

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI
CP (IB) No. 1079/MB-VI/2022

*[Under Section 7 of the Insolvency and Bankruptcy Code, 2016
r/w Rule 4 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016]*

IN THE MATTER OF:

EDELWEISS ASSET RECONSTRUCTION COMPANY LIMITED

[CIN- U67100MH2007PLC174759]

Registered Office: Edelweiss House, Off. C.S.T Road, Kalina
Mumbai – 400098, Maharashtra.

...Financial Creditor

V/s

NCR RAIL INFRASTRUCTURE LIMITED

(Formerly known as 'Arshiya Rail Infrastructure Limited')

[CIN- U93000MH2008PLC180907]

Registered Office: 205 & 206 (Part), 2nd Floor
Ceejay House, F-Block, Shiv Sagar Estate
Dr. Annie Besant Road, Worli, Mumbai
Maharashtra.

...Corporate Debtor

Pronounced: 07.03.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances:

Financial Creditor : Adv. Rohit Gupta

Corporate Debtor : Adv. Nausher Kohli

ORDER

[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. BACKGROUND

1.1 This is an Application bearing C.P. (IB) No. 1079/MB/C-VI/2022 filed by Edelweiss Asset Reconstruction Company Limited, the Financial Creditor (FC), on 04.08.2022 under section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) for initiating Corporate Insolvency Resolution Process (CIRP) in respect of NCR Rail Infrastructure Limited (Formerly 'Arshiya Rail Infrastructure Limited'), the Corporate Debtor (CD). The Application is filed against the CD to initiate CIRP for a total outstanding of Rs.71,65,55,064/- being aggregate of principal and interest as on 30.06.2022.

1.2 The FC under a Facility Agreement dated 17.01.2018, sanctioned a short-term loan facility (Credit Facility) amounting to Rs. 30,00,00,000/- (Thirty Crore Rupees), in favour of Arshiya Industrial and Distribution Hub Limited (AIDHL). Further, *vide* order dated 06.12.2019, passed by this Tribunal, AIDHL was merged with the CD and thus, the rights and liabilities under the Credit Facility stood transferred to the CD. The CD defaulted in repayment under the Credit Facility and the said loan was recalled on 14.07.2019. However, the CD continues to be in default in repayment of the financial debt and hence, the Application for initiating

CIRP in respect of the CD has been filed. The FC stated 18.04.2018 as the date of default in Part IV of the Application. Hence, the FC prays that CIRP may be initiated in respect of the CD under Section 7 of the IBC.

2. CONTENTIONS OF FC

2.1 A Facility Agreement; Lenders' Agreement; and Cash Flow Agreement dated 17.01.2018 were executed between AIDHL and FC for sanctioning the Credit Facility aggregating to thirty crores and a Deed of Hypothecation dated 17.01.2018, was also entered into between AIDHL and the FC. A Corporate Guarantee dated 20.02.2018, and an Indenture of Mortgage dated 02.03.2019 were executed between AIDHL and FC. A Personal Guarantee was executed by one Mr. Ajay Mittal and one Ms. Archana Mittal in favour of the FC on 07.03.2018. The record of default in CIBIL Report is submitted by the FC.

2.2 Ld. Counsel for the FC submitted that the CD, however, defaulted in repayment of the Credit Facility granted to it by FC. A Default Notice dated 18.04.2019 was sent to the CD, and thereafter, another Default-cum-Recall notice dated 13.07.2019, was issued by FC to CD. The Ld. Counsel further submitted that the debt remains unpaid and the CD has thus committed default and thus, CIRP is only to be initiated in the matter.

3. CONTENTIONS OF CD

The CD has opposed the Application on the following grounds:

- 3.1 *The Application is barred by limitation-* The FC in Part IV has indicated 18.04.2018 as the date of default. The Application was filed on 04.08.2022, i.e., 4 years after the alleged date of default. It is submitted by the Ld. Counsel for the CD that the Report of the Insolvency Law Committee sufficiently clarifies that the intent of the IBC is not to give a new lease of life to debts which are time-barred and unenforceable. Relying on the judgements of the Hon'ble Supreme Court in *BK Educational Services Private Limited Vs. Parag Gupta and Associates* (Civil Appeal 23988/2017); *Sampuran Singh And Ors. Vs. Niranjana Kaur and Ors.* (Civil Appeal 4544/1984); and *Sesh Nath Singh & Anr. Vs. Baidyabati Sheoraphuli Co-Operative Bank Ltd. and Anr.* (Civil Appeal 9198/2019), the Ld. Counsel for the CD argued that an acknowledgement, if any, must be made before the expiry of period of limitation and must be made in writing in respect of any right claimed by a party and signed by the party against whom such right is claimed.
- 3.2 *Additional Affidavit of FC to be struck off-* The Ld. Counsel for the CD submitted that the documents on record do not fulfil the test of solid documentary proof of debt and default. According to the Ld. Counsel, Form 1 must be complete in all respects for enabling NCLT to pass admission order in rem. The FC has failed to produce copy of entry in banker's book along with requisite certificates which is the very basis of proving existence of debt and default. The Ld. Counsel objected to the taking on record the Additional Affidavit dated 25.11.2022 filed by the

FC, saying that it is against the procedure laid down under the proviso to Section 7(5) of the IBC. The Ld. Counsel for the CD cited the judgement of Hon'ble Supreme Court in *M/s. Surendra Trading Company v/s. M/s. Juggilal Kamlatpat Jute Mills Company Limited & Ors.* (Civil Appeal 8400/2017) and *Swiss Ribbons* (WP (C) 99/2018), saying that if the application is not complete, the AA is not supposed to deal with the same. According to him, under Part-I of Form 1 under Rule 4 of the AA Rules, the Application ought to have been filed by the 'person authorised' along with documents proving such authorisation.

- 3.3 *Application is not filed by authorised person-* The Ld. Counsel for the CD submitted that Rule 23(2) read with Rule 26 of the National Company Law Tribunal Rules, 2016 (NCLT Rules) mandates that the Application is to be filed/signed/verified by an 'authorised representative' of the FC. He submitted that no specific authorisation by the Board of Directors of the FC has been given to Mr. Aherar Patel to file this Application, in terms of the Notification dated 27.02.2019, issued by the Ministry of Corporate Affairs (MCA). The Resolution is by "Operations Committee" of the FC and not by the Board of Directors and thus, Mr. Aherar Patel had no authority to file the Application. Again, the FC has failed and neglected to annex certified true copy of the Resolution passed by its Board delegating authority to its "Operations Committee". Further, the Application is defective as all

certificates of charge in respect of securities allegedly created in favour of the FC have not been furnished against Serial No. 1 - Part V of Form-1.

- 3.4 *FC using NCLT as recovery forum-* The CD also submits that the FC has abused the process of law and filed the Application solely for the purpose of arm-twisting the CD and thereby abusing the process of law. It is using the IBC as a tool for extorting illegal, non-maintainable and time-barred claims with an intent to cause recovery of its illegal demands. Action under Section 65 of the IBC is to be pressed into service, for initiating fraud and malicious proceedings.

4. ANALYSIS AND FINDINGS

- 4.1 We have perused all the documents and pleadings and heard both the Ld. Counsel for the FC and the CD. In **IA 2161/2023**, the CD has raised objections as to the Additional Affidavit filed by the FC on 25.11.2022, and prayed that it should be struck off from the records as it was filed without express leave of the Court. According to the Ld. Counsel for the CD, this Additional Affidavit was an afterthought and, hence, it cannot be taken into consideration. On perusal of the records, it is seen that the CP was filed on 04.08.2022 and it was first listed for hearing on 18.10.2022. The Bench issued notice to the CD on that day and fixed the matter for hearing on 28.11.2022. However, due to paucity of time, the matter could not be taken up on 28.11.2022. On the next date of

listing on 09.01.2023, the CD was represented. Meanwhile, the FC had already filed the Additional Affidavit on 25.11.2022 and was part-heard on 13.06.2023. However, it could not be finally heard until 22.11.2023 for various reasons. On 22.11. 2023, it was submitted by the CD that it was willing to settle the matter and that a settlement proposal would be taken up with the FC and the matter was adjourned to 12.12.2023, for reporting settlement. On 12.12.2023, it was submitted by the CD that the FC was proceeding with SARFESI action with regard to the properties of the CD. When the matter was fixed for final arguments on 19.12.2023, it was submitted by the FC that the auction fixed on 13.12.2023 did not yield any result. On 02.01.2024, we heard both the Ld. Counsel for FC and CD and this IA and the main CP were reserved for orders. This chronology of events indicates that the Additional Affidavit was filed by the FC almost immediately after filing the main CP. The CD also has availed of the opportunity to file its objections to the contents of the Additional Affidavit. However, instead of dealing with the merits of the Additional Affidavit, it only chose to pray for striking it off on the ground of procedural irregularity. This Tribunal is not prevented from entertaining any document, material or record for determination of a dispute under law. The Hon'ble Supreme Court in *Dena Bank Vs. C. Shivkumar Reddy and Anr.* (Civil Appeal No. 1650/2020), held that there is no bar in law to the amendment of pleadings in an Application under Section 7 of the IBC or to the filing of

additional documents apart from those initially filed alongwith the Application filed in Form-1. Rule 11 of the NCLT Rules empowers us to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of process of Court. We, therefore, have no reluctance to exercise our inherent powers under Rule 11 to take the Additional Affidavit filed by the FC on record, as we hold that it is essential for the right determination of the debt and default in the instant case. This issue goes against the CD.

- 4.2 The challenge on merits is that the Application is barred by limitation and that the date of default, being 18.04.2022 has not been explained by the FC. Since both these are interconnected issues, let us deal with them together. In Part IV of the Application, 18.04.2018 is mentioned as the date of default and the Application is filed on 04.08.2022, which appears to be beyond three years from the date of default. On perusal of the Facility Agreement dated 17.01.2018, in the Definition and Interpretation Clause, "Final Repayment Date" is defined as the date falling on 90 days from the Initial Utilisation. The term "Utilisation" means the utilisation of the Credit Facility. Further, "Utilisation Date" is defined as the date on which the relevant loan is made. The date of default as mentioned in Part IV of the Application is thus, 18.04.2018, which is 90 days after the date of the Facility Agreement dated 17.01.2018. Annexure–E, which is the detailed working of the dues computation, clearly indicates that an amount of Rs.30,00,00,000/- was

disbursed to the CD on 18.01.2018. Moreover, the financial statements of 'Arshiya Rail Infrastructure Limited' (Erstwhile name of the CD) for the period 01.04.2019 to 31.03.2020 disclose CD's continuing default of Rs. 3,000/- lakhs towards the FC during the financial year 2018-2019. In the Auditor's Report (Annexure-B) of the Additional Affidavit dated 25.11.2022, under the heading 'Disclosure in Auditor's Report Relating to Default in Repayment of Financial Dues', Director's, Report discloses the default of the CD towards the FC to the tune of Rs.3000/- lakhs. Along with the Additional Affidavit, the FC has produced the balance confirmation of thirty crore rupees made by the CD as on 30.09.2021, i.e., after one and half year of the debt and liability reflected in the financial statement of the CD on 31.03.2020. However, this balance confirmation letter has not been refuted by the CD. Hence, the debt, liability and default by the CD are proved beyond doubt. Neither the Credit Facility Agreement nor disbursement of the loan amount has been specifically challenged by the CD. The Hon'ble NCLAT, New Delhi in *Asset Reconstruction Company (India) Ltd. Vs. Uniworth Textiles Ltd.* in Company Appeal (AT) (Insolvency) No. 991 of 2020, held that if there is acknowledgement of debt due in the balance sheet, it would extend the limitation period in terms of Section 18 of Limitation Act, 1963, and the same shall result in fresh period of limitation to be computed from such time. We determine the date of default as 18.04.2018, i.e., 90 days after disbursement of Credit Facility on 18.01.2018. Since the CD's

financial statement acknowledges debt and liability as on 31.03.2020, and the debt is of continuing nature, limitation shall reckon from 31.03.2020. The Application was filed on 04.08.2022, which is thus within the period of limitation under Section 238A of the IBC read with Section 18 and Article 137 of the Limitation Act, 1963. This issue is decided in favour of the FC.

- 4.3 The next issue to be decided is whether the Application has been filed by an 'authorised person' on behalf of the FC. The Ld. Counsel for the CD took us to Form I, Part-I, Serial No. 5 appended to Rule 4 of the AA Rules, wherein only "authorised person" is allowed to submit an application for initiation of CIRP under Section 7 of the IBC. He took us to the Notification of the MCA No. S.O. 1091 (E) dated 27.02.2019, which, *inter alia*, notified "a person duly authorised by the Board of Directors of a Company" as competent person to file an application under section 7 of the IBC. Under Section 7(1) of the IBC, a financial creditor has a right to file application either by itself or jointly with other creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government. Hence, a financial creditor itself or jointly with other financial creditors or any other person on behalf of the financial creditor may file application under Section 7. The MCA, by S.O. 1091 (E) dated 27.02.2019, has only notified "other persons on behalf of the financial creditor" to file application, *inter alia*, "a person duly authorised by the Board of Directors of a Company". The financial

creditor itself has filed the present Application and is represented by its own authorised officer and is distinguishable from “any other person on behalf of the financial creditor”. The authorisation for Mr. Aherar Patel to file this Application is proved by the Board Resolution passed by Circulation by the Operations Committee of the FC. When the Resolution has been drawn out by the Company Secretary Mr. Deepak Nautiyal for “Edelweiss Asset Reconstruction Company Limited” (the FC itself), no further proof of authorisation to the said Mr. Aherar Patel is required. Hence, we are satisfied that Mr. Aherar Patel has sufficient authority to file the Application, and this issue is accordingly decided in favour of the FC.

4.4 The FC in his Additional Affidavit dated 25.11.2022, has placed on record the balance sheet of the CD for the year 2019-2020, wherein, the auditor’s report clearly mentions the debt taken by the CD as a liability in the CD's books of account. This shows that there is a clear acknowledgement by the CD of its liability with respect to the debt due and payable. Therefore, we find no merit in the contention of the CD that no enforceable debt and liability towards the FC exists.

4.5 When we have already found that the Application is filed by the FC itself is valid; the debt and liability is acknowledged by the CD; the date of default and the amount in default exist; and the Application has been filed within the period of limitation, there is no need to further consider any other issue raised by the parties. The FC has also filed fresh AFA

of the IRP in compliance of Section 7 (3)(b) of IBC. The Application is filed in proper format. In above circumstance, only CIRP needs to be initiated against the CD.

ORDER

In the result, the **IA 2161/2023** filed by the CD is **rejected** and the **C.P. (IB) No. 1079/NCLT/MB/C-VI/2022** filed under Section 7 of the IBC by the FC for initiating CIRP in the case of NCR Rail Infrastructure Limited, the CD, is **admitted**.

We further declare moratorium u/s 14 of the IBC, with consequential directions as follows:

- I. We prohibit-
- a) the institution of suits or continuation of pending suits or proceedings against the CD 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 CD 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 CD in respect of its property including any action under the Securitisation 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 possession of the CD.
- II. That the supply of essential goods or services to the CD, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Bench approves the resolution plan under section 31(1) of the IBC or passes an order for the liquidation of the CD under section 33 thereof, as the case may be.
- IV. That the public announcement of the CIRP shall be made in accordance with the provisions of the IBC, the Rules and Regulations made thereunder.
- V. That this Bench hereby appoints **Mr. Bhuvan Madan, a registered Insolvency Professional** having Registration Number- IBBI/IPA-001/IP-P01004/2017-2018/11655 and e-mail – madan.bhuvan@gmail.com having valid Authorisation for Assignment as the IRP to carry out the functions under the IBC, the fee payable to IRP/RP shall be in accordance with the Regulations/Circulars issued by the IBBI.
- VI. During the CIRP Period, the management of the CD shall vest in the IRP or, as the case may be, the RP in terms of Section 17 or Section 25, as the case may be, of the IBC. The officers and managers of the CD shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

- VII. In exercise of the powers under Rule 11 of the NCLT Rules, 2016, we order the FC to deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the FC on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC).
- VIII. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the CD. A copy shall also be forwarded to the Insolvency and Bankruptcy Board of India for record and dissemination on their website.
- IX. A copy of the Order may also be sent to the Insolvency and Bankruptcy Board of India for information and record.
- X. The Registry is directed to immediately communicate this Order to the FC, the CD and the IRP by way of e-mail and WhatsApp, not later than two days from the date of this Order.
- XI. **Compliance report of the order by Designated Registrar is to be submitted today.**

**Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)**

**Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)**

// LRA Akshata //