SL. No.132

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II

Video Conference

CORAM: HON'BLE BHASKARA PANTULA MOHAN,-MEMBER (J)
CORAM: HON'BLE VEERA BRAHMA RAO AREKAPUDI-MEMBER (T)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 20.04.2022 AT 02:30 PM THROUGH VIDEO CONFERENCE

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	Company Petition IB/28/2022
NAME OF THE COMPANY	IVRCL Chengapalli Tollyways Ltd
NAME OF THE PETITIONER(S)	Assets Care Reconstruction Enterprises
NAME OF THE RESPONDENT(S)	IVRCL Chengapalli Tollyways Ltd
UNDER SECTION	7 of IBC

ORDER

CP IB/28/2022 is listed for orders today. CP is admitted. Orders pronounced vide separate sheets.

MEMBER (T)

MEMBER (J)

Syamala

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD

CP (IB) No.28/2022
Under section 7 of the IB Code, 2016
Under rule 4 of the Insolvency and Bankruptcy
(Application Adjudicating Authority) Rules, 2016.

In the matter of
M /s IVRCL CHANGAPALLI TOLLWAYS LIMITED

Between:

M/s Assets Care and Reconstruction Enterprise Limited
Registered Office at: 2nd Floor, Mohan Dev Building, 13,
Tolstoy Marg, New Delhi

... Financial Creditor

AND

M/s IVRCL Changapalli Tollways Limited
Registered Office at: MIHIR, #8-2-350/5/A/24/1B&2,
Panchvati Colony Road No. 2,
Banjara Hills, Hyderabad, Telangana 500034

...Corporate Debtor

Date of Order: 20.04.2022

Coram:

Shri Bhaskara Pantula Mohan, Member Judicial

Shri Veera Brahma Rao Arekapudi, Member Technical.

Parties/Counsels present:

For the Applicant: Mr. Avinash Desai, Advocate

For the Respondent: Mr. Vipul Gupta, Advocate

Per: Bench

ORDER

1. Under consideration is a Company Application filed by M/s. Assets Care and Reconstruction Enterprise Limited (*Petitioner/Financial Creditor"*) under section 7 of the Insolvency and Bankruptcy Code, 2016 (in short

IB Code, 2016) read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s IVRCL Changapalli Tollways Limited under the Insolvency and Bankruptcy Code, 2016.

2. Brief facts of the case as submitted by the Financial Creditor are as follows:

   a) The National Highways Authority of India (NHAI) accepted the bid of IVRCL infrastructure and Project Limited, now IVRCL for undertaking a (IVRCL/SPONSOR) project for Six Laning from Km 102.035 to Km 144.680 on the Chengapalli to start of Coimbatore Bypass and Four Laning From Km 170.88to Km 183.010 and end of Coimbatore Bypass to TN/Kerala Border Section of NH-47 is the State of Tamil Nadu under NHDP Phase-II on DBFOT (Toll) basis (Package No. NS-II/BOT/TN-8). IVRCL had promoted and incorporated the Corporate Debtor as Special Purpose Vehi9cle to undertake and perform the obligations and exercise rights in relation to the Project, for which the Corporate Debtor and NHAI entered into a Concession Agreement dated 25 March 2010.

   b) That the Corporate Debtor herein required financing assistance to complete the Project and five banks namely IDBI Bank Limited, Andhra Bank, Bank of Baroda, Karur Vysya Bank and State Bank of India collectively **"Lenders"** agreed to grant the Corporate Debtor rupees terms loans (Facilities) of:

      i. INR 797,45,00,000/- (loans) under the Common Loan Agreement dated 24.11.2010 entered into and by and amongst the Corporate Debtor and the Lenders and amended from time to time.

      ii. INR 64,70,00,000/- under an additional Common Loan Agreement dated 30.12.2016 and amended from time to time.

   c) That the Corporate Debtor by way of its letter dated 25.07.2019 categorically acknowledged its indebtedness to the Lenders and acknowledged for the purpose of Section 18 of the Limitation Act, 1963 its liabilities under the Facilities to the Lenders.

d) Pertinently, Lenders had declared Corporate Debtor as Non-Performing Asset from time to time on.

Bank	Date of Default/NPA Date
IDBI Bank Limited	29.07.2017
Bank of Baroda	29.07.2017
Union Bank of India	25.09.2017
Karur Vysya Bank and	28.03.2018
State Bank of India	29.07.2017

e) Since the loans remained outstanding, the Lenders issued various default notices.

f) That on 10.11.2021, an assignment agreement was entered into between Lenders led by IDBI Bank Limited and the Applicant **(Assignment Agreement)** for assignment of loans given by Bank to Corporate Debtor for purchase of consideration of INR 624,00,00,000 (Indian Rupees Six Hundred and Twenty-Four Crores. As on 09.11.2021, total outstanding amount due to the Lenders was INR 1,001.47 Crores (Indian Rupees One Thousand One Crore and Forty Seven Lacs). INR 738.44 Crores was Principal Outstanding Amount and INR 263.03 Crore was Interest on Principal Amount.

g) That the pursuant to the Assignment Agreement, all the loans by Lenders were transferred to the Applicant, for holding the same in ACRE-117-Trust in terms of Section 5(1) of the SARFAESI Act 2002. Further, Applicant became full and absolute legal owner of the loans and entitled to recover/receive the loans or any part thereof in accordance with Financial Documents.

h) That the total outstanding amount which is due and payable to Corporate Debtor as on 17.01.2022 was INR 1024,62,28,276/-

(Rupees One Thousand Twenty-Four Crore-Sixty Two Lakh Twenty Eight Thousand Two Hundred and Seventy Six Only), in respect of which the instant Application has been filed.

i) That the Applicant has by way of its letter dated 18.01.2022 called upon the Corporate Debtor to immediately pay the outstanding amount and the Corporate Debtor has failed to make p[payment towards such outstanding amount and no money has been received by the Applicant till date.

Reiterating the above, learned counsel for the Financial Creditor prayed to admit the instant Application.

3. Counsel for Respondent filed counter, *inter-alia,* stating as under:-

a) That there is no cause of action for filing the present petition u/s.7 of the IBC since there is no default committed by the respondent vis-à-vis the Applicant herein. The Applicant cannot fall back on the dates of debt alleged to have taken place during the years 2017-2018 towards the original lenders of the respondent herein. Admittedly, the applicant has purchased the loans given by the IDBI Bank and other lenders in the month of November, 2021 and thereafter served a notice dated 18.01.2022 upon the respondent herein seeking repayment of the entire amount. Surprisingly, it filed the present application on 22.01.2022 itself, i.e., within 4 days after the notice was served on this respondent. Moreover, in the statutory application, the Applicant did not mention any date of default as regards it is concerned. Thus, there is no default committed in so far as this Applicant is concerned and therefor the application itself is not maintainable. The earlier lenders are no more in the picture after 10.11.2021 and hence the alleged dates of default towards those lenders extinguished and Applicant cannot take benefit of those defaults. Hence, the petition is liable to be dismissed on that ground itself.

b) That having purchased the loans given by the IDBI and other lenders to this respondent under assignment deed dated 10.11.2021, the Applicant has straight away proceeded to file the present petition for recovery of the amount from this respondent, which clearly shows that the Applicant is using the proceedings u/s. 7 of the IBC as a money recovery mechanism, which has been deprecated by the Hon'ble Supreme Court.

c) That the respondent herein is a wholly owned subsidiary of M/s. IVRCL Limited and it was a special purpose vehicle floated for the purpose of execution of the project of Chengapalli Tollways in pursuant to the work awarded by NHAI vide concession agreement dated 25.03.2010. In order to execute the work, the respondent has availed finances from the above mentioned banks during the periods by way of Term Loan –I and Term Loan- II. After the project was completed, the Tollway is being operated and the revenue generated there form is deposited into the designated escrow account maintained by IDBI Bank. Thus, there has been regular repayment of the outstanding amounts by way of the above mentioned mechanism and the lender bands have approved the same. As per the books of this Respondent the Total Outstanding Debt as on 31.12.2021 is Rs. 996,93,22,034 (Principal due – 694,31,97,035 & Interest – 302,64,25,000). Due to the unexpected reason like the Toll collections falling below the expectations, Covid-19 etc., the generation of revenues has not been up to the projected levels but still the collections are regularly deposited in the escrow account. The actual traffic on the highway is far less than the "Target Traffic" as envisaged by NHAI in Article 29 of the Concession Agreement as on 31.03.2021 the "Target Date" is an established fact. Even after the Applicant has taken over the loans, the said escrow account is continuing and the revenues are getting deposited in the same. All the expenditure incurred by the Respondent for maintenance of the Project will be subject to the scrutiny and sanction by the Applicant herein. Without their indulgence, the respondent cannot incur any expenditure and thus indirectly the Applicant has been overseeing the management of the finances of the project. These facts have been deliberately omitted by the Applicant in the present petition and the same amounts to suppression of facts and the application has to be rejected on that ground itself.

d) That there is no purpose in filing the present petition seeking initiation of the CIRP since the concession for operating the Tollway by this respondent is available till 2043 including the proposed extension period of 5 years 4 months. The amount collected, under the supervision of the Applicant, will be deposited in the escrow account and will be meeting the outstanding debt as well as meeting the financial expenditure.

e) In the case of Swiss Ribbons Private Ltd. & Others Vs. Union of India, reported in 2019 (4) SCC Page No. 17, the Hon'ble Supreme Court has observed that the focus of the IBC is to ensure revival and continuation of the corporate debtor, where liquidation is to be availed of only as a last resort. It was further pointed out that the Code is a beneficial legislation to put the corporate debtor on its feet and not a mere recovery legislation for the creditors. This views taken in the case of Swiss Ribbons has been reiterated in the subsequent judgment reported in AIR 2020 SC 4668 in the case of Babulal Vardharji Gurjar. It has been further held at para 18.3.2 of that judgment as under:

"*The trigger for a financial creditor's application is non-payment of dues when they arise under loan agreements. It is for this reason that Section 433(e) of the Companies Act. 1956 has been repealed by the Code and a change in approach has been brought about. Legislative Policy now is to move away from the concept of "inability to pay debts" to "determination of default". The said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation*".

f) In the light of the above submissions and keeping in view the fact that the respondent is a going concern having the concession to operate the Project of Tollway, granted by the NHAI for another 20 years and also the fact that the Application herein is effectively administering the collection of Toll amount as well as the expenditure towards financial costs, there is no circumstances to initiate any CIRP by admitting the present application. Thus, the appeal is devoid of merits and the same is liable to be dismissed with costs.

4. Heard. Perused the record.

5. After hearing both sides and perusing the record, we are of the view that in the instant case there is a financial debt and there has been a default in repayment of the same and that this Adjudicating Authority is satisfied that the financial Creditor has proved its case by placing evidence that default has occurred for which the Corporate Debtor was liable to pay. it is seen that the in the instant Application, the Applicant has not denied the assignment of Debt to the Applicant and has further. It is also noted that the instant Application is not barred by limitation as the Corporate Debtor has been acknowledging its debt from time to time and also notice of demand was issued on 18.01.2022. Hence, the contentions of the Corporate Debtor are overruled and the instant Application is also not barred by limitation. Further, it is pertinent herein to note that the Hon'ble Supreme Court, while deciding the matter in the case of INNOVENTIVE INDUSTRIES LTD. Vs. ICICI BANK & ANR., in Civil Appeal Nos. 8337-8338 of 2017, held as under:

> "..............*The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.*"

6. Further the Financial Creditor has fulfilled all the stipulations as required under the provisions of the IB Code, 2016 for the purpose of initiating Corporate Insolvency Resolution Process. In these circumstances, having satisfied with the submissions made by the

Petitioner/Financial Creditor, this Adjudicating Authority is inclined to admit the instant Application.

7. Accordingly, the instant application is hereby admitted and this Adjudicating Authority orders the commencement of the Corporate Insolvency Resolution Process (CIRP) which shall ordinarily be completed within the timelines stipulated in the IB Code, 2016 (as amended), reckoning from the day of this order is passed.
8. The Financial Creditor proposed the name of Mr. Sutanu Sinha, Interim Resolution Professional and he has given here written consent in Form 2. Accordingly, this Tribunal appoints Mr. Sutanu Sinha, having Registration No. IBBI/IPA-N000020/2017-18/10167 e-mail id: sutanusinha@bdo.in as Interim Resolution Professional. She is directed to file Authorization for Assignment within three days from the date of this order.
9. The IRP is directed to take charge of the Respondent/Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under section 15 of the IB Code, 2016 within three days from the date the copy of this order is received, and call for submissions of claim in the manner as prescribed.
10. We direct the Financial Creditor/Petitioner to pay sum of Rs.2,00,000/- towards the advance fee of IRP and expenses towards CIRP, which shall be ratified later on by CoC.
11. The moratorium is hereby declared which shall have effect from the date of this order till the completion of CIRP. For the purposes referred to in section 14 of the IB Code, 2016. It is hereby ordered to prohibit all of the following namely:-
    i. *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 or law, tribunal arbitration panel or other authority;*
    ii. *Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal rights or beneficial interest therein;*

iii. *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);*

iv. *The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

v. *Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.*

12. The supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. Further, if the IRP considers supply of any goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period. Furthermore, the provisions of Sub-section (1) of Section 14 shall not apply to such transactions, agreements. or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority.

13. The IRP shall comply with the provisions of Sections 13(2), 15, 17 & 18 of the Code. The Directors, Promoters or any other person associated with the management of Corporate Debtor are directed to extend all

assistance and co-operation to the IRP as stipulated under Section 19 and for discharging his functions under Section 20 of the I&B Code, 2016.

14. The Petitioner/Financial Creditor as well as the Registry is directed to send the copy of this Order to IRP so that he could take charge of the Corporate Debtor's assets etc. and make compliance with this Order as per the provisions of I&B Code, 2016.
15. The Registry is directed to communicate this Order to the Financial Creditor and the Corporate Debtor.
16. The Registry shall also communicate this Order to the ROC, Hyderabad for updating the status of the Corporate Debtor in the MCA website.
17. Accordingly, this Petition is admitted.

Veera Brahma Rao Arekapudi
Member Technical

Bhaskara Pantula Mohan
Member Judicial

Santi/SKRathi