NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD
SPECIAL BENCH - COURT 1 (URGENT HEARINGS THROUGH VIDEO CONFERENCE)
PRESENT: HON'BLE SHRI K ANANTHA PADMANABHA SWAMY – MEMBER JUDICIAL
HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI - MEMBER TECHNICAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 18.01.20201 AT 10:30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP (IB) No. 673/7/HDB/2019
NAME OF THE COMPANY	ECI Infra Towers Company Pvt Ltd
NAME OF THE PETITIONER(S)	Bank of India
NAME OF THE RESPONDENT(S)	ECI Infra Towers Company Pvt Ltd (Corporate Guarantor of ECI Engineering & Construction Co. Ltd)
UNDER SECTION	7 of IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

The application is allowed vide separate order.

MEMBER (TECHNICAL)

MEMBER (JUDICIAL)

Karim

NATIONAL COMPANY LAW TRIBUNAL
BENCH-1, HYDERABAD

CP No. 673/7/HDB/2019

Application filed under Section 7 of IBC, 2016 R/w Rule 4 of I&B (AAA) Rules, 2016

In the matter of

Bank of India
Star House, Bandra Kurla Complex
Bandra East, Mumbai – 400051

Branch Office at
Hyderabad Large Corporate Branch
1st Floor, PTI Buildings AC Guards
Khairatabad Mandal
Hyderabad – 500004

... Petitioner/
Financial Creditor

VERSUS

M/s ECI Infra Towers Company Private Limited
(Corporate Guarantor of M/s ECI Engineering & Construction Co. Ltd)
Plot No. A-12 & A-13, Panchavati Township
Manikonda Hyderabad Telangana – 500089

...Respondent/
Corporate Guarantor

Date of order: 18.01.2021

Coram:

Hon'ble Shri K. Anantha Padmanabha Swamy, Member (Judicial)
Hon'ble Shri Veera Brahma Rao Arekapudi, Member (Technical)

Appearance:

For Petitioner: Ms P. Suseela and Shri R. Mani Kumar, Advocates
For Respondent: Mr. M. Satyanarayana Reddy, Advocate

Heard on: 16.12.2020

PER: SHRI VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)

JUDGEMENT

1. **Bank of India** (hereinafter referred as Petitioner/ Financial Creditor) has filed the present petition against **M/s. ECI Infra Towers Company Private Limited** (hereinafter referred as Respondent/ Corporate Guarantor) who is the Corporate Guarantor to the credit facility sanctioned to **M/s ECI Engineering and Construction Company Limited** to trigger Corporate Insolvency Resolution Process ("CIRP"). It is alleged by the Petitioner that the Corporate Guarantor had defaulted in paying of Rs. 364,89,52,887.45 (Rupees Three Hundred Sixty Four Crores, Eighty nine lakhs, Fifty Two Thousand, Eight Hundred Eighty Seven and Forty five paise only) which includes interest as at 15.07.2019 with further interest thereon at contractual rates. The debt arose due to failure of making payment towards principal instalments of various term Loans and interest thereon. Hence this petition is filed under Section 7 of Insolvency and Bankruptcy Code, 2016, (referred to as "CODE") R/w Rule 4 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, seeking admission of the Petition, initiation of Corporate Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon.

2. **Facts of the case in brief:-**

The averments apropos to the Petition in brief are:-

2.1 That **ECI INFRA TOWERS COMPANY PRIVATE LIMITED** (referred to as Corporate Guarantor of M/s ECI Engineering and Construction Company Limited) is a limited Company and engaged in the business of construction activity of National Highways, Irrigation Projects, Infrastructure Projects etc.

2.2 **M/s ECI Engineering and Construction Company Limited (Borrower)** was granted financial assistance under diverse loan and security agreements entered into and executed between the

4

Borrower and Bank of India (Petitioner herein) for the purpose and on the terms and conditions contained therein.

2.3 At the request of the M/s ECI Engineering and Construction Company Limited (Borrower), the Petitioner, after due consideration for annual review/ restructuring of accounts under CDR Mechanism with enhancement had sanctioned a sum of Rs. 349.18 crores vide its sanction letter dated 10.09.2014 and the Respondent herein stood as Corporate Guarantor to the said facility for which a Board resolution dated 30.12.2014 was passed, guaranteeing the repayment of the loan amount by the borrower for which Deed of Guarantee dated 02.01.2015 and other documents were executed.

2.4 It is averred, the Borrower defaulted in payment of interest and the principal instalments of the Loans and further failed to clear the overdue amounts under the loans, resulting in classification of loans as Non-Performing Asset on 31.03.2016 in the books of accounts of the Bank. An OA No. 236 of 2019 for recovery of Rs. 293,14,25,167.86 was filed before Debts Recovery Tribunal-II under SARFAESI Act 2002 which is pending adjudication.

2.5 According to the Petitioner, an amount of Rs. 364,89,52,887.45 is due from the Borrower and M/s ECI INFRA TOWERS COMPANY PRIVATE LIMITED / Corporate Guarantor / Respondent herein as on the date of filing of the Petition i.e 15.07.2019. Hence, this petition is filed seeking orders to initiate CIRP against the Corporate Guarantor.

3. Reply filed by Corporate Guarantor

3.1 The Borrower was granted working capital facilities of Rs. 130 crores of NGB BG limited by the Financial Creditor on 03.11.2010. According to the Respondent, neither the Corporate Guarantee of Subsidiaries ECI Infra and Heyen Hydel, nor subservient charge on their assets was stipulated by the Financial Creditor as per the original sanction letter. It is also stated in the reply that the working capital limits were subsequently enhanced by the Financial Creditor to Rs. 245 crores on 28.03.2012 and again to Rs. 445 crores on

27.06.2013 by way of various sanction letters and subsequent agreements.

3.2 It is further stated that the Principal Borrower was extended credit facilities by 09 banks under MBA for executing infrastructure projects across India till restructuring of accounts under CDR package in June 2014.

3.3 It is the case of Respondent that operations of Principal Borrower came under stress due to the slowdown in the infrastructure, lower asset turnover, high rate of interest and other sector specific issues. The reasons cited for the stress was delays in releasing of final bills, retention monies, payments from clients on additional works, release of price variations and delays in release of regular running account bills due to lack of funds with the clients.

3.4 It is the further case of Respondent that in order to improve the operations, the consortium of banks with IDBI as lead bank referred the principal Borrower to Corporate Debt Restructuring (CDR) cell, which approved a restructuring package, under which the existing loans of all the lenders including the Petitioner herein to the Principal Borrower were to be restructured, granting certain additional financial assistance vide letter of approval dated 30.06.2014. Pursuant to the said letter, Master Restructuring Agreement was entered into on 30.06.2014.

3.5. The Respondent submits, the Petitioner bank, as a pre-condition demanded additional collateral securities from the Borrower before signing the joint documentation which a prerequisite for other members of the consortium to release the sanctioned facilities. However, the Borrower expressed its inability to give any additional securities or sub-servient charge on the assets of subsidiary companies or to obtain the requisite NOCs from the sole lenders of the subsidiaries.

3.6 It is alleged, the Petitioner violated the extant Regulations of RBI by creating sub-servient charge on the assets surreptitiously without obtaining the requisite NOCs, apart from obtaining Corporate Guarantees of the subsidiary companies. It is further alleged, the

Financial Creditor further failed to release the sanctioned CDR limits in full which adversely affected the operations of the Company and that when the account became NPA, the outstanding was Rs. 260.22 only.

3.7 The contention of the Respondent that Petitioner on some pretext or the other delayed release of sanctioned facilities to Borrower and stated that Financial Creditor was a part of various JLM meetings held by IDBI to revive the operations of the Company by invoking S4A Scheme and Deep Restructuring of the debt but alleges the Petitioner acted as a stumbling block.

3.8 The Respondent submits, pursuant to admission of petition bearing CP(IB) No. 5/7/HDB/2019 against the Principal Borrower, on 29.04.2020 Omakara Assets Reconstruction Private Limited took over all the loan facilities and underlying security interests from IDBI by executing an Assignment Agreement.

3.9 The Respondent further submits that its sole Bankers i.e. Union Bank of India had already assigned the total debt to M/s Omakara Assets Reconstruction Private Limited in November 2018 at a discount and had not recovered its dues in full, being the first charge holder. When such is the case the second charge holder will not have any right to recover even if the charge is properly created.

3.10 It is also stated that Omakara Assets Reconstruction Private Limited has expressed its interest to settle / take over the debt of Principal Borrower which is in process and pleaded the Adjudicating Authority to adjourn the matter till Omakara Assets Reconstruction Private Limited decide on the settlement / assign the debt from the Financial Creditor.

4. OBSERVATIONS / FINDINGS OF ADJUDICATING AUTHORITY

4.1 We heard the Counsel for the Petitioner and the Counsel for Respondent via video-conference. This is a Petition filed under Section 7 of IBC by the Financial Creditor seeking initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor. Admittedly, ECI Infra Towers Company Private Limited is the Corporate Guarantor to the credit facility sanctioned to M/s ECI Engineering and Construction Company Limited (Borrower). It is observed M/s ECI Infra Towers Company Private Limited is engaged in the business of construction activity of National Highways, Irrigation Projects, Railway etc, and was granted, inter-alia, financial assistance under diverse loan and security agreements entered into and executed between the Borrower and the Bank of India (BOI). The Borrower approached the Petitioner for annual review/restricting of accounts under CDR Mechanism with enhancement and after due consideration sanctioned the same by the Financial Creditor. The Respondent herein stood as a Corporate Guarantor to the said facility of ECI Engineering and Construction Company Limited. When M/s ECI Engineering and Construction Company Limited defaulted in payment of interest and the principal instalments of the Loans and failed to clear the overdue amounts, the loans were classified as Non-Performing Asset on 31.03.2016. The Financial Creditor has also initiated action under SARFAESI by filing OA No. 236 of 2019 for recovery of Rs. 293,14,25,167.86 before Hon'ble DRT-II, Hyderabad and the same is pending adjudication.

4.2. It is also true that an amount of Rs. 364,89,52,887.45 is due from ECI Infra Towers Company Private Limited as on date of filing of the Petition on 15.07.2019 and remains unpaid by the Borrower as well as by ECI Infra Towers Company Private Limited who is the Corporate Guarantor. In view of the default in repayment of of the financial debt amounting to Rs. 364,89,52,887/- by the Borrower and the Respondent herein, who is the Corporate Guarantor, the instant petition filed by the Financial Creditor to initiate CIRP under Section 7 of the IBC, 2016. It is also observed that the Borrower and the Corporate Guarantor/ Respondent herein had accepted the terms of sanction, passed resolution on their Board for providing security and Guarantee and executed documents to that effect.

4.3 On the other hand it is the case of Learned Counsel for Corporate Debtor that the operations of the Corporate Debtor came under stress due to slow down in the infrastructure sector, lower asset turnover, high rate of interest and other sector specific issues. Considering the reasons for stress, cash flow mismatches and the Corporate Debtor's commitments to improve its operations, the Financial Creditor by joining the consortium under the leadership of IDBI referred the Corporate Debtor to Corporate Debt Restructuring (CDR) Cell, for efficient structuring of Corporate Debt, which approved a restructuring package in terms of which the existing loans to the Corporate Debtor of all the lenders including the Financial Creditor were to be restructured and certain additional financial assistance was to be extended to the Corporate Debtor.

4.4 The Financial Creditor being the second largest lender in the consortium as per the approved CDR package, has sanctioned Rs, 349.18 crores on 10.09.2014 as its share. The Financial Creditor was also nominated as a member of the Monitoring Committee by the CDR Empowered Group for timely and successful implementation of the package. The Learned Counsel for Corporate Debtor submits that the Financial Creditor in violation of the consortium spirit put pressure on the Corporate Debtor by demanding additional collateral securities to be given as a pre-condition for signing the joint documentation, which is a pre-requisite for other members to release sanction facilities. However, the Corporate Debtor submits that they had expressed their inability to give any additional charge as they do not have any un-encumbered properties. Despite expressing inability, the Financial Creditor persisted on creating sub-servient charge on the assets clandestinely without even obtaining the mandatory NOCs from other lenders (United Bank of India, North East Development Financial Institution) in clear violation of the extant regulations of RBI. The Financial Creditor also put pressure and obtained Corporate Guarantees of the subsidiary companies to justify creation of charge on their assets in favour of the Financial Creditor. The Corporate Debtor alleged that the acts of Financial Creditor are malafide and against the spirit of consortium. The subservient charge thus and the Corporate Guarantees obtained are invalid and unenforceable. It is further alleged that the Financial Creditor apart from taking undue advantage also failed to release the sanctioned CDR limits which has negatively affected the operations of the Company.

4.5 However, the Financial Creditor vehemently opposed the averments contained in para 7-12 of the counter filed by the Respondent and submitted that the securities and guarantees are obtained as per the terms of the sanction and as accepted by the borrower. Further the Learned Counsel for Financial Creditor submits that neither the Borrower nor the Corporate Guarantor raised such an issue till date. The Learned Counsel for Financial Creditor further submitted that the averments made by the Corporate Debtor in paras 13-18 of the reply filed by Corporate Debtor are not correct and all the allegations contained therein are after thought by the Corporate Debtor. The Borrower fully utilised the sanctioned limits basing on the power of utilisation and on escalation of the work in progress. Hence the allegation of not releasing the sanctioned limits does not arise. It is also reiterated that the Financial Creditor never delayed in releasing the sanctioned facilities. The Corporate Debtor while utilizing the funds, has failed to comply with the terms and conditions of the sanction. Several notices have been sent to the Corporate Debtor/ Corporate Guarantors and the Director to regularize the Company's accounts. Till date the same has not been done even though both the companies are functioning and generating income.

4.6 The Learned Counsel for the Financial Creditor submits that they can initiate action simultaneously against the Borrower and the Corporate Guarantor also under Section 7 of the Code and action against the Principal Borrower and Corporate Debtor for recovery of dues before invoking the guarantees. Moreover the liability of the guarantor is joint and several and co-extensive with the Borrower and as such there is no bar for initiating action under Section 7 of the Code. On this aspect, the Financial Creditor relied on the judgement dated 24.11.2020 in the matter of SBI Vs Athena Energy Ventures Private Limited, wherein it held as follows:-

We find substance in the arguments being made by the learned Counsel for Appellant which are in tune with the Report of ILC. The ILC in para – 7.5 rightly referred to subsequent Judgement of "Edelweiss Asset Reconstruction Company Ltd. v. Sachet Infrastructure Ltd. and Ors." dated 20th September, 2019 which permitted simultaneously initiation of CIRPs against Principal Borrower and its Corporate Guarantors. In that matter Judgment in the matter of Pirmal was relied on but the larger Bench mooted the idea of group Corporate Insolvency Resolution Process in para – 34 of the Judgement. The ILC thus rightly observed that provisions are there in the form of Section 60(2) and (3) and no amendment or legal changes were required at the moment. We are also of the view that simultaneously remedy is central to a contract of guarantee and where Principal Borrower and surety are undergoing CIRP, the Creditor should be able to file claims in CIRP of both of them. The IBC does not prevent this. We are unable to agree with the arguments of Learned Counsel for Respondent that when for same debt 19 Company Appeal (AT) (Ins) No.633 of 2020 claim is made in CIRP against Borrower, in the CIRP against Guarantor the amount must be said to be not due or not payable in law. Under the Contract of Guarantee, it is only when the Creditor would receive amount, the question of no more due or adjustment would arise. It would be a matter of adjustment when the Creditor receives debt due from the Borrower/Guarantor in the respective CIRP that the same should be taken note of and adjusted in the other CIRP. This can be conveniently done, more so when IRP/RP in both the CIRP is same. Insolvency and Bankruptcy Board of India may have to lay down regulations to guide IRP/RPs in this regard.

4.7. It is apparently clear and lucid from the above cited judgement that CIRP can be proceeded against Principal Borrower as well as the Guarantor. We agree with the contention of the Financial Creditor that the Application filed by IDBI before this Adjudicating Authority is not a bar to the present petition. Hence, the Adjudicating Authority is of the considered view that CIRP can be initiated simultaneously against Principal Borrower and the Corporate Guarantor and as such the Petition is liable to be admitted. The Petitioner has suggested the name of IRP and filed consent form of the proposed IRP in Form No.2. The Petition is complete in all respects and accordingly we allow the Company Petition.

ORDER

5. As a sequel to the above, this Adjudicating Authority admits this Petition under Section 7 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions:-

5.1 The Bench hereby prohibits 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; Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;

5.2 That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

5.3 That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

5.4 That the order of moratorium shall have effect from **18.01.2021** till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.

5.5 This Bench hereby appoints **Ms. G. Kalpana** having IBBI Registration No. IBBI/IPA-001/IP-P00756/2017-18/11288, #R/o H.No. 16-11-19/4, G-1 Sri Laxmi Nilayam, Saleem Nagar Colony, Malakpet, Hyderabad, 500036, mob. No. 9962568858 as Interim Resolution Professional, who has filed Form No.2 and who's

Authorization for Assignment is valid till 26.11.2021 as per IBBI Website.

5.6 That the Public announcement of Corporate Insolvency Resolution Process shall be made immediately as specified under section 13 of the code.

5.7 The Registry of this Tribunal is directed to send a copy of this order to RoC, Hyderabad for marking appropriate remarks against the Corporate Debtor on MCA site as being under CIRP.

18/01/21

(Veera Brahma Rao Arekapudi)
Member (Technical)

(K. Anantha Padmanabha Swamy)
Member (Judicial)

Binnu