**IN THE NATIONAL COMPANY LAW TRIBUNAL**
**MUMBAI BENCH, COURT-I**

**CP (IB) 1279/MB/C-I/2019**

Under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

**India Factoring and Finance Solutions Private Limited**
**[CIN: U65923MH2009PTC197597]**
Having Office at 401, Windsor House, Off C.S.T. Road, Kalina, Santacruz (E), Mumbai - 400098

…Financial Creditor

Versus

**Arcons Infrastructure and Construction Private Limited**
**[CIN: U45201MH2006PTC162735]**
Reg. Office-Building No. 4, 1st Floor, Mangalwari Commercial Complex, Bajaj Wing Sadar, Nagpur, Maharashtra- 440001.

…Corporate Debtor

**Order Delivered on 11.11.2022**

***Coram:***

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)
Hon'ble Member (Technical): Mr. Shyam Babu Gautam

***Appearances:***

For the Operational Creditor : Mr. Shyam Kapadia, Counsel a/w Mr. Rahul Deshpande, Advocate.

For the Corporate Debtor : Mr. S. Rajagopalan, Counsel and Ms. Chetna Reddy, Advocate.

**ORDER**

***Per: Shyam Babu Gautam, Member (Technical)***

1. This Company Petition is filed under section 7 ("**the Petition**") of the Insolvency and Bankruptcy Code, 2016 **(IBC)** by Mr. Johny Joseph, on

behalf of M/s India Factoring and Finance Solutions Private Limited **("the Financial Creditor")**, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Arcons Infrastructure and Construction Private Limited ("the Corporate Debtor")**.

2. The Corporate Debtor was incorporated 09.06.2006 under the Companies Act, 1956. The registered office of the Corporate Debtor is situated at Building No. 4, 1st Floor, Mangalwari Commercial Complex, Bajaj Wing Sadar, Nagpur, Maharashtra- 440001. Therefore, this Bench has jurisdiction to deal with this petition.

3. The total amount of debt alleged is Rs.4,52,13,711.60 (Rupees Four Crore Fifty Two Lakh Thirteen Thousand Seven Hundred and Eleven Only) as on 28.02.2019. The date of default as per Part IV is 07.01.2019.

**<u>Submissions made by the Financial Creditor by the way of Petition:</u>**

4. It is the case of the Financial Creditor that the Corporate Debtor had entered into agreement for construction of Check Posts with the IL&FS Transportation Networks Ltd (hereinafter referred to as ITNL). The bills raised by the Corporate Debtor to ITNL were duly certified by the ITNL for a total amount of Rs. 4,90,90,654. The Corporate Debtor had approached the Financial Creditor for availing financial assistance to meet their working capital requirements. Thereafter the Financial Creditor purchased the approved bills vide factoring facility provided to the Corporate Debtor. In respect of the same Financial Creditor issued a facility letter dated 04.07.2018 in favor of the Corporate Debtor whereby the Financial Creditor agreed to purchase the receivables due to the Corporate Debtor from its Debtors.

5. Pursuant to the approval of the facility vide facility letter dated 04.07.2018, the Financial Creditor and the Corporate Debtor had entered into a factoring agreement dated 05.07.2018 for extending credit facilities to the Corporate Debtor. In pursuance of the factoring agreement, an irrevocable Bill of Exchange dated 09.07.2018 was drawn by Corporate Debtor on ITNL which was duly accepted and acknowledged by ITNL and admitted to pay a sum of Rs. 4,90,90,654 on or before 05.01.2019. In terms of the said agreement, the Financial Creditor acted as a factor in the transaction/s and disbursed such payments towards the facilities extended as recorded in the Fund In Use (FIU) statement.

6. That the details of the said bill of exchange are hereinbelow:

   i. Bill of Exchange dated 09.07.2018 drawn by Corporate Debtor on M/s. IL&FS Transportation Networks Ltd. The beneficiary / payee of the aforesaid Bill of Exchange is the Financial Creditor i.e M/s India Factoring and Finance Solutions Private Limited acting as the factor of the Corporate Debtor in terms of the facility letter dated 04.07.2018 and the factoring agreement dated 05.07.2018. The bill of exchange was drawn for Rs.4,90,90,654/- (Rupees four crores ninety lakhs ninety thousand six hundred and fifty four only) for receivables arising out of Invoice Ref No. RA 12 dated 22.05.2018, RA 13 dated 09.06.2018 and Retention Money as per RA bill 13 dated 09.06.2018.

7. The Financial Creditor submits that despite acceptance of ITNL to honour the Bills of Exchange issued by them they have failed to do so. The Financial Creditor issued a legal notice dated 07.01.2019 to the Debtor namely IL&FS Transportation Networks Ltd calling upon to pay the amount of Rs.4,46,55,874.64 with further interest @14.50% pa

against the payable dues, however the Debtor never responded to said Legal Notice and never repaid the debts. Therefore, the liability rested on the Corporate Debtor under clause 12 of the Factoring agreement dated 05.07.2018 to repay the amount towards the facility issued to them under the facility letter and factoring agreement dated 04.07.2018 and 05.07.2018 respectively. Corporate Debtor has defaulted on its payment obligations in terms of the recourse exercised by the Financial Creditor in respect of the said Bills of Exchange dated 09.07.2018. It is submitted that the Corporate Debtor has been in continuous default of its payment obligations in terms of the said Bills of Exchange and the recourse exercised under the factoring agreement and has failed to discharge its liability towards the Financial Creditor.

8. The Financial Creditor while invoking the right of recourse available as per clause 12 of the Factoring agreement to recover the debt due from the Corporate debtor, issued a legal notice dated 07.01.2019 to the Corporate Debtor calling upon to pay a sum of Rs. 4,46,55,873,64 being due and payable. Despite repeated reminders and requests the Corporate Debtor has not come forward to settle its dues and therefore an event of default has occurred and continues. The Corporate Debtor vide letter dated 09.01.2019 has admitted to the dues however shifted the liability over IL&FS Transportation Networks Ltd to pay the same, which contention does not sustain as per terms of the Factoring agreement specifically clause 12 which states that in a situation of non-payment of dues the Corporate Debtor shall be liable to pay at any time when the demand is made by the Financial Creditor.

9. As per clause 6.2 of the Factoring Agreement, the Financial Creditor had maintained a Fund In Use account for the Corporate Debtor to record all sums paid to the Corporate Debtor against the facility or repaid by

the Corporate Debtor along with other charges pertaining to interest, penalty, etc,. The funds in use statement shows that as on 28.01.2019, against the abovementioned facilities extended to the Corporate Debtor and other charges, an amount aggregating to Rs.4,52,13,711.60 stands due and payable. In view of the above and as per the clear and unequivocal terms as stipulated in the Factoring Agreement and Facility Letter, the Corporate Debtor has absolutely, irrevocably and unconditionally agreed that any liability and obligation under the said Agreement shall be continuing, absolute, unconditional agreed that any liability and obligation under the said agreement shall be continuing, absolute, unconditional and irrevocably irrespective of any disputes or differences of whatsoever nature between the Corporate Debtor and Financial Creditor.

10. There is no gain saying the fact that the Corporate Debtor has agreed that its liability to pay in respect of any sum due and payable or remaining unpaid after the recourse date, the Financial Creditor shall at any time on demand be entitled to recover the amount due against the receivables and the Corporate Debtor shall not be discharged or released of the liability in any manner by reason of any arrangement or compromise between the Corporate Debtor and Debtor.

11. Pursuant to the approval of the facility vide 'facility letter' dated 04.07.2018 and Factoring Agreement dated 05.07.2018, the Corporate Debtor is liable to make good all the deficiencies in payment. The Financial Creditor submits that unless CIRP is set into motion by the orders of this Tribunal, great loss and prejudice would occasion to the Financial Creditor and to the other bona-fide creditors of the Corporate Debtor company.

12. The Corporate Debtor has filed a Commercial Suit before the Hon'ble High Court of Bombay seeking an injunction against the Financial Creditor from acting upon the Factoring Agreement dated 05.07.2018 or exercising any other recourse for recovering the said amount disbursed to the Corporate Debtor in lieu of the extended facility, which prayer is bad in law and does not sustain and is further not entertained by the Hon'ble Court and no restrain order in respect of the said suit against the Financial Creditor has been issued or considered.

**Submissions made by the Corporate Debtor by the way of Affidavit in Reply:**

13. The Corporate Debtor states that for the reasons explained below, the amount disbursed has been excluded from the definition of "Financial Debt" as defined under section 5(8) of the Insolvency and Bankruptcy Code, 2016 ("IBC"), as follows:

"Financial Debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-

"

a) .........
b) .........
c) .........
d) .........
e) receivables sold or discounted ***other than any receivables sold on non-recourse basis:***
f) ........."

There being no "Financial Debt", the Petition is not maintainable.

14. The counsel submits that by virtue of the absolute assignment of the underlying receivables (Property in Chose), the absolute rights (including all associated rights, all legal and beneficial rights, title and interest in and into such receivables arising from Bill of Exchange (Annexure-H) have been transferred and vested with the Financial Creditor both in law and in equity and as such the monies paid by the Financial Creditor to the Corporate Debtor is a consideration/ purchase price of receivables and not a Financial Debt and as such the present petition is not maintainable.
15. By virtue of the execution of duly stamped Factoring Agreement (Annexure-G) and duly stamped Bill of Exchange dated 09.07.2018 (Annexure-H) and the composite reading thereof indicates that each such receivables and associated rights shall transfer to and vest with the Financial Creditor by virtue of Section 130 of Transfer of Property Act and as such the Financial Creditor is an assignee under an absolute assignment at all points of time and that his right to recover the monies are solely from IL&FS Transportation Networks Limited and that the Financial Creditor does not have any right to file the present petition against this Corporate Debtor, he does not have right of recourse to Corporate Debtor and hence the present petition is not maintainable.
16. By virtue of the execution of duly stamped Factoring Agreement (Annexure-G) and duly stamped Bill of Exchange dated 09.07.2018 (Annexure-H) and the composite reading thereof indicates that each such receivables and associated rights shall transfer to and vest with the Financial Creditor and given the fact that on the date of bill of exchange became due for payment, a moratorium was imposed by the Honourable National Company Law Appellate Tribunal, New Delhi and as such the Financial Creditor cannot claim default of IL&FS Transportation Networks Limited.

17. The present application is not maintainable since the claim of the Financial Creditor is primarily against IL&FS Transportation Networks Limited who is the principal debtor of the Financial Creditor and the same having been admitted by the Financial Creditor by virtue of the Financial Creditor himself issuing legal notice to IL&FS Transportation Networks Limited dated 07.01.2019 (Annexure-P).
18. The liability under the said Factoring agreement (Annexure-G) and Bill of Exchange (Annexure-H) is admittedly payable by IL&FS Transportation Networks Limited on 05.01.2019 and that the Moratorium imposed by Honourable National Company Law Appellate Tribunal, New Delhi came in to force on 15.10.2018 much prior to the Bill of Exchange becoming due for payment and as such the present petition against the Corporate Debtor is not maintainable and liable to be dismissed.
19. The Hon'ble National Company Law Appellate Tribunal, New Delhi has been adjudicating on the insolvency proceedings initiated by Union of India against Infrastructure and Leasing Finance Limited (IL&FS) and its group companies vide Company Appeals (CA) 346 and 347 of 2018 and that the adjudication process is pending before the Honourable National Company Law Appellate Tribunal, New Delhi.
20. The Hon'ble National Company Law Appellate Tribunal, New Delhi, in Company Appeals (CA) 346 and 347 of 2018, has vide order dated 15.10.2018 granted a moratorium on the obligations and the amounts payable by IL&FS and its group companies which includes IL&FS Transportation Networks Limited, who are the principal debtors in the present case (Annexure-O). The said moratorium and stay has been in force on 05-01-2019 when the bills became due for payment by IL&FS Transportation Networks Limited to Financial Creditor and the said Moratorium continues to be in force even as of date of this Counter filed

by Corporate Debtor. It is further stated that therefore the recovery of any amount payable under any agreement or transaction entered into by IL&FS Group companies including the one in terms of the Factoring Facility (Annexure-G) and Bill of Exchange (Annexure-H) herein has been stayed by the Hon'ble National Company Law Appellate Tribunal, New Delhi. The copy of the Order dated 15.10.2018 is annexed and marked as Annexure-O.

21. It is also pertinent to point out that in view of the moratorium/stay granted by the Hon'ble National Company Law Appellate Tribunal, New Delhi vide order dated 15.10.2018 and that the said Bill of Exchange (Annexure-H) became due for payment by IL&FS Transportation Networks Limited to the Financial Creditor on 05.01.2019, no default at all has taken place by IL&FS Transportation Networks Limited in payment of any amount to the Financial Creditor, therefore the present application is not maintainable against the Corporate Debtor.

22. The action of the Financial Creditor in declaring the account of the Corporate Debtor as Non Performing Asset during pendency of the proceedings before the Honourable National Company Law Appellate Tribunal in proceedings numbered as Company Appeals (CA) 346 and 347 of and Hon'ble High Court of Judicature at Bombay in its Commercial Division, vide Commercial Suit (L) No 231 of 2019 filed by the Corporate Debtor against the Financial Creditor is ex-facie illegal and liable to be set aside since there is no default either by the Principal Debtor i.e IL&FS Transportation Networks Limited given the fact that that the Principal Debtor i.e IL&FS Transportation Networks Limited has been restrained by Honourable National Company Law Appellate Tribunal, New Delhi in honouring the Bill of Exchange and as such the

act of the Financial Creditor in declaring the account of Corporate Debtor as Non Performing Asset is not sustainable in the eyes of law.

23. It is pertinent to note that the Honourable National Company Law Appellate Tribunal, New Delhi vide its specific order dated 25.02.2019 has restrained banks and financial institutions from declaring the accounts of IL&FS companies as Non Performance Assets, owing to the existence of moratorium on the obligation and payments to be made in terms of any agreement, facility or arrangement entered by IL&FS and its Group companies Including IL&FS Transportation Networks Limited. The copy of the Order of Honourable National Company Law Appellate Tribunal, New Delhi dated 25.02.2019 is annexed and marked as Annexure-T.

24. In the same matter, the Hon'ble National Company Law Appellate Tribunal, New Delhi vide order dated January 11, 2019 granted permission to the Financial or Operational Creditors to file their applications along with their claims.

25. In pursuance to the permission granted to the financial or operational creditors by the Honourable National Company Law Appellate Tribunal, New Delhi, the Financial Creditor has claimed himself as the Financial Creditor and filed an application numbered as Diary Number 8335 of 2018 in the Honourable National Company Law Appellate Tribunal against IL&FS and its group companies including IL&FS Transportation Networks Limited on the same cause of action pending adjudication vide the present petition filed before this Honourable Adjudicating authority, based on same set of documentation and claiming the same amount. Hence, the present application is not maintainable.

26. Given the fact that the Financial Creditor herein having already agitated its claims before the Hon'ble National Company Law Appellate

Tribunal, New Delhi cannot be allowed to continue with the present proceedings.

27. The Union of India vide its further affidavit dated 24.01.2019 filed before the National Company Law Appellate Tribunal, New Delhi, has submitted that the resolution of the IL&FS group entities will be based on the principles enunciated in the Insolvency and Bankruptcy Code, 2016 and that Ms. Grant Thornton India LLP has been appointed as Claims Management Advisor and presently Grant Thornton India LLP has been collating and verifying all the claims of all the creditors and also in parallel the fair value and liquidation values of each Sale Company is to be prepared along with Constitution of a Creditors Committee and inviting EOIs for the Companies.

28. The Corporate Debtor has also submitted the details to the claims advisor of the pending Bills of Exchange and have requested the claims advisor to make payment directly to the Financial Creditor as and when the said claims are processed in accordance to law.

**Findings:**

29. We have heard both the parties and perused the records.

30. We find it pertinent to note that there is a valid factoring agreement entered into between both the parties, wherein clause 12 clearly mentions "Recourse and Credit Protection" clause. This clause makes it clear that in the event the receivable remain unpaid after the recourse date, the Financial Creditor shall have the right of recourse against the Corporate Debtor. Hence, this clearly shows that the present agreement is a recourse agreement, that is the receivables were sold on recourse basis.

31. Considering the defence raised by the Corporate Debtor, we note that the same is invalid, as the above agreement falls under Section 5(8)(e) of the Code and hence is a valid financial debt.

32. The sole fact that the receivables were sold to the Financial Creditor and hence the liability to repay is upon IL&FS Transportation Networks Limited, does not extinguish the liability of the Corporate Debtor in the present case as the agreement entered into between the parties is not a non-recourse one. Hence, as per the agreement since IL&FS Transportation Networks Limited has defaulted in the payment of debt, the Corporate Debtor is liable to re-pay the same.

33. Hence, considering the same the defence of the Corporate Debtor that the it is no longer liable to repay the debt and the same applies to IL&FS Transportation Networks as the Hon'ble National Company Law Appellate Tribunal, New Delhi has imposed moratorium on all the claims and debts against IL&FS Transportation Networks stands irrelevant.

34. We also consider the facts of the case in the lights of the Order passed by Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. & Ors. Vs. Union of India & Ors. [Writ Petition (Civil) No. 99 of 2018] upholding the Constitutional validity of IBC, the position is very clear that unlike Section 9, there is no scope of raising a 'dispute' as far as Section 7 petition is concerned. As soon as a 'debt' and 'default' is proved, the adjudicating authority is bound to admit the petition.

35. The Financial Creditor has proposed the name of Mr. Prabhakar Bhat, Registration No. IBBI/IPA-001/IP-P00299/2017-18/10543, as the Interim Resolution Professional of the Corporate Debtor. He has filed his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 along with a copy of his Certificate of Registration.

36. The application made by the Financial Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount stipulated under section 4(1) of the IBC. Therefore, the debt and default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.

37. It is, accordingly, hereby ordered as follows: -

(a) The petition bearing **CP (IB) 1279 (MB) 2019** filed by **India Factoring and Finance Solutions Private Limited,** the Financial Creditor, under section 7 of the IBC read with rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Arcons Infrastructure and Construction Private Limited,** the Corporate Debtor is **admitted**.

(b) There shall be a moratorium under section 14 of the IBC, in regard to the following:

(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 of 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 right 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002;

(iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

(c) Notwithstanding the above, during the period of moratorium:-

(i) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;

(ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;

(d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

(e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(f) **Mr. Prabhakar Bhat,** Registration No. IBBI/IPA-001/IP-P00299/2017-2018/10543, having address at No. 7, First Floor, Plot no. 81, Shital, Jain Mandir Marg, Behind Old SIES College, Sion West, Mumbai- 400022 [email: sukkhe@gmail.com] is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the IBC. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions issued/as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.

(g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

(h) The Financial Creditor shall deposit a sum of Rs.3,00,000/- (Rupees Three Lakhs only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

(i) The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

(j) IRP is directed to send a copy of this Order to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

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| **Sd/-** | **Sd/-** |
| **SHYAM BABU GAUTAM** | **JUSTICE P.N. DESHMUKH** |
| **Member (Technical)** | **Member (Judicial)** |

11.11.2022
DSB