Resolution of Stressed Assets'. In the Application, the Applicant has given brief history of the case beginning from filing of petition under Section 241-242 of Companies Act, 2013 by Union of India before the National Company Law Tribunal (NCLT), Mumbai Bench. The Board of Directors of ILFS were removed and replaced by new Board of Directors as proposed by the Union of India. This Tribunal in an Appeal filed by Union of India being Company Appeal (AT) No. 346 of 2018 passed an interim order on 15.10.2018 issuing certain protective orders to ILFS and its group companies. Reference is also been made to various orders passed by this Tribunal for resolution of difference group companies of ILFS. IEDCL is a subsidiary company of ILFS which is an energy developing company. ILFS together with IEDCL holds 92.4% of shareholding in the ITPCL. ITPCL was formed for setting up a 3,840 MW Coal based Thermal Power Project at Cuddalore in the state of Tamil Nadu. In Phase-I of the project, a thermal power plant consisting of two units of 600 MW each

were to be established. For setting up two units, the ITPCL obtained financial benefit from Consortium of Banks. ITPCL also granted contract to EPC Contractors for the purpose of setting of the Power Plant. In February, 2019, public process was launched for sale of the ILFS Group's stake in ITPCL but no binding bids were received in the sale process. Thereafter, the lenders of ITPCL undertook the task of formulating restructuring proposal in accordance with Circular dated 07.06.2019 issued by the RBI. In the restructuring proposal outstanding amounts of all creditors were considered as per the books of ITPCL as on 15.10.2018 (Cut-off date). The total debt of ITPCL was divided into Sustainable and Unsustainable Debt. Restructuring Plan also provided details of distribution/ apportionment of Sustainable and Unsustainable Debt. In the Application I.A. No. 59 of 2021 following prayers have been made:-

“a) Permit and approve the restructuring proposal of Respondent No.2 (ITPCL Restructuring Plan) sought to be implemented to restructure the debt of Respondent No.2 on the terms set out above and as set out in the respective term sheets by the Consortium of Banks:

b) Permit the Applicant and IL&FS Energy Development Corporate Limited to implement the Term Sheets dated October 16, 2020, December 12, 2020, December 16, 2020 (3 term sheets), December 21, 2020, December 29, 2020 with Punjab National Bank, Bank of Baroda, LIC, SBM Bank, SBI, Union Bank of India, PFC Limited respectively, and such

other banks which form part of the consortium on similar terms;

c) Following the approval of the ITPCL Restructuring Plan, direct that the said Restructuring Plan be binding on all stakeholders of Respondent No.2 (including Group, Operational and CAPEX Creditors) and that any claim, entitlement or contingent liability (disclosed or undisclosed) of any nature (statutory, contractual or otherwise), and whether existing at or relating to a period prior to the Cut-off date which is specifically not provided/contemplated in the ITPCL Restructuring Plan be extinguished immediately upon implementation of the ITPCL Restructuring Plan;

d) Confirm termination of the Terminated Contracts and direct that any claim, entitlement, or contingent liability (disclosed or undisclosed) that may arise from Terminated Contracts/Under Scrutiny Transactions on account of termination of the respective contracts or which relate to period beyond the termination date or to the extent has not been provided under ITPCL Restructuring Plan shall stand extinguished; and

e) Grant any further reliefs as this Hon'ble Tribunal deems fit and proper in the facts and circumstances.”

3. This Tribunal vide order dated 01.12.2021 allowed prayers (a) and (b) of I.A. No. 59 of 2021. By a subsequent order dated 31.01.2022, while

hearing I.A. No. 59 of 2021, this Tribunal granted time to the Operational Creditors who were to be effected by prayers (c) and (d) in the application to filed their objections. In pursuance of liberty granted on 31.01.2022, impleadment application and objections have been filed by the Operational Creditors/ Capex Creditors who were going to be effected by the prayers (c) and (d) in the application. In I.A. No. 59 of 2021, reply has been filed by the Capex Creditors. In the Application I.A. No. 59 of 2021, in Para 28 certain transactions were referred to as 'Excluded or to be Excluded Transactions'. The Objectors submitted before this Tribunal that details as mentioned in Para 28 and documents relied in Para 28 of the application have not been brought on record by the ILFS, hence, it may be directed to bring the materials relied for extinguishing claims of the Operational Creditors/ Capex Creditors on record. This Court passed order on 25.02.2022 granting time to the Applicant to place materials on record as referred to in Para 28 of the Application. The ILFS in pursuance of the liberty granted on 25.02.2022 has filed the reply to the objections received vide its Reply dated 23.03.2022. I.A. No. 516 of 2022 has been filed by 'SEPCO III Electric Power Construction Co. Ltd.' and I.A. No. 517 of 2022 has been filed by 'Shandong Tiejun Electric Power Engineering Company Limited', details of which we shall notice hereinafter. I.A. No. 543 of 2022 was also filed by two Capex Creditors seeking impleadment. The prayer in I.A. 59 of 2021 is now confined to prayers (c) and (d) which prayers have been pressed by learned senior counsel for ILFS.

I.A. No. 516 of 2022

4. I.A. No. 516 of 2022 has been filed by 'SEPCO III Electric Power Construction Co. Ltd.' (hereinafter referred to as 'SEPCO'). The case of SEPCO is that SEPCO was engaged as EPC Contractor by the ITPCL and contract dated 22.12.2010 namely 'Offshore Equipment Supply Contract' was executed. SEPCO states that it has completed 100% supply under the 'Offshore Equipment Supply Contract'. Under the contract SEPCO completed the works and ITPCL being satisfied has issued Provisional Acceptance Certificate for Unit-1 on 25.12.2016 and for Unit-2 on 21.05.2016 and Final Acceptance Certificate for both units was issued on 31.05.2018 and both the units have been commercially operating and generating power since 25.12.2015 and 30.05.2016, respectively. There have been deliberations between the parties for the outstanding amount held in the year 2018. Although a part of amount was paid, amount of USD 16,638,568 remained unpaid. The Applicant also filed an Intervention Application in the Company Appeal (AT) No. 346 of 2018 and 347 of 2018 in February, 2019. In furtherance of the public announcement dated 25.02.2019 published on the website of ITPCL, the claim was filed to the Claim Management Advisor namely 'Grant Thornton India LLP' admitted the claim of the SEPCO to the tune of INR 123,07,68,178/-. It is submitted that in spite of admitted claim of the SEPCO now by I.A. No. 59 of 2021 the ILFS on the plea of restructuring of debt of ITPCL is trying to extinguish the claim of SEPCO. The Applicant by the application has prayed for the following reliefs:-

- “a) Allow the Application and permit the Applicant to be impleaded in the present interlocutory application bearing I.A. No. 59 of 2021 read with Company Appeal (AT) No. 346/2018 pending before this Hon’ble Tribunal;*
- b) Direct the Respondent to disclose/ produce the documents referred to and mentioned in para 28 the IA No.59 of 2021 including but not limiting to purported Forensic Audit Report through Grant Thornton India LLP, Transaction Review Report dated June 30, 2020 and further grant liberty to the Applicant to file its detailed Affidavit in rebuttal to IA No. 59 of 2021.*
- c) Reject the contradictory, inconsistent and illegal plea of the Respondent for extinguishment of the Applicant’s admitted claims against the Respondent as sought by the Respondent vide its prayers c) and d) respectively, of the application i.e. IA 59/2021;*
- d) Any other/further Orders which this Hon’ble Tribunal may deem fit in the facts and circumstances of the present case.”*

I.A. No. 517 of 2022

5. This I.A. has been filed by ‘Shandong Tiejun Electric Power Engineering Company Limited’ (hereinafter referred to as ‘Shandong’). The case of the Applicant – Shandong is that Shandong was engaged as EPC

Contractor by the ITPCL for Unit-1 and Unit-2 of Thermal Power Plant at Cuddalore District, Tamil Nadu. On 22.12.2010, four contracts for supply and erection of plant were entered with Shandong. An Amendment Agreement dated 13.05.2015 entered to extend the commencement dates of both the Units. The Shandong has discharged its part of the contractual obligation and Provisional Acceptance Certificate towards both Unit-1 and Unit-2 were issued on 25.12.2015 and 31.05.2016, respectively. Both the units have been generating power since 25.12.2015 and 31.12.2016, respectively. There have been deliberations between the parties regarding payments of the outstanding amount. The ITPCL agreed for payment of admitted outstanding amount but only part payment was made. In pursuance of public notice by Claim Management Advisor, Shandong has filed its claim where the claim of Shandong for INR 2,69,34,55,673/- has been admitted. The admitted claim of Shandong has not been paid and now ILFS by I.A. No. 59 of 2021 wants to extinguish the claim of Shandong. In the Application I.A. 517 of 2022 following prayers have been made:-

- “a) Allow the Application and permit the Applicant to be impleaded in the present interlocutory application bearing I.A. No. 59 of 2021 read with Company Appeal (AT) No. 346/2018 pending before this Hon’ble Tribunal;*
- b) Direct the Respondent to disclose/ produce the documents referred to and mentioned in para 28 the IA No.59 of 2021 including but not limiting to purported Forensic Audit Report*

through Grant Thornton India LLP, Transaction Review Report dated June 30, 2020 and further grant liberty to the Applicant to file its detailed Affidavit in rebuttal to IA No. 59 of 2021.

- c) Reject the contradictory, inconsistent and illegal plea of the Respondent for extinguishment of the Applicant's admitted claims against the Respondent as sought by the Respondent vide its prayers c) and d) respectively, of the application i.e. I.A 59/2021;*
- d) Any other/further Orders which this Hon'ble Tribunal may deem fit in the facts and circumstances of the present case."*

I.A. No. 543 of 2022

6. This Application has been filed by two Applicants namely (i) China Datang Technologies and Engineering Co. Ltd. (hereinafter referred to as 'CDTE') and (ii) Datang Technologies & Engineering India Pvt Ltd. (hereinafter referred to as 'DTEI'). By I.A. No. 543 of 2022, Applicants have prayed for impleadment in I.A. 59 of 2021. Alongwith filing I.A. 543 of 2022, an affidavit in reply has also been filed by both the above Operational Creditors. The case of the CDTE and DTEI as detailed in the reply is that CDTE is a company registered under the laws of Republic of China and DTEI is a subsidiary company of CDTE incorporated in India. ITPCL in February, 2013 invited bids for developing wet limestone based FGD plant

for Phase-I. The bid of CDTE was declared as successful and awarded the contract vide Letter of Award dated 20.03.2013. In pursuance of issuance of LOA, four contracts were entered between ITPCL and CDTE. In terms of the Contract, CDTE was required to submit Performance Bank Guarantee (PBG), which was duly submitted. There had been Amendment Agreement by which date of commencement was extended. CDTE performed all its obligations in terms of the contracts and Unit-2 is in commercial operation for more than four years but appropriate certificates i.e. Provisional Acceptance Certificate and Final Acceptance Certificate have not been issued due to which the ITPCL continued to hold the PBG. Under the orders of Appellate Tribunal dated 11.02.2019, the ITPCL was categorized as 'Amber' entity. ITPCL informed that due to initiation of insolvency resolution process, it is not possible to make payment to CDTE and DTEI. Both CDTE and DTEI filed their claims before the Claim Management Advisor – Grant Thornton. The Claim Management Advisor admitted following claims:-

CDTE: INR 1,58,76,33,494/-

DTEI: INR 62,88,55,934/-

7. It is the case of CDTE and DTEI that delayed payment is causing considerable financial losses. The ITPCL directed the CDTE to extend the PBG under the contract. The CDTE addressed various representations to Hon'ble Justice D. K. Jain (Retd.) seeking his intervention last being 14.05.2021 praying for closure of the contract and issuing Provisional

Acceptance Certificate and Final Acceptance Certificate and further to release the PBG furnished by the CDTE. Application further state ITPCL is attempting to restructure the debt of ITPCL in terms of RBI Circular dated 07.06.2019. There is no Resolution Plan in the instant case and terms of proposed payment to all creditors by ITPCL in the Restructuring Plan could not have been dealt with. The admitted claim has been divided into Sustainable and Unsustainable Debt without any rationale. By I.A. 59 of 2021, the claim of CDTE and DTEI is sought to be extinguished without any basis.

I.A. No. 795 of 2022

8. I.A. No. 795 of 2022 has been filed by Punjab National Bank, which is lead Bank, for and behalf of the lenders of ITPCL. Borrower has obtained Rupee Loan Working Capital Facility from the lenders by hypothecating all its current assets and immovable assets. In pursuance of the RBI Circular dated 07.06.2019, restructuring has been proposed of the ITPCL. Punjab National Bank supports the prayers made in the I.A. 59 of 2021. By this Application impleadment has been prayed for as well as implementing Restructuring Plan by allowing prayer (c) and (d) as made in I.A. 59 of 2021.

9. We have heard Shri Ramji Srinivasan, learned senior counsel appearing for the Applicant in I.A. No. 59 of 2021, Shri Atul Sharma, learned counsel appearing for China Datang Technologies and Engineering Co. Ltd. and Datang Technologies & Engineering India Pvt Ltd., Ms.

Meenakshi Arora, Sr. Advocate appearing for SEPCO and Shandong. Shri Amit Anand Tiwari has also appeared for SEPCO.

10. Shri Ramji Srinivasan, learned senior counsel submits that the Restructuring Plan of the ITPCL has been prepared with the agreement of the lenders under which total outstanding liabilities of ITPCL are being dealt in a fair and reasonable manner. As per Techno Economic Viability Study, the debts have been classified into 'Sustainable Debt' and 'Unsustainable Debt'. It is submitted that the New Board had commissioned a Forensic Audit through Grant Thornton in respect of the transactions entered into by ITPCL. The Transaction Review Auditor carried out investigation and made certain findings in the Transaction Review Report, which demonstrate that certain transactions including the Under Scrutiny Transactions may fall within the purview of Section 66 of the Insolvency and Bankruptcy Code, 2016. It is submitted that the amounts identified in connection with the Under Scrutiny Transactions under the Sustainable and Unsustainable Debt will be paid, subject to clearance by investigating agencies/ any judicial process and in case of adverse findings/ final pronouncement, no amount will be paid in connection with the Under Scrutiny Transaction.

11. In reply to the objections placed by SEPCO, it is submitted that with regard to SEPCO III and Shandong Tiejun, the Transaction Review Report has referred both the entities collectively as 'SEPCO'. Irregularities in selection process and in awarding contract have been found. SEPCO provided financial assistance to AS Coal to invest in ITPCL, to repay which

fund, value of EPC Contract was potentially increased/ inflated by ITPCL. An email dated 22.09.2020 has been received from Investigating Officer, Enforcement Directorate informing ITPCL that the transactions between ITPCL and SEPCO are under investigation. ITPCL was directed to not release any money to SEPCO or Shandong. The Provisional Attachment Order dated 05.01.2021 has also been passed under Prevention of Money Laundering Act, 2002 (hereinafter referred to as 'PMLA Act'). In the Provisional Attachment Order shares of AS Coal has been attached. Subsequently, the Provisional Attachment Order was confirmed by order dated 24.08.2021. It is submitted that due to above Under Scrutiny Transactions, the dues has to be kept in abeyance to the SEPCO and Shandong. It is further submitted that Section 66 Application has been filed before the Adjudicating Authority, which is wholly independent proceeding.

12. Shri Srinivasan replying to the objections raised by CDTE and DTEI submitted that all Operational Creditors are being similarly treated in the Restructuring Plan. The debt has been divided into Sustainable and Unsustainable Debt on the basis of future cash flow projection of ITPCL. ITPCL is using the principle of 4:2:1, which is proportionate to the outstanding total liabilities of ITPCL, which will lead to systematic pay out of dues. For the sustainable debt portion under the ITPCL Restructuring Plan, the Secured Consortium Lenders would be entitled to 59% recovery, the other Financial Creditors would be entitled to 30% recovery, and the

Operational & Capex Creditors would be entitled to 15% recovery. This is in addition to the recovery that the said creditors would be entitled to under the unsustainable debt category. Shri Srinivasan submits that the Restructuring Plan has already been approved by allowing prayer (a) and (b) by order dated 01.12.2021; now prayer (c) and (d), as prayed in I.A. 59 of 2021, be also allowed to fully implement the Restructuring Plan.

13. Ms. Meenakshi Arora, learned senior counsel appearing for SEPCO and Shandong submits that Grant Thornton has already admitted all the outstanding dues of the SEPCO and Shandong which amount they are entitled to receive from ITPCL. It is submitted that the project of Unit-1 and Unit-2 has already been completed and both the units are generating power and ITPCL is receiving commercial benefits out of generation of power, however, SEPCO and Shandong, who has completed their part of contract, have not been paid their dues. The prayer (d) made in I.A. 59 of 2021 that dues of SEPCO and Shandong be treated to be extinguished is wholly unjustified and needs to be rejected by this Tribunal. It is submitted that no proceedings under PMLA Act has been initiated against SEPCO or Shandong nor there is any adjudication holding that SEPCO and Shandong are involved in money laundering. Both Provisional Order dated 05.01.2021 and Confirmation Order dated 24.08.201 passed by the Adjudicating Authority under the PMLA Act only attaches the shares of AS Coal. The case set out by ILFS that the claim of SEPCO and Shandong be extinguished is unfair, unreasonable and without any basis. The Capex

Creditors are entitled to receive their outstanding dues, which they are waiting for more than four years, the amount having been admitted by the Claim Management Advisor. It is further submitted that after email dated 22.09.2020 which is said to be Freezing Order, there are no further confirmation of the order by Adjudicating Authority or any further proceeding taken in accordance with PMLA Act. The email dated 22.09.2020 cannot continue indefinitely and the Freezing Order shall be treated to be come to an end after a month. It is submitted that no application was filed by the Investigating Officer, Enforcement Directorate within one month from 22.09.2020 as required under Section 17 of PMLA Act. Learned Senior Counsel for the Applicants in I.A. 516 and 517 of 2022 also relied on judgment of Hon'ble Supreme Court in the matter of '*OPTO Circuit India Ltd. Vs. Axis Bank & Ors*', (2021) 6 SCC 707.

14. Shri Atul Sharma, learned counsel appearing for CDTE and DTEI submits that both the entities were awarded contract in the year 2013 and they have completed their part of contract. It is submitted that both the units started commercially operating more than four years ago but Provisional Acceptance Certificate and Final Acceptance Certificate has not been issued inspite of letter dated 16.06.2017 that supplies are satisfactory. It is submitted that Claim Management Advisor has admitted the claim of both the entities. Both the entities filed I.A. 1958 of 2021 seeking prayer for decision by Hon'ble Justice Shri D. K. Jain (Retd.) in representation which has already been submitted by both the entities for closure of contract and

for release of PBG. It is submitted that in Para 13 of the Application 59 of 2021 a different amount has been mentioned against both the entities whereas amount admitted was different.

15. We have considered submissions of learned counsel for the parties and perused the record.

16. The main issue to be answered in these applications is as to whether prayer (c) and prayer (d) as made in Application I.A. No. 59 of 2021 deserves to be allowed or rejected.

17. The main case of ILFS in its application I.A. No. 59 of 2021 is that the Restructuring Plan which has been finalized with the consent of Lenders is in accordance with RBI Circular dated 07.06.2018. Copy of Circular dated 07.06.20198 has been brought on record as Annxure-4 to the I.A. No. 59 of 2021. Para 3 of the Circular deals with applicability. Para 3 is as follows:-

“Applicability

3. *The provisions of these directions shall apply to the following entities:*

(a) *Scheduled Commercial Banks (excluding Regional Rural Banks);*

(b) *All India Term Financial Institutions (NABARD, NHB, EXIM Bank, and SIDBI);*

(c) *Small Finance Banks; and*

(d) *Systemically Important Non-Deposit taking Non-Banking Financial*

*Companies (NBFC-ND-SI) and Deposit
taking Non-Banking Financial
Companies (NBFC-D).”*

18. The expression ‘Restructuring’ has also been explained in the Circular in following words:-

“Restructuring is an act in which a lender, for economic or legal reasons relating to the borrower’s financial difficulty, grants concessions to the borrower. Restructuring would normally involve modification of terms of the advances / securities, which would generally include, among others, alteration of payment period / payable amount / the amount of instalments / rate of interest, roll over of credit facilities; sanction of additional credit facility/ release of additional funds for an account in default to aid curing of default / enhancement of existing credit limits; compromise settlements where time for payment of settlement amount exceeds three months.”

19. As noted above, the Consortium of Lenders has approved the Restructuring Plan to restructure debt of ITPCL. No objection can be raised to the Restructuring Plan when the Restructuring Plan is in accordance with the Circular dated 07.06.2019, which has support of 100% lenders. The restructuring of the debt as contemplated by Circular dated 07.06.2019 as per Para 3 of the Circular extracted above is to apply principally on entities mentioned therein. The restructuring proposal is basically a settlement

between the Lenders and Debtor i.e. ITPCL. Now, the debt that will be restructured with the period and amount are all part of the Restructuring Plan. In the Restructuring Plan the ITPCL and the Lenders have also included the payment to Operational Creditors/ Capex Creditors. The payments to Operational Creditors/ Capex Creditors is the matter of Resolution Plan which needs to be framed and approved as per Revised Resolution Framework approved by this Tribunal dated 12.03.2020.

20. It is also to be noted that in the I.A. No. 59 of 2021, the Operational Creditors/ Capex Creditors were not made parties and prayers (c) and (d) were made in the application seeking extinguishment of their claim and termination of their contracts and claim entitlement. This Tribunal granted opportunity to the Operational Creditors/ Capex Creditors to file objections. Consequently, objections/ I.As. have been filed by following:-

- (i) SEPCO III Electric Power Construction Co. Ltd.
- (ii) Shandong Tiejun Electric Power Engineering Company Limited
- (iii) China Datang Technologies and Engineering Co. Ltd.
- (iv) Datang Technologies & Engineering India Pvt Ltd.

21. There is no dispute between the parties that in pursuance of the public notice issued by Claim Management Advisor – ‘Grant Thornton’, all the Objectors have filed their claim and the Claim Management Advisor after collating and verifying the claim has admitted the claims of Capex Creditors. The objectors have brought on record the updated list of creditors as on

31.12.2021 as Annexure – A6 to I.A. No. 516 of 2022. As per the admitted claim following is the admitted claims of the Objectors:-

S. No.	Name of Creditor	Date of receipt	Amount claimed	Amount admitted	Nature of claim
4.	China Datang Technologies And Engineering Co. Ltd.	19 Jun 2019	1,587,633,494	1,587,633,494	Construction Service
7.	Datang Technologies And Engineering India Pvt. Ltd.	19 Jun 2019	628,855,934	628,855,934	Construction Service
19.	SEPCO III Electric Power Construction Co. Ltd.	17 Jun 2019	1,230,768,178	1,230,768,178	Supply of Goods
20.	Shandong Tiejun Electric Power Engineering Company Limited	17 Jun 2019	2,693,455,673	2,693,455,673	Construction Service
21.	Shandong Tiejun Electric Power Engineering Company Limited	17 Jun 2019	177,146,410	--	Other Services

22. We may also notice that objection was also raised by the Objectors regarding the difference in the amount of claim which is claimed in Para 13 of the Application to one which was admitted by the Claim Management Advisor. In Para 13 with regard to Capex Creditors/ Operational Creditors following is the relevant clause:-

“Note: (i) Outstanding amounts are as per the books of ITPCL; (ii) The amounts are based on the last audited balance sheet date of March 31, 2019

CAPEX Creditors in INR Crore

Name of the Vendor	Outstanding
<i>China Datang Technologies</i>	<i>149.11</i>
<i>Coastal Marine Construction</i>	<i>44.24</i>
<i>Datang Technologies & Engg.</i>	<i>64.69</i>
<i>Sepco III Electric Power</i>	<i>115.09</i>
<i>Shandong Tiejun Electric</i>	<i>235.05</i>
Total	608.18

Outstanding amounts are as per the books of ITPCL

Note- The liabilities of Operational and Capex Creditors denominated in foreign currency have been converted at the exchange rate (US\$ to INR) as at the last audited balance sheet date of 31st March 2019.”

23. It has been explained in the Reply filed by the ILFS that the difference is only on account of conversion at the exchange rate as prevailing at the last audited balance sheet dated 31.03.2019. This is not an issue which may detain us since there is no dispute that the claims, as per Para 13 of the I.A. No. 59 of 2021, of the Capex Creditors have already been accepted and admitted and we proceed to examine on the basis of claims as has been mentioned in Para 13 of the I.A.

24. We may first consider the submissions of the parties on ‘Excluded or to be Excluded Transactions’ as claimed by ILFS. We may first notice that

with regard to excluded transactions, the issue relates only to SEPCO and Shandong. With regard to other two entities i.e. CDTE and DTEI, there is no issue pertaining to excluded transactions. The basis given by ILFS to exclude the transactions is the 'Forensic Audit Report' through Grant Thornton India LLP and 'Report on Forensic Audit of IL&FS Tamil Nadu Power Company Limited (ITPCL)' on June 30, 2020 (in short 'Transaction Review Report') submitted by Transaction Review Auditor. The case of the ILFS is that in the above reports adverse findings have been given with regard to SEPCO and Shandong. It is also on record that in pursuance of the aforesaid reports, the ITPCL has also filed application under Section 66 of the I&B Code before the Adjudicating Authority being CA No. 190 of 2022 dated 06.04.2022. It is for the Adjudicating Authority to consider the Section 66 application and pass appropriate order. However, the fact that Section 66 application is filed and pending consideration, on the basis of certain adverse observations against the Capex Creditors/ Operational Creditors, the outstanding amount which is admitted by the Claim Management Advisor cannot be withheld to be paid relying on any observation in the Forensic Audit Report or Transaction Review Report. The submission on which Shri Ramji Srinivasan, learned counsel for ILFS has placed much reliance is the proceeding initiated under the PMLA Act. It is submitted that the Investigating Officer issued email dated 22.09.2020, where it was mentioned that no kind of payment be made to SEPCO and Shandong. The email dated 22.09.2020 is as follows:-

"From: "Rana Banerjee"

To: "NK Balaji" , "n ramesh" , "Maharudra Wagle"

Cc "Piyush Yadav"

Date 09/22/2020 01 :48 PM

*Subject: Investigation under PMLA, 2002 against
IL&FS and its other group companies- reg*

Sir,

This Directorate is conducting investigation under the Prevention of Money Laundering Act, 2002 against IL&FS and its other Group Companies. IL&FS Tamil Nadu Power Company Ltd. (ITPCL) is also in the purview of the said investigation being conducted by this Directorate. During the course of investigation it has appeared that SEPCO Ill and Shandong Tiejun Electric Power Engineering Co. Ltd. had been the EPC contractors for Phase I and Phase II for IL&FS Tamil Nadu Power Company Ltd. Awarding of the said contract and other associated financial transactions are under the scope of our investigation and have drawn adverse remark.

*In view of the above, it is directed by this office of Directorate of Enforcement to ITPCL, **not to** make any kind of further payment to SEPCO Ill and Shandong Tiejun Electric Power Engineering Co. Ltd. towards their dues against the work done in the IL&FS Tamil Nadu Power project. without prior permission of this Directorate or till further Order of this Directorate. whichever is earlier. During the*

course of investigation it has appeared that INR 352 Cr (approximately, as per present foreign exchange rate) is payable to EPC Contractors by ITPCL and hence it is directed to freeze the entire amount payable to EPC Contractors.

This issues under the provisions of the Prevention of Money Laundering Act, 2002.

Kindly acknowledge receiving of this mail.

*Rana Banerjee,
Investigating Officer,
Enforcement Directorate,
MbZO-1, Mumbai
022-22719937”*

25. Apart from above email, reliance has been laid on Provisional Attachment Order dated 05.01.2021 passed by the Adjudicating Authority in exercise of powers conferred under Sub-section (1) of Section 5 of the Provisions of Money Laundering Act, 2002. The Provisional Attachment Order has been filed as Annexure – 4 to the Reply. By the Provisional Attachment Order the shares of M/s AS Coal has been attached. Last two paragraphs of the order which are relevant in the case are as follows:-

*“36. From the statement of officials of ITPCL and mail dated 04.09.2020 received from CFO of ITPCL, it appears that ITPCL is yet to pay Rs. 352 Cr. Apart from that, presently **A. S. Coal is holding 8.86% shares of ITPCL which it acquired from the proceeds of crime. A. S. Coal has executed one non disposable agreement with Noble Coal Pte, Singapore.***

Hence, 14,851,486 numbers of shares of ITPCL equivalent to 8.86% shares of ITPCL, presently valued Rs.449,24,26,000 @ Rs.302.48, is the proceeds of crime which is in possession of M/s A. S. Coal Pte. ltd., Singapore. Therefore, in terms of Section 2(1)(u) of PMLA, 2002, the 14,851,486 numbers of shares of ITPCL equivalent to 8.86% shares of ITPCL, presently valued Rs. 449,24,26,000 @ Rs. 302.48 are liable for attachment, under Section 5(1) of The Act.

37. **NOW THEREFORE** in exercise of the powers conferred under sub-section (1) of the Section 5 of the Prevention of Money Laundering Act 2002(15 of 2013) read with Notification No.GSR.441(E), dated 1st July, 2005 and in terms of the authorization dated 07.02.2007, issued by the Director of Enforcement, Directorate of Enforcement, New Delhi read with Addendum No.DLA(A)/AUT/5:8(4)/03/2010 dated 12.10.2011, I hereby provisionally attach the moveable properties as 14,851,486 numbers of shares of ITPCL equivalent to 8.86% shares of ITPCL, presently valued Rs. 449,24,26,000 @ Rs. 302.48, for a period of 180 days (One Hundred and Eighty Days) and further order that the same shall not be transferred, disposed-off, alienated or parted with or otherwise dealt with in any manner whatsoever until or unless specifically permitted to do so by the undersigned.”

26. The above Provisional Order indicates that what have been provisionally attached are shares of ITPCL held by M/s A. S. Coal Pte. Ltd. There is no attachment of any of the assets of SEPCO or Shandong. The Provisional Order was subsequently also confirmed by order dated 24.08.2021 passed by the Adjudicating Authority. The copy of the order dated 24.08.2021 has also been brought on record as Annexure – 6 to the Reply. Conclusion of order contained in Para 18, is to the following effect:-

“18. CONCLUSIONS:

I have carefully considered the written replies filed by the Defendants to the Notice to show cause. I have also considered the rejoinders filed by the Complainant to the written replies. I have heard the Counsel for the Defendant at length. I have also heard the Counsel for the Complainant. I have taken into account all the relevant materials placed on record before me.

Considering the material in O.C., the written replies and rejoinders and the arguments above referred, I find that the immovable properties provisionally attached by PAO No. 01/2021 dated 05.01.2021 i.e, movable properties mentioned at page no- 3 of this order are involved in money laundering.

a. I, therefore, hereby confirm the attachment of the properties made under sub-section (1) of Section 5 of PMLA. I, therefore, order that the said Attachment shall continue during pendency of the proceedings relating to any offence under the prevention of Money-Laundering Act, 2002 before the

Special Court; (prosecution complaint for the offence of money-laundering is filed) and become final after an order of confiscation is passed under Sub-section (5) or sub-section (7) of section 8 of PMLA by the Special court.

b. PAO No. 01/2021 dated 05.01.2021 is hereby confirmed.

c. Hence OC no. 1403/2021 is allowed.”

27. The above order confirming the Provisional Attachment Order is regarding the 8.86% shares of ITPCL. Para 18 refers to movable properties mentioned on Page 3 of the Order. Page 3 of the Order mentions ‘Schedule of Properties’, which is to the following effect:-

“2. SCHEDULE OF PROPERTIES

S N	Description of Property	Owner of the Property	Value as on December 2020
1	A. S. Coal Pte. (owned and controlled by Mr. Jaimin Vyas) is holding 8.86% shares of ITPCL totalling to 14,851,486 numbers of shares	M/s A.S. Coal Pte., Singapore	Rs. 449,24,26,000/- @ Rs. 302.48

28. From the Provisional Attachment Order as well as the Final Attachment Order dated 24.08.2021 it is clear that what is attached is

shares of A S Coal Pte. Ltd. There is no other attachment of any assets of SEPCO or Shandong.

29. Now we revert back to the email dated 22.09.2020. This email has been issued by the Investigating Officer, where Freezing Order was passed with regard to amount payable to EPC Contractors. Section 17(1A) of the PMLA Act, 2002 empowers freezing of the property. Section 17 of the Act is relevant, which is to the following effect:-

“17. Search and seizure- (1) Where the Director or any other officer not below the rank of Deputy Director authorized by him for the purposes of this section, on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person-

- (i) has committed any act which constitutes money-laundering, or*
- (ii) (ii) is in possession of any proceeds of crime involved in money-laundering, or*
- (iii) is in possession of any records relating to money-laundering, or*
- (iv) is in possession of any property related to crime*

then, subject to the rules made in this behalf, he may authorise any officer subordinate to him to-

- (a) Enter and search any building, place, vessel, vehicle or aircraft where he has reason to*

suspect that such records or proceeds of crime are kept;

- (b) Break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (a) where the keys thereof are not available;*
- (c) seize any record or property found as a result of such search;*
- (d) place marks of identification on such record of property, if required or make or cause to be made extracts or copies therefrom;*
- (e) make a note or an inventory of such record or property;*
- (f) examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under this Act:*

(1A) Where it is not practicable to seize such record or property, the officer authorised under sub-section (1), may make an order to freeze such property whereupon the property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned:

Provided that if, at any time before its confiscation under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60, it becomes practical to seize a frozen

property, the officer authorised under sub-section (1) may seize such property.

(2) The authority, who has been authorised under sub-section (1) shall, immediately after search and seizure or upon issuance of a freezing order forward a copy of the reasons so recorded along with material in his possession, referred to in that sub-section, to the Adjudicating Authority in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such reasons and material for such period, as may be prescribed.

(3) Where an authority, upon information obtained during survey under section 16, is satisfied that any evidence shall be or is likely to be concealed or tampered with, he may, for reasons to be recorded in writing, enter and search the building or place where such evidence is located and seize that evidence:

Provided that no authorisation referred to in sub-section (1) shall be required for search under this sub-section.

(4) the authority seizing any record or property under sub-section (1) or freezing any record or property under sub-section (1A) shall, within a period of thirty days from such seizure or freezing, as the case may be, file an application, requesting for retention of such record or property seized under sub-section (1) or for continuation of the order of freezing served under sub-section (1A), before the Adjudicating Authority.”

30. Section 17 provides for scheme for search and seizure. Sub-section (4) of Section 17 requires that authority seizing any record or property or freezing any record or property shall, within a period of thirty days from such seizure or freezing, file an application, requesting for retention of such record or property seized under sub-section (1) or for continuation of the order of freezing, before the Adjudicating Authority. The present is the case where there is no material to indicate that any application under Section 17(4) was filed after the email dated 22.09.2020. In the application which has been filed by ILFS i.e. I.A. No. 59 of 2021 there is no mention of filing of any application under Section 17(4). More so, in the present case, consequent to the investigation Provisional Order has been passed on 05.01.2021 and final confirming order was passed on 24.08.2021, which we have already notice. There is no order of the Adjudicating Authority confirming or continuing the Freezing Order. Thus, directions issued by the Investigating Officer by email dated 22.09.2020 cannot be said to be still continuing so as to inhibit the ITPCL to make payment to Operational Creditors/ Capex Creditors. The Hon'ble Supreme Court in '**OPTO Circuit India Ltd. Vs. Axis Bank & Ors', (2021) 6 SCC 707** had occasion to consider Section 17 of the PMLA Act. In Para 9, 10 and 14 following has been observed:-

"9. A perusal of the above provision would indicate that the prerequisite is that the Director or such other Authorised Officer in order to exercise the power under Section 17 of PMLA, should on the basis of

information in his possession, have reason to believe that such person has committed acts relating to money laundering and there is need to seize any record or property found in the search. Such belief of the officer should be recorded in writing. Subsection (1A) to Section 17 of PMLA provides that the Officer Authorised under subsection (1) may make an order to freeze such record or property where it is not practicable to seize such record or property. Subsection (2) provides that after search and seizure or upon issuance of a freezing order the Authorised Officer shall forward a copy of the reasons recorded along with material in his possession to the Adjudicating Authority in a sealed envelope. Subsection (4) provides that the Authority seizing or freezing any record or property under subsection (1) or (1A) shall within a period of thirty days from such seizure or freezing, as the case may be, file an application before the Adjudicating Authority requesting for retention of such record or properties seized.

10. For the purpose of clarity, it is emphasised that the freezing of the account will also require the same procedure since a bank account having alleged 'proceeds of crime' would fall both under the ambit "property" and "records". In that regard it would be appropriate to take note of Section 2(v) and (w) of PMLA which defines "property" and "records". The same read as follows:

"Sec. 2(v) "property" means any property or assets of every description, whether corporeal or incorporeal,

movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located.”

“Sec. 2(w) – “records” – include the records maintained in the form of books or stored in a computer or such other form as may be prescribed.”

14. The respondent No.4 in the counter affidavit has stated that the action initiated against the appellant is based on the complaint dated 02.11.2019 made by the State Bank of India alleging that the appellant, its Chairman and the Promoter Directors have conspired and cheated them to tune of Rs. 354.32 crores by diversion of funds abroad. In that regard the CBI has registered the case in FIR No. RC 18(A)/2019 dated 04.11.2019 under Section 120(B) read with Section 420, 468 and 471 IPC and under Section 13(2) read with section 13(1)(d) of Prevention of Corruption Act, 1988. Since the said offences are also schedule offences under Section 2(1)(x) and (y) of PMLA, the case in ECIR BGZO/01/2020 was recorded by the Directorate on 02.01.2020 and action is taken to safeguard the alleged proceeds of crime. On that aspect we have already indicated that the High Court was justified in upholding the action initiated under the PMLA but the consideration herein was only with regard to freezing of the bank account and as to whether while doing so the due process had been complied by adhering to the procedure prescribed under Section 17 of PMLA.”

31. There being no material on record to indicate that the provisions of Section 17 (1A) have been followed after issuance of email dated 22.09.2020, the Freezing Order issued by the Investigating Officer shall not continue, more so, when Provisional Attachment Order has been passed on 05.01.2021 where there is no reference of the Freezing Order or continuation of the Freezing Order. We, thus, are satisfied that the arguments raised by Shri Ramji Srinivasan on the basis of PMLA proceeding cannot be ground for depriving the payments of the dues of SEPCO and Shandong. It is always open for the authority which is making payment to the Operational Creditors to obtain appropriate security before payment, to safeguard the interest on account of any pending proceedings which may have adverse effect on any payments made.

32. It is also relevant to notice that in the I.A. No. 59 of 2021 prayer (c) the ILFS has prayed for extinguishment of rights and interests of Capex Creditors/ Operational Creditors. However, after objections were filed by the Objectors, Reply has been filed by the ILFS on 23.03.2022, wherein in Para 4.12 following has been stated:-

“4.12 In view of the above, it is relevant to clarify that:

(i) The amounts identified in connection with the Under Scrutiny Transactions under the Sustainable and Unsustainable Debt will be paid, subject to clearance by investigating agencies/ any judicial

process initiated for setting aside such transaction and there being no adverse finding by the relevant investigative/regulatory/ judicial authorities in connection with the Under Scrutiny Transactions. In case of adverse findings/ final pronouncement, no amount is to be paid in connection with the Under Scrutiny Transaction and any sums allocated for repayment/ servicing will be distributed amongst the secured creditors, unsecured financial creditors and remaining Operational & Capex Creditors towards their dues in the ratio provided under ITPCL Restructuring Plan with exclusion to the Under Scrutiny Transactions.”

33. The above stand now taken by ILFS indicates that instead prayer of extinguishment, now they pray that the payment will be made subject to any adverse finding in final pronouncement.

34. When the claims of Capex Creditors/ Operational Creditors has been admitted by the Claim Management Advisor, which is also admitted fact, the prayer of the ILFS for extinguishing the claim of the Capex Creditors and the Operational Creditors, is not acceptable. The admitted claim of Capex Creditors/ Operational Creditors has to be dealt with in the Resolution Plan when it will be drawn. As noted above, the claim of Operational Creditors/ Capex Creditors are sought to be dealt with in a plan of restructuring debt under Reserve Bank of India Circular dated 07.06.2019. For dealing with

admitted debts of Operational Creditors/ Capex Creditors, an appropriate Resolution Plan has to be made for addressing the claims. The Restructuring Plan has been arrived between the lenders and the borrower i.e. ITPCL. The ITPCL, who was bound to consider the admitted claim of the Operational Creditors/ Capex Creditors, has to consider the claims appropriately and arrive at a fair and reasonable resolution of the claims. The claims of Capex Creditors/ Operational Creditors are being tried to dealt with a side wind without properly appreciating their claim. There are adverse observations in Transaction Review Report and Forensic Audit Report against ITPCL. The borrower, who has been charged with collusive and unfair dealings in awarding the contracts and conducting other affairs, could not be allowed to defeat the claim of Operational Creditors/ Capex Creditors citing its own shortcomings and misdeeds.

35. We are of the view that the claim of Operational Creditors/ Capex Creditors has to be appropriately considered in a fair and reasonable Resolution Plan. The effect and consequence of contract entered by it with Operational Creditors/ Capex Creditors cannot be done away with as now sought to be prayed by ILFS in prayers (c) and (d) in I.A. No. 59 of 2021.

36. We, thus, are not persuaded to accept prayers (c) and (d) of I.A. No. 59 of 2021. We, thus, refuse to grant prayer (c) and (d) in I.A. No. 59 of 2021. We are of the view that the Board of ITPCL may consider a supplementary Resolution Plan in addition to Debt Restructuring Plan dealing with claims of the Operational Creditors/ Capex Creditors, which resolution needs to be

approved by New Board as well as approval by the Adjudicating Authority.
With these directions we dispose of all the above Interlocutory Applications.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

**[Shreesha Merla]
Member (Technical)**

NEW DELHI

4th July, 2022

Archana