

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1392 of 2019

(Arising out of Order dated 25th November, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in CP (IB)- 2803/MB/2019)

IN THE MATTER OF:

Amitabh Kumar Jha

...Appellant

Vs.

Bank of India & Anr.

...Respondents

Present: For Appellant: - Mr. Krishnendu Datta, Mr. Nikhil Chawla, Mr. Aditya Panda and Mr. Jaydeep Krol, Advocates.

**For Respondents:- Mr. Anant A. Pavgi and Mr. Siddhartha Nagpal, Advocates for IRP.
Mr. Abhishek Singh and Mr. J. Amal Anand for Banks.
Mr. I.P.S. Oberoi, Advocate for R-1.
Mr. D. Lalitha and Mr. Deepak, Advocates.**

J U D G M E N T

Bansi Lal Bhat, J.

Through the medium of this appeal, Sh. Amitabh Kumar Jha, the Director of 'TD Toll Road Private Limited'- ('Corporate Debtor') seeks to assail the impugned order dated 25th November, 2019 passed in CP (IB)- 2803/MB/2019 by virtue whereof the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai admitted the application under Section 7 of the Insolvency and Bankruptcy Code,

2016 (“I&B Code” for short) filed by the ‘Bank of India’ (‘Financial Creditor’) slapping Moratorium on the ‘Corporate Debtor’ besides appointing the ‘Interim Resolution Professional’. The impugned order is challenged primarily on the ground that the admission of application by the Adjudicating Authority has unjustly tilted the balance in favour of the ‘Financial Creditor’ to the detriment of all other stakeholders which is designed to defeat the object of the ‘I&B Code’.

2. For appreciating the issue raised in this appeal, a brief reference to the factual matrix of the case is inevitable. The ‘Financial Creditor’- ‘Bank of India’ approached the Adjudicating Authority with an application under Section 7 of the ‘I&B Code’ seeking initiation of the ‘Corporate Insolvency Resolution Process’ on the ground that the ‘Corporate Debtor’ committed default on 16th July, 2019 to the extent of Rs. 21,68,44,477/-. It was asserted in the application that the ‘Corporate Debtor’ is a Special Purpose Vehicle setup by ‘Reliance Infrastructure Limited’ for the purpose of executing the project awarded to it by ‘National Highways Authority of India’ for four laning of Trichy-Dindigul Road in Tamil Nadu. The ‘Corporate Debtor’ approached the ‘Financial Creditor’ besides other lenders for financial assistance. A Common Rupee Loan Agreement came to be executed by the ‘Corporate Debtor’ along with ‘Canara Bank’, ‘Corporation Bank’, ‘India Infrastructure Finance Company Limited (IIFCL)’, ‘Oriental Bank of Commerce’ and ‘UCO Bank’ with ‘Canara Bank’ acting as the lenders’

agent and security trustee. The 'Financial Creditor' i.e., 'Bank of India' advanced loan of Rs. 25 Crores to the 'Corporate Debtor' with other lenders as members of consortium advancing different amounts. According to 'Bank of India', the 'Corporate Debtor' failed to clear the outstanding liability of Rs. 21,68,44,477/-, in respect whereof a Demand Notice was issued on 12th November, 2018 specifying that the date of classifying the account as Non-Performing Asset as 29th October, 2018. It appears that the factum of default was not disputed by the 'Corporate Debtor' before the Adjudicating Authority as emerges from paragraph 8 of the impugned order. However, the 'Corporate Debtor' raised the contention before the Adjudicating Authority that since it had faced difficulties in implementing the project and was entitled to restructure the loan, it had proposed a 'Resolution Plan' to the lenders who appointed 'Ernst and Young Merchant Banking Service' to evaluate the same, but before the 'Resolution Plan' could be discussed, the 'Financial Creditor'- 'Bank of India' filed an application under Section 7. It was contended that the consortium members have entered into an 'Inter-Creditor Agreement' in pursuance whereof no member of the consortium can take any action in respect of default individually and only a collective action is envisaged. The Adjudicating Authority, while brushing aside the argument that an 'Inter-Creditor Agreement' had an overriding effect and without its compliance no individual creditor could approach the Adjudicating Authority for triggering 'Corporate Insolvency Resolution Process', admitted the application in terms of the impugned

order. The Adjudicating Authority appears to have been influenced by the decision of the Hon'ble Apex Court in ***"Innoventive Industries Ltd. v. ICICI Bank and Ors.- (2018) 1 SCC 407"*** in passing the impugned order. The Adjudicating Authority further observed that Section 238 of the 'I&B Code' provides overriding effect to the provisions of the Code and the 'Inter-Creditor Agreement' entered between the consortium members would not stand in the way of admission of the application under Section 7 of the 'I&B Code'. It further observed that by consenting to and executing the 'Inter-Creditor Agreement' with other Creditors, the 'Financial Creditor' i.e., the 'Bank of India' had not waived its statutory rights by a contractual agreement, but only envisaged a mechanism/ procedure to jointly enforce the loan as a consortium. Thus, having been satisfied that there was a financial debt and the 'Corporate Debtor' had committed default in respect of such debt payable under law, the Adjudicating Authority admitted the application in terms of the impugned order.

3. The limited issue arising for consideration is whether the 'Inter-Creditor Agreement' devising a mechanism for enforcement of rights qua the 'Corporate Debtor' would bar an individual Creditor from triggering 'Corporate Insolvency Resolution Process' in the event of default qua outstanding liability in respect of its financial debt without the consent of other lenders forming the consortium of the same 'Corporate Debtor'.

4. It is contended on behalf of the Appellant that the three contracts entered *inter se* the lenders including the 'Bank of India' with the 'Corporate Debtor' on 28th March, 2008 were part of the same transaction. The consortium of six Banks had advanced total amount of Rs. 322.40 Crores to the 'Corporate Debtor' in terms of financing documents i.e., 'Common Rupee Loan Agreement (CLA)', 'Security Trustee Agreement (STA)', 'Inter-Creditor Agreement (ICA)'. It is submitted that the share of loan amount advanced by the 'Bank of India' constituted only 7.75% of the consortium. It is further submitted that the CLA clearly specified that no enforcement action will be taken without complying with the procedure laid down therein and since said procedure has not been complied with, 'Bank of India' could not take enforcement action against the 'Corporate Debtor'.

5. Learned counsel for the Appellant further submits that in view of the aforesaid, the debt was not due and payable in law or in fact. It is further submitted that the 'Corporate Debtor' is a confirming party to the ICA and as CLA and ICA were entered into on the same day, these form part of the same transaction. Thus, the 'Corporate Debtor' has a *locus standi* under ICA. As regards the overriding effect of Section 238 of the 'I&B Code', it is submitted that the ICA only lays down a procedure to be followed before an application can be made by lender against the 'Corporate Debtor' and does not in any manner take away the right of a single lender to approach the Adjudicating Authority. It is

further submitted on behalf of the Appellant that an arbitral award has been passed in favour of the 'Corporate Debtor' as against NHA and the same has been challenged. 'Canara Bank', the lead Bank of the consortium is said to have issued notice for a meeting of consortium and the 'Corporate Debtor' is prepared to settle the dispute with all the lenders.

6. Per contra, it is submitted on behalf of the 'Financial Creditor'- 'Bank of India' that the 'I&B Code' empowers a single 'Financial Creditor' to initiate 'Corporate Insolvency Resolution Process', for which consent of other 'Financial Creditors' is not required. It is submitted that since the factum of debt and default has not been disputed, the independent right of 'Bank of India' as individual lender to enforce its rights and seek triggering of 'Corporate Insolvency Resolution Process' is not affected by the terms of CLA.

7. It is further submitted by the 'Financial Creditor' that the 'Corporate Debtor' is not a party to ICA and cannot derive any benefit therefrom.

8. The consortium of lenders has sought intervention. Written submissions have been filed to buttress the point that the 'Inter-Creditor Agreement' governs the *inter se* rights and duties of the consortium lenders and none of the consortium members have objected to filing of the Section 7 petition against the 'Corporate Debtor'. The

Intervenors submit that the Appellant has no locus to raise an objection in this regard.

9. Having heard learned counsel for the parties including the Intervenors, we find that existence of financial debt and its default on the part of the 'Corporate Debtor' is not the issue in controversy as the same has admitted. The factum of the 'Corporate Debtor' having obtained financial facility from consortium of lenders including the 'Bank of India', the 'Financial Creditor' and default on the part of the 'Corporate Debtor' in discharging its liability do not form issue for consideration. It is also not in controversy that the financial debt in respect whereof the 'Financial Creditor' herein sought triggering of 'Corporate Insolvency Resolution Process' is payable both in law as also in fact. The 'Corporate Debtor' is merely banking upon the Financing Documents including CLA, STA and ICA to assail the impugned order notwithstanding the fact that neither the claim is barred by law nor do such Financing Documents clothe the 'Corporate Debtor' with a right to disentitle the 'Financial Creditor' from enforcing its claim, in its individual capacity, despite being a member of the consortium of lenders. It is queer that the 'Corporate Debtor' is making a vain bid to get out of the rigours of its liability in terms of loan documents sanctioning the loan and giving rise to contractual liability as against it on the basis of an 'Inter-Creditor Agreement', to which admittedly it is not a party. It would be a travesty of justice to raise a plea that since

the Creditors has an *inter se* agreement in regard to enforcement of the liability of the debtor qua the Creditor, an individual Creditor should not be permitted to enforce its right arising under a contract in regard to discharge of liability for loan advanced by the Creditor which is otherwise payable in law and not barred by any legal framework including the law of limitation. What transpires among the Creditors in regard to 'Inter-Creditor Agreement' is a matter exclusively *inter se* the Creditors. The debtor has no locus to meddle with the internal arrangement and affairs of the Creditors in regard to their joint or individual interests, more so when in the instant case the Interveners who are the consortium of lenders have supported the action taken by the 'Bank of India' in triggering 'Corporate Insolvency Resolution Process'. None of the members of the consortium of lenders has taken exception to enforcement of individual rights by the 'Bank of India' in regard to the financial debt payable to it and to the extent of its interest.

10. 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'. The contractual rights, unless recognised by the statute as a permissible mode, would not override the statutory mechanism and right created and enforceable under statute. This legal proposition appears to have been recognised in Clause 2.2 of the 'Common Rupee Loan Agreement', which is reproduced under:

“2.2. Nature of Rights and Obligations of Rupee Lenders–

The rights of each Rupee Lender under the Finance Documents are separate and independent. Any Rupee Lender may separately enforce any of its rights arising out of any Finance Documents. This Agreement will govern the right and obligation of the Rupee Lenders and the Borrower and not the inter-se relationship among the Rupee Lenders.

The obligations of each of the Rupee Lenders hereunder are several. No Rupee Lender shall be responsible for the obligations of any other Rupee Lender.”

11. The language employed in this Clause is eloquent enough to hold that each lender who is a member of the consortium may separately enforce its rights and no Rupee Lender having separate and independent rights shall be responsible for the obligations of any other Rupee Lender. The Clauses in the ‘Inter-Creditor Agreement’ would not supersede the rights and obligations of Rupee Lenders in their independent capacity and this is further re-inforced by Clause 1.3 of the ‘Inter-Creditor Agreement’, which reads as under:

“1.3 Rights against the Borrower not affected

Nothing in this Agreement is intended or meant to alter, modify or impair any of the rights of any of the Rupee Lenders against the Borrower under the Finance Documents.”

The aforesaid Clause 1.3 speaks in unambiguous terms that the ‘Inter-Creditor Agreement’ would not in any manner alter, modify or impair any of the rights vesting in the Rupee Lenders against the Borrower under the Finance Documents. This leaves no room for the ‘Corporate Debtor’ to contend that these financing documents do in any manner enure to the benefit of the ‘Corporate Debtor’ who has absolutely no locus to raise an issue in this regard.

12. In view of the foregoing discussion, we are of the considered opinion that the issue raised in this appeal is devoid of merit. The Financing Documents do not in any manner curtail or limit the rights of the ‘Financial Creditor’- ‘Bank of India’ in its individual capacity to enforce its rights against the ‘Corporate Debtor’ in regard to the financial debt which is payable in law and in fact and in respect whereof default as alleged is not disputed.

The appeal is dismissed as being frivolous. However, in the circumstances of the case, we do not intend to impose any cost on the Appellant.

[Justice Bansi Lal Bhat]
Member (Judicial)

[Justice Venugopal M.]
Member (Judicial)

[V.P. Singh]
Member (Technical)

NEW DELHI

22nd May, 2020

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