

In the National Company Law Tribunal
Mumbai Bench.

C.P.(IB)-3245/(MB)/2018

Under Section 7 of Insolvency & Bankruptcy Code, 2016

In the matter of

Indiabulls Housing Finance Limited : Petitioner/ Financial Creditor

V/s

Akund Buildcon Private Limited : Respondent/ Corporate Debtor

Heard on : 16.01.2019

Order delivered on: 19.02.2019

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)

For the Petitioner(s) : 1. Mr. Gaurav Joshi, Sr. Counsel;
2. Mr. Chirag Kamdar, Counsel;
3. Mr. Nanri Grewal, Advocate;
4. Paidhi Saraf, Advocate;
5. Henna Goradia, i/b. Wadia Gandhi & Co.

For the Respondent(s) : 1. Mr. Nikhil Ratti Kapoor, Advocate, i/b. The
Law Point.

Per M.K. Shrawat, Member (Judicial).

ORDER

1. A Petition was filed in Form No.1 on 27.08.2018 by M/s. Indiabulls Housing Finance Limited (**IHFL** in short) in the capacity of '**Financial Creditor**', u/s. 7 of The Insolvency & Bankruptcy Code, 2016 to initiate Corporate Insolvency Resolution Process against M/s. Akund Buildcon Private Limited (**ABPL** in short), Andheri (East), Mumbai (**Corporate Debtor**) to claim an outstanding Loan amount of **₹47 Crores** granted vide Loan Agreement dated 28.09.2015 read with Addendum Agreement dated 30.09.2015. The Loan amount was **disbursed in full on 30.09.2015**.

1.1. The total amount claimed in default and due to the Financial Creditor by the Corporate Debtor as on 24.08.2018 is ₹79,49,28,344/- along with pending TDS for ₹22,43,285/-, reproduced below:-

"Computation Table

Loan Account No.	S000238984
Applicable interest Rate	18.10%
Recall Amount (In Rupees)	780605831
Interest till 24.08.2018 (In Rupees)	1,43,22,513
No. of Days	37
Total Outstanding as on 24.08.2018 (In Rupees)	79,49,28,344
Pending TDS	22,43,285

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2. **Brief history of the case** :- The **Financial Creditor (IHFL)** **sanctioned a Loan of ₹47,00,00,000/-** (Rupees Forty Seven Crores only) to the Corporate Debtor (ABPL) vide Loan Agreement dated on 28.09.2015 towards 'acquisition and development of residential Units' to the Corporate Debtor ABPL for a period of 60 months from the date of disbursement of the Loan or any part thereof whichever is earlier. Accordingly, the Loan Agreement was executed on 28.09.2015 between both the parties.

3. The details of the Transaction on account of which the Debt fell due, as narrated in the Petition, are reproduced below:-

- "1. *Indiabulls Housing Finance Limited (IHFL) granted a loan in favour of Akund Buildcon Private Limited (ABPL) on the terms and conditions stated in the Loan Agreement. The total amount of loan granted was ₹47,00,00,000/- (Rupees Forty Seven Crores Only).*
2. *Following Security documents were executed to secure the said Loan Facility:*
- (a) *Mortgage Deed dated 15th January, 2016 executed by ABPL in favour of IHFL;*
 - (b) *Mortgage Deed dated 15th January, 2016 executed by Shree Ram Urban Infrastructure Limited in favour of IHFL;*
 - (c) *Demand Promissory Note along with letter of continuity;*
 - (d) *Pledge / Charge Agreement dated 9.02.2016;*
 - (e) *Deed of Personal Guarantee executed by Mr. Vikas Kasliwal dated 30.09.2015;*
 - (f) *Deed of Corporate Guarantee executed by Shree Ram Urban Infrastructure Limited dated 30.09.2015.*

4. Facts which are allegedly led to the default as stated by the Financial Creditor are as under :-

- "1. *ABPL was irregular and committed a breach in making payment towards the EMI with respect to aforesaid loan. In fact, no EMI was paid after 21.01.2016.*
2. *As a result of ABPL's breach, said Loan was declared as Non-Performing Assets by IHFL.*
3. ***IHFL issued a recall notice dated 21.07.2018 under Section 13(2) of SARFAESI to ABPL. ABPL has not made any payment nor provided any explanation for its default. responded to the legal notices vide their Advocates letter dated 14.02.2018. IHFL responded to the letter addressed by the Advocates of ABPL on 5th April 2018. ABPL has not made any payment nor provided any explanation for its default.***

Thus at the time of filing this application an amount of Rs.79,49,28,344/- (Rupees Seventy Nine Crore Forty Nine Lakhs Twenty Eight Thousand Three Hundred Forty Four only) along with pending TDS for an amount of Rs.22,43,285/- (Rupees Twenty Two Lakhs Forty Three Thousand Two Hundred Eighty Five Only) is due and payable to IHFL.”

5. Copy of Loan Agreement is placed on record. A Demand Promissory Note dated 28.09.2015 for ₹47 Crores executed by ABPL (Corporate Debtor) is also on record.

6. The Financial Creditor has submitted that the Corporate Debtor had created a mortgage over all that pieces or parcels of properties as under together with all furniture, fixtures, fittings, standing and/ or plant and machinery installed/ to be installed and/ or constructed/ to be constructed thereon and all present and true title, interests and rights of M/s. Akund Buildcon Private Limited therein:

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Sr. No.	Unit No.	Side	Type	Level	Carpet Area (in Sq. Mtr.)*
1.	26SW	South West	Sky Apartment	26	450.17
2.	26SW	South West	Sky Apartment	29	450.17
3.	55SE	South East	Sky Apartment	55	450.17
4.	64NE	North East	Sky Apartment	64	450.17
5.	67NW	North West	Sky Apartment	67	450.17
			Total		2250.85

”

7. The Petitioner/Financial Creditor has stated, in the Notice dated 21.07.2018 sent to Corporate Debtor U/s. 13(2) of the SARFAESI Act, 2002 that a total outstanding amount of ₹78,06,05,831/- (Rupees Seventy Eight Crore Six Lakhs Five Thousand Eight Hundred Thirty One Only) by way of Outstanding Principal, Arrears (including accrued late charges) and interest till 17.07.2018 is due and payable by the Respondents along with future interest in terms of loan agreement w.e.f. 18.07.2018 along with pending TDS for an amount of ₹22,43,285/-. Also stated that the Interest and/ or instalment of principal has/ have remained overdue for a period of more than 90 days, the account has been classified by the Secured Creditor as a Non Performing Asset (NPA) on 05.05.2016, in accordance with the Prudential guidelines issued on the Assets Classification by the Regulatory Body.

Submissions from the side of the Respondent :-

8. The Respondent Debtor in his Affidavit-in-Reply, submitted on 27.11.2018, has stated that:-

- The Petitioner has failed to categorically mention the date of occurrence of default in Part-IV of the petition, as is required under the law.
- The Petitioner is not merely a financial creditor as envisaged under the Insolvency & Bankruptcy Code, 2016 but in fact has a larger, vested interest in the flagship real-estate project known as "Palais Royale" ("Project") undertaken by a company known as Sree Ram Urban Infrastructure Limited ("SRUIL").
- The Petitioner had advanced loans at various instances to SRUIL for the purpose of construction and development of the Project.
- The project ran into legal difficulties on account of the Public Interest Litigations initiated by an NGO called "Janhit Manch" at the behest of business rival Kalpataru Group. As a result, SRUIL was unable to obtain the Occupation Certificate for the building.
- That the Funds disbursed by the Petitioner to the Respondent do not fall under the definition of "financial debt" as provided under Section 5(8) of the Insolvency & Bankruptcy Code.

9. The Respondent Debtor pleaded that SARFAESI Proceedings have not been attended by the Petitioner properly, therefore, invoking a new jurisdiction of NCLT is nothing but multiplicity of Court proceedings by the Petitioner. The Debtor Company was facing various Court proceedings and legal actions due to which it had become a financially stressed Company. Learned Representative from the side of the Respondent Debtor is present, however, placed reliance on the communication already on record and nothing much is added during the course of hearing.

FINDINGS :-

10. Heard the submissions of both the sides. Perused the contents of the Petition as well as the reply of the Respondent in the light of the annexed evidences.

11. It is pleaded by the **Petitioner/ Creditor** that the Corporate Debtor had defaulted to make repayments of the loan in accordance with the terms of the Loan Agreement. On the other hand, from the side of the **Respondent Debtor** it is argued that the impugned Debt is not a '**Financial Debt**' as provided under **Section 5(8)** of the Insolvency & Bankruptcy Code.

11.1 However, a view has already been taken by this Bench in the case of *IL & FS Financial Services Ltd. V/s. La-Fin Financial Services Pvt. Ltd. [T.C.P. No. 919/I&BC/NCLT/MB/MAH/2017; Order dated 28.08.2018]* wherein it is held in Paragraph 11.3 that quote:

"11.1. On careful reading of this section, in my humble opinion, **Financial Debt** can be segmented into **two types**. One is disbursed against the consideration for the time value of money. The **second** is any amount raised under any other transaction having commercial effect of a borrowing. It is not necessary that there is always a "disbursement" of money, because of the reason that in the first segment a Financial Debt is to be disbursed against the consideration for the time value of money. In this category, therefore, money borrowed against the payment of interest falls within the definition of Financial Debt as defined in sub-section (a) of Section 5 (8). But there are examples where there is no actual disbursement of money. In other word there are examples of Financial Debt where the money in kind has not change hands or transferred from an account of lender to the account of borrower. For e.g. in the definition of Financial Debt **Section 5(8) as per clause (g)** of I&B Code, any derivative transaction entered into in connection protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account. Under this category of "Financial Debt" only a value of transaction is taken into account as there is no physical exchange of money in kind.

11.2. The definition of "Financial Debt" is a very wide definition. From sub-clauses (a) to (i) there are several types of transactions which are the examples of Financial Debt. In these examples the Financial Debt may be in the nature of "counter-indemnity-obligation" in respect of a guarantee.

Thus, a careful decipher of this section may lead to a conclusion that it is not necessary that every borrowing should have a consideration for the time value of money. **If an amount has been "raised" with an objective of economic gain or commercial effect may also be treated as "Financial Debt"**. I, hereby, hasten to add that an investment, may or may not be a long term investment, with the purpose of acquisition of an asset, right or ownership and prima facie a capital-outlay may be having commercial intention, shall not fall within the definition of "Financial Debt". Thus a broad distinction can be made that if there is an assured return or commercial gain within a guaranteed period than that transaction be not

considered an Investment under the Insolvency Code but a Financial Transaction so as to fall within any of the long list of categories prescribed u/s 5 of the Code defining 'Financial Debt'.

11.3. In my opinion it is an important judicial phenomenon that in the "Definition" section both the terms i.e. "means" and "includes" are used. By using both these expressions the definition has enlarged its scope of implementation. In the **first segment of the section where the expression "means" is used the term "Financial Debt" defines a disbursement against the consideration for the time value of money.** But where the expression **"includes" is used, thereunder several examples are enlisted which thus fall within the ambit of the definition of "Financial Debt"**. In one of the example, an "amount raised" having commercial effect, is a borrowing within the definition of "Financial Debt". As a consequence, certain transactions as enlisted are beyond the conventional sense of borrowings. The scope of the borrowings is enlarged in this definition beyond the conventional scope of borrowing against payment of interest." Unquote.

12. In the light of the above discussion and on due perusal of the documents annexed, the Debt is to be qualified as "Financial Debt" as defined under section 5(8) of Insolvency & Bankruptcy Code, 2016. As a result, the Financial Creditor has filed this Application for initiating Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

13. Since this is a Petition of "Financial Creditor", therefore, the Insolvency Process shall commence as prescribed under Section 7 of I&BC, 2016.

14. The Petitioner / Financial Creditor has proposed the name of the IRP Mr. Ravi Prakash Ganti, Address: Flat No.2, Ashiana CHS, Plot No. 60-A, Sector 21, Kharghar, Navi Mumbai – 410210, Registration No. IBBI/IPA-002/IP-N00102/2017-18/10245, email: gantirp@gmail.com. The proposed IRP has furnished the requisite Certificate on Form No.2 that no Disciplinary Proceeding is pending. On due consideration, the proposal of appointment of the IRP is hereby confirmed.

15. Upon Admission of the Application and Declaration of "Moratorium" the Insolvency Process such as Public Announcement etc. shall be made immediately as prescribed under section 13 read with section 15 of The Code. The appointed IRP shall perform the duties as an Interim Resolution professional as defined under section 18 of The Code and inform the progress of the Resolution Plan and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate

even at an early date, if need be. The IRP shall submit the Resolution Plan for approval as prescribed under section 31 of The Code.

16. It is hereby pronounced that the "Moratorium" as prescribed under Section 14 of the Code 2016 shall come into operation. As a result, institution of any suit or parallel Proceedings before any Court of Law are prohibited. The assets of the Debtor must not be liquidated until the Insolvency Process is completed. However, the supply of essential goods or services to the Corporate Debtor shall not be suspended or interrupted during "Moratorium Period". This direction shall have effect from the date of this Order till the completion of Insolvency Resolution process.

17. Accordingly, this C.P.(IB)-3245/(MB)/2018 stood "Admitted".

18. The Corporate Insolvency Resolution Process is commenced from the date of this Order.

Sd/-
(M.K. SHRAWAT)
Member (Judicial)

Date : 19.02.2019

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