

General Manager, duly authorised in this regard vide board resolution dated 14 August 2017 for initiating Corporate Insolvency Resolution Process (**'CIRP'**) against Abhijeet Integrated Steel Limited (**'Corporate Debtor'**).

1.3. The Corporate Debtor is an unlisted public company incorporated under the Companies Act, 1956 having its registered office at Plot No.06, Small Industrial Area, De Gaulle Avenue, Durgapur, Bardhaman – 713212, in the State of West Bengal. Therefore, this Adjudicating Authority has jurisdiction to deal with the present petition.

2. Submissions of Mr Rishav Banerjee, Ld. Counsel for the Financial Creditor

2.1. The Corporate Debtor approached the Financial Creditor for financial assistance with respect to setting up a 1.2MTPA beneficiation and pelletisation plant at Jharkhand (**'Project'**). Since, the project cost was estimated at ₹575 crore, the Financial Creditor also approached other Financial Institutions as well. Vide letter dated 25 March 2010,¹ the Financial Creditor sanctioned a term loan of ₹100 crore. However, a few of the terms with respect to LER limit, change of interest rate etc. were modified as per letter dated 18 February 2011.²

2.2. On 25 February 2011, a Common Loan Agreement (**'Loan Agreement'**) was entered into by and between seven Financial Institutions, including the Financial Creditor, on the one part and the Corporate Debtor on the other. The promoters of the Corporate Debtor also infused the required equity contribution of ₹192 crore in the said project.

2.3. The Financial Creditor relies on the following terms and conditions of the Loan Agreement:

Clause in the Common Loan Agreement	Particulars
2.7A (i): Drawdown	<i>The Facility may be disbursed in one or more</i>

¹ Annexure L1, pages 211-218.

² Annexure L3, pages 223 -225.

Clause in the Common Loan Agreement	Particulars
	<p><i>instalment(s) subject to the Borrower complying with the provisions of this Agreement and the Disbursement Procedure stipulated hereinbelow being complied with, including production/ execution of evidences/ documents required for such Disbursement, and the expenditure incurred or to be incurred on the Project being in consonance with the provisions of this Agreement, and a Notice of drawal to that effect being received by the Lenders' Agent (with a copy to each of the Lenders) from the Borrower.</i></p> <p><u>The Borrower shall not be entitled to seek any Disbursement after the account has been classified as non-performing in the books of any of the Lenders as per guidelines issued by the RBI in this regard or on occurrence of an Event of Default.</u></p> <p><i>(page 336 of the petition)</i></p>
2.7A (ii) Availability of Disbursements	<p><i>Subject to the terms and conditions of this Agreement, the <u>Borrower may request disbursement</u> on any Business Day during the Availability Period, provided that:</i></p> <p><i>a) the aggregate amount of each Disbursement during any month from the Lenders shall be at least ₹10,00,00,000/- (Rupees ten crores only) and in integral multiple of ₹1,00,00,000/- (Rupees one crore only), except for the final Disbursement of the Available Commitment, under this Agreement; and</i></p> <p><i>b) the aggregate amount of any Disbursement does not exceed the Available Commitment</i></p> <p><i>(pages 336-337 of the petition)</i></p>
2.7A (iii) Drawdown Schedule	<p><i>“a) The <u>Borrower shall provide to the Lenders, at least 30 (thirty) days prior to the Disbursements proposed to be sought by the Borrower from the Lenders, an indicative Drawdown Schedule</u> for a quarter, specifying the amount of the Facility proposed to be disbursed for a period ending such quarter. (“Drawdown Schedule”).”</i></p> <p><i>(page 337 of the petition)</i></p>
2.11 Repayment	<p><i>(i) The Borrower undertakes to repay the Facility to the</i></p>

Clause in the Common Loan Agreement	Particulars
	<p><i>Lenders In accordance with the Amortisation Schedule set forth In Schedule IV of this Agreement.</i></p> <p><i>(ii) The Lenders may, in suitable circumstances and in consultation with the Borrower, revise, vary or postpone the repayment of the principal amounts of the Facility or the balance outstanding for the time being or any Instalment(s) of the principal amounts of the Facility or any part thereof.</i></p> <p><i>(iii) Unless otherwise provided herein, in the event of any default in any payments or any Interest or additional interest, on postponement, if any, allowed by the Lenders shall be at the rate of interest as may be stipulated by the Lenders at the time of such postponement.</i></p> <p><i><u>(iv) If, for any reason, the amount finally Disbursed by the Lenders is less than the amount of the Commitment(s), the Instalment(s) of repayment of the Loans shall stand reduced proportionately but shall be payable on the Due Dates as specified in the Amortisation Schedule.</u> “</i></p> <p><i>(page 351 of the petition)</i></p>
Schedule I Part B	<p><u>Respective Commitment of Lenders in the Facility</u></p> <p><i>...*IDBI has sanctioned facility amount of ₹100,00,00,000/- (Rupees one hundred crores only) out of which an amount of ₹98,00,00,000/- (rupees ninety-eight crores only) has been allocated.”</i></p> <p><i>(page 422 of the petition)</i></p>
Schedule IV	<p>Amortisation Schedule ("Amortisation Schedule") shall mean the <u>schedule of repayment of the Loans</u> set forth in Schedule IV of this Agreement as may be modified from time to time”</p> <p><i>(page314 (definition clause) & 425 of the petition)</i></p>
7.1-Events of Default	<p><i>For the purpose of this Agreement, each of the following shall constitute an Event of Default:</i></p> <p><i>a)Default In Payment of Interest or Repayment of Principal Sums of the Loans</i></p> <p><i>Default has occurred In the payment of Interest and/or</i></p>

Clause in the Common Loan Agreement	Particulars
	<p>repayment of principal amount of the Loans on the Due Dates and such default has continued for a period of 30 (thirty) days.</p> <p>b) Default in other Payment</p> <p>Default has been committed by the Borrower in payment of any amount payable pursuant to the Finance Document or a Security Document on the respective Due Dates or on being demanded by the Lenders In terms thereof as the case may be and such default has continued for a period of thirty (30) days.</p> <p>(page 400 of the petition)</p> <p>l) Extra-Ordinary Circumstances</p> <p>If extra-ordinary circumstances have occurred, in the opinion of the Lenders, which make it Impossible for the Project to be carried out and for the Borrower to fulfill its obligations under any of the Finance Documents or the Project documents.</p> <p>m) Abandonment of the Project</p> <p>The Borrower has abandoned the Project. The Project shall be deemed to have been "Abandoned", <u>if the construction activity during the project construction has been suspended continuously for a period of 60 days or the operations of the Project have been halted for a continuous period of thirty (30) days for reasons other than the Force Majeure."</u></p> <p>(page 402 – 403 of the petition)</p>
7.2 Consequences of Default	<p><u>If one or more of the aforesaid Events of Default shall occur and be continuing thereupon, and in every such event and at any time thereafter during the continuance of such event, the Lenders shall have the right to terminate their Commitments and accelerate the Secured Obligations and in exercise of such rights the Lenders may, take one or more of the following actions</u></p> <p>(i) give written notice of an Event of Default, in which case all Commitments and the Lenders' obligations to</p>

<i>Clause in the Common Loan Agreement</i>	<i>Particulars</i>
	<p><i>make the Available Commitment available to the Borrower, shall be terminated forthwith;</i></p> <p><i>(ii) declare the unpaid principal amount of and all accrued Interest with respect of the Loans and all other Secured Obligations and all other amounts payable by the Borrower hereunder and under the Security Documents to be forthwith due and payable, whereupon <u>such amounts shall become forthwith due and payable without presentment, demand, protest or any other notice of any kind, all of which are hereby expressly waived;</u></i></p> <p><i>(page 405 – 406 of the petition)</i></p>
8.1 Suspension	<p><u>Right of the Borrower to avail the Facility may be suspended or terminated by the Lenders:</u></p> <p><i>a) on failure by the Borrower to carry out all or any of the terms of this Agreement which will have Material Adverse Effect or on the occurrence of an Event of Default or a Potential Event of Default; or</i></p> <p><i>b) on any material change in the Borrower's business or financial position or the efficiency of the Borrower's management or personnel or the execution of the Project.</i></p> <p><i>c) If in the opinion of the Lenders, any extraordinary situation makes it improbable that the Borrower would be able to perform its obligation under the Transaction Documents.</i></p> <p><i>(page 410 of the petition)</i></p>

2.4. As per the terms and Conditions agreed between the Financial Creditor and the Corporate Debtor, the Financial Creditor disbursed³ the following amount:

<i>Dates of disbursement</i>	<i>Amount (₹)</i>
09.03.2012	45,00,00,000.00
01.08.2012	7,45,00,000.00
27.12.2012	1,85,88,377.00

³ Annexure – E, Page 112 – 122.

<i>Dates of disbursement</i>	<i>Amount (₹)</i>
05.01.2013	65,11,623.00
07.03.2013	1, 28,66,955.00
02.04.2013	68,29,446.00
30.12.2013	4,20,81,116.00
29.03.2014	3,72,40,949.00
30.06.2014	2,36,75,776.00
27.09.2014	1,61,94,838.00
Total	68,84,89,080.00

- 2.5. The Corporate Debtor has failed to pay the interest on the principal amount for three consecutive months, due to which the account of the Corporate Debtor was classified as Non-Performing Asset (*NPA*) on **30.12.2014**. As per clause 2.7A (i) of the Loan Agreement, the Corporate Debtor was not entitled to seek any disbursement after the account has been classified as *NPA*.
- 2.6. As per clause 1.4 of the Loan Agreement, the rights and obligations of each of the lenders are several. Further, none of the secured parties is liable for the obligations of the other secured parties. Also, as per clause IV(c) at page 465 of the Petition, the Financial Creditor submits that each of the Financial Institutions retains their individual rights to commence legal proceedings against the borrower in various jurisdictions. Hence, the Financial Creditor cannot be held responsible for the failure on the part of the other Financial Institutions to disburse the loan amount.
- 2.7. Reliance has been placed on *Innoventive Industries Ltd v ICICI Bank*,⁴ where the Hon'ble Supreme Court has held that the Adjudicating Authority has merely to see the records of the Information Utility and other evidence produced by the Financial Creditor to satisfy itself that a default has occurred. Thereafter, if the Adjudicating Authority is *satisfied* that there is existence of debt and that default has occurred, then the application filed by the financial creditor under section 7 of the Code must be admitted.

⁴ (2018) 1 SCC 407 : 2017 SCC OnLine SC 1025 decided on 31 August 2017 (paras 27, 30, 57, 58 and 59)

- 2.8. Further, the Corporate Debtor in its reply has admitted that the project was progressing satisfactorily until 2012, when the Central Bureau of Investigation (CBI) filed an FIR against Shri Manoj Jayaswal (one of the Directors of the Corporate Debtor) and on one of the group companies, being Jas Infrastructure & Power Limited, for coal block allocation. Hence, the submission by the Corporate Debtor that the Financial Creditor did not perform its reciprocal obligations under the Common Loan Agreement/sanction letter is misleading. The Financial Creditor continued to disburse payments until 27 September 2014, whereas the CBI filed its closure report on 05 May 2014 itself.
- 2.9. It is also pertinent to note that the Hon'ble NCLAT, in *Amitabh Kumar Jha v Bank of India & another*,⁵ has held that the statutory right across the ambit of section 7 of the I&B Code cannot be curtailed or made subservient to any Inter Creditor Agreement and that the debtor has no locus to meddle with the internal arrangements and affairs of the Creditors. Further, there are a catena of judgments that has held that a Financial Creditor can file an application under section 7 of the Code independently of the consortium and the Joint Lenders Committee. The Financial Creditor has also relied on *Indian Bank v Athena Demwe Power Ltd.* (NCLT – New Delhi),⁶ *Bank of Baroda v Ultra Home Construction Pvt. Ltd.* (NCLT, New Delhi)⁷ (paragraphs 15 and 17 - 20), *Bank of Baroda v Rotomac Exports Pvt. Ltd.* (NCLT, Allahabad Bench).⁸
- 2.10. The instant petition is within the limitation period. The date of NPA *i.e.*, was 30.12.2014 and the instant petition was filed on 11.12.2018. The Corporate Debtor has acknowledged its debt and default in its audited balance sheets for FY 2015-16 and FY 2016-17 (on pages 32, 98, 100 and 101 of the rejoinder). It is a well settled law that balance sheet entries amount to acknowledgment of

⁵ 2020 SCC OnLine NCLAT 1072 decided on 22 May 2020

⁶ 2017 SCC OnLine NCLT 11328 decided on 28 September 2017 (paras 9, 10 and 11)

⁷ CP (IB) No.122(PB)/2017 decided on 04 October 2017 (paras 15, 18 to 20)

⁸ CP (IB) No.70/ALD/2017 decided on 20 September 2017

debt under section 18 of the Limitation Act, 1963 [*Asset Reconstruction Company Ltd. v. Bishal Jaiswal & another*⁹].

3. *Submissions by the Ld. Sr. Counsel, Mr. Jishnu Saha appearing on behalf of Corporate Debtor*

3.1. On perusal of the clauses in the Loan Agreement it can be presumed that the Financial Institutions had formed a consortium to assist the Corporate Debtor to set up the plant and extend financial aid. Based on such collective assurances from the Financial Institutions including the Financial Creditor, the Corporate Debtor proceeded to infuse equity and set up the beneficiation and pelletisation plant. However, disbursements were not made in terms of the assurance.

3.2. With reference to all the compliances of loan agreement Corporate Debtor had issued first notice of drawal to all the lenders on 09 March 2012 for ₹205 crore. The Lenders' Independent Engineers, Development Consultants Pvt Ltd ('LIE') has also certified to IDBI (Lead Bank) on 21 March 2012 for disbursement towards the said project. After submission of certificate from LIE and compliance of all pre-disbursement condition, the Lead bank issued First Lending Confirmation Notice ('LCN') to all lenders on dated 22 March 2012. Even after issue of LCN by the Lead Bank, only five lenders out of seven have disbursed in the project. Punjab National Bank and United Bank of India from the consortium lenders did not disburse towards the said project though they signed the Financing Documents.

3.3. The Project was progressing satisfactory till September 2012. However, in the meantime, CBI filed FIR in September 2012 for coal block allocation on one of the Group Company, i.e., Jas Infrastructure and Power Limited ('JIPL') and Financial Creditor have stopped disbursements for the entire projects of group. Thus, the group came under severe cash flow strain.

⁹ (2021) 6 SCC 366 : 2021 SCC OnLine SC 321 decided on 15 April 2021 (paras 22 to 34)

- 3.4. In the meantime banks disburse only interest portion of their respective accounts to regularize and to maintain their account as a standard asset and appropriated the same for their benefits, thus relegating the said company to clutches of darkness. Corporate Debtor had already placed all the required contract/orders but due to non-disbursement from lenders could not achieve much progress after September 2012. Ultimately, after 20 months, CBI filed closure report in May 2014 which proved the company's good corporate governance practices.¹⁰ It is pertinent to mention that this period of delay in disbursement in terms of the sanctioned commitments has completely derailed the project prospects.
- 3.5. The Corporate Debtor tried to persuade the consortium members to take steps to revive the project, however, the said consortium proposed to proceed to initiate a Joint Lenders Meeting ('JLM'). In the JLM dated 26th July, 2013, proposal to approach CDR cell for revival of the project was advanced and consortium had provided their in-principle approval including PNB and UBI in meeting.
- 3.6. Top management of consortium has given consolation to project and given approval for CDR in 2013 for revival of the project. Final package of CDR has also been approved by financial creditor but at the end moment consortium had withdrawal its application from CDR with the reason that the promoters was not in a position to bring in additional equity or any investors due to CBI enquiry, this fact was already discussed by promoters to lenders.
- 3.7. In the JLM of Corporate Debtor dated 08 February 2014, all the Financial Creditor had carried out second option for revival of the project and decided for change of management in the company. IDBI Capital was mandated to explore various possible investors for change in management. IDBI capital had suggested that change in management will take place through '*Swiss Challenge Bidding Process*.'

¹⁰ A copy of the closure report is annexed hereto and marked as "**Annexure B**".

- 3.8. In the interest of lenders and for revival of project, the promoters of Corporate Debtor have sacrificed their entire equity of ₹123 Cr and willing to transfer it to new promoters at ₹1/- only. To take over the project, discussions were held by IDBI capital with many leading industrial houses of the country for takeover of management. In this quest, one of the established Group – Uttam Galva Steel Ltd. (*'UGSL'*), has agreed to acquire entire stake in the project & bring additional equity along with sanction of additional debt by lenders to complete the project.
- 3.9. The final proposal was discussed amongst the lenders of Corporate Debtor project in the JLM held on 05 June 2014. However, in the span of four months lenders did not take any action in this regard and declined the proposal submitted by UGSL. With the efforts of promoters for revival of project, promoters met with top management of consortium and approached them for change of management in project.
- 3.10. Further as discussed in consortium meeting once again lenders had decided for change of management in Corporate Debtor, as a third option. In this regard company solely approached OPG Group to take over the project by way of change in management process. After conducting detailed due diligence, OPG Group had submitted its firm offer to take over the Corporate Debtor project to IDBI Bank dated 19 March, 2015.
- 3.11. Corporate Debtor promoters along with OPG group promoters have also met with the lenders of Corporate Debtor for taking up the change in management process and get approve from banks competent authority. Promoters are extending their full cooperation towards revival of the project.
- 3.12. In the instant matter, the Corporate Debtor has been a victim of the callousness, arbitrary acts of omissions and commissions of the officials of Consortium Lenders. That the lenders had miserably failed to disburse the term loan for the said project and also failed to implement the CDR, Swiss Challenge Method and change of the management process. Furthermore, it is

pertinent to mention that due to the defaults of the Consortium Lenders, the Corporate Debtor was not able to commission the said project as the same required financial assistance to which all the members of the consortium agreed in the first place.

- 3.13. It is now settled law that all commercial contracts must be interpreted from the standpoint of business efficacy, and such construction of the contract as will render the same commercially inefficacious must be avoided. Reference in this regard may be made to the decision of the Hon'ble Supreme Court in the case of *Citibank, N.A. v. TLC Marketing PLC & another*,¹¹ and the decision of the United Kingdom Supreme Court in the case of *Wood v Capita Insurance Services Ltd*.¹²
- 3.14. Further, the Corporate Debtor relied on the case of *Gedala Satchidananda Murthy v. Commissioner, Deptt. of Endowments, Transmission Corporation of Andhra Pradesh Ltd. v. GMR Vemagiri Power Generation Ltd.*¹³ where the Hon'ble Supreme Court has clearly held that a contract is a commercial document and must be interpreted in a manner to give efficacy to the contract rather than to invalidate the same.
- 3.15. The stalling of disbursement was only on the account of investigation of coal block allocation in the middle of September 2012 to which the CBI who conducted the coal block allocation inquiry have submitted a closure report in the year 2014, by which the fate of the project was adequately jeopardised with no scope for its revival.
- 3.16. The coal block allocation investigation as ordered the Hon'ble Apex Court was conducted by CBI in respect of a separate group company by the name and style of Jas Infrastructure and Power Ltd. which has separate legal entity

¹¹ (2008) 1 SCC 481 : 2007 SCC OnLine SC 1213 decided on 05 October 2007 (paras 51 and 52)

¹² (2017) 2 WLR 1095 : [2017] UKSC 24 decided on 29 March 2017 (paras 10 to 13)

¹³ (2007) 5 SCC 677 : 2007 SCC OnLine SC 704 decided on 15 May 2007 (para 32)

¹⁴ (2018) 3 SCC 716 : 2018 SCC OnLine SC 125 decided on 16 February 2018 (paras 18 to 26)

and not the Corporate Debtor, however, the disbursement as agreed upon in the letter of sanction being the obligation by and between the parties even then the terms thereof were breached by failing to deliberately disburse the sanctioned quantum.

- 3.17. On and from September 2012 the Financial Creditor stopped disbursal of part of the loan amount on the pretext of filing of the FIR by CBI against the group company though it has no connection with the Corporate Debtor. Till December 2012 the Financial Creditor stopped disbursing loan amount in the credit of the Corporate Debtor and only on 27 December 2012, the Financial Creditor disbursed only the interest amount for three months. Thereafter on next eight occasions the Financial Creditor disbursed only the respective interest amount and adjusted the said amount against the pending interest of the loan account.

4. *Issues involved*

- 4.1. We have heard the Ld. Counsel appearing on behalf of the Financial Creditor and the Ld. Sr. Counsel appearing for the Corporate Debtor and perused the record.
- 4.2. The issue that merits consideration in the present case is whether the Financial Creditor, after having allegedly playing a contributory role in the default, can maintain a section 7 application against the Corporate Debtor.

5. *Analysis and findings*

- 5.1. To briefly recall the facts, there has been no effective disbursements on the part of the Financial Creditor after 27 December 2012. The disbursements made thereafter are all appropriate either on the same day or the very next day towards interest. Therefore, these disbursements have remained on paper, and have contributed towards increased liability on the part of the Corporate Debtor to repay the amounts owed to the Financial Creditor.
- 5.2. In the case of *State Bank of India v N. S. Engineering Projects Private Limited*, we have taken the view that having contributed towards the default

by their own conduct, the Financial Creditor cannot be allowed to maintain a section 7 application against the Corporate Debtor. The findings in that case will apply on all fours in a fact-situation such as the present case. Therefore, we have no hesitation in holding that in the present case also, the present section 7 application deserves to be dismissed on the ground of contributory role played by the Financial Creditor, forcing the default on the part of the Corporate Debtor. The latin maxim, *nullus commodum capere potest de injuria sua propria*, will apply to the present case also. The Financial Creditor cannot be allowed to take advantage of its own wrong.

- 5.3. There cannot be a mechanical admission of the application under section 7 of the Code just because a debt and a default is established. Primacy has to be given to the ultimate objective of the Code, which is to achieve a resolution of the Corporate Debtor. In order to be satisfied in terms of the provisions of section 7(5), of the Code, the role of the petitioning creditor in the alleged default must also be examined.
- 5.4. Considering the totality of circumstances, CP (IB) No.1676/KB/2018 shall stand **rejected**. However, the Financial Creditor is at liberty to pursue its remedies under any other law as may be available to it.
- 5.5. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
- 5.6. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities
- 5.7. File be consigned to record.

BALRAJ
JOSHI

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Balraj Joshi
Member (Technical)
SA (LRA)

Rajasekhar V
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