

Through Videoconference

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT No. V

CP No. 30/(IB)-MB-V/2020

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

In the matter of Yes Bank Limited
Yes Bank Tower, India Bulls Finance Centre-2, 15th Floor, Senapati Bapat Marg, Elphinstone (West), Mumbai-400013

... Petitioner/ Financial Creditor

Vs.

RKW Developers Private Limited
HDIL Towers, 4th Floor, Anant Kanekqar Marg, Bandra (East), Mumbai-400051, Maharashtra.

...Corporate Debtor

Order reserved on: 23.08.2021

Order Pronounced on: 27.09.2021

Coram:

Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)

Hon'ble Shri Chandra Bhan Singh, Member (Technical)

Appearance:

For the Petitioner: Mr. Arif Doctor, Advocate a/w Mr. Bhargav Kosuru, Advocate.

For the Respondent: Sr. Advocate Mr. JP Sen a/w Ms. Janaki Garde, Advocate.

Per: Suchitra Kanuparthi, Member (Judicial)

ORDER

1. Yes Bank Limited (hereinafter called 'Petitioner') has sought the Corporate Insolvency Resolution Process against RKW Developers Private Limited (hereinafter called the 'Corporate Debtor') on the ground that the Corporate Debtor has committed a default as on 01.08.2019 in the repayment of loan to the extent of Rs. 839,59,87,999/- including interest. This Petition is filed under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereafter called the 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. In the requisite Form-1, under the head "Particulars of Financial Debt" the total amount granted as a term loan is stated to be Rs. 750,00,00,000/-, and the amount claimed to be in default to the extent of Rs. 839,59,87,999/- including normal interest @10.90% and penal interest @ 2%. The details of the default amount are as follows:

	(in Rs.)
Term Loan	750,00,00,000
Principal outstanding	750,00,00,000
Normal Interest at the rate of 10.90% calculated from 27 th Sept 2018 till June 26, 2020	62,36,74,503
Penal Interest at the rate of 2% calculated from 27 th Sept 2018 till June 26, 2020	27,23,13,496
Total outstanding	839,59,87,999

3. The Corporate Debtor is a company incorporated under the Companies Act, 1956 having registered office at 4th Floor, HDIL Towers, Anant Kanekar Marg, Bandra (East), Mumbai 400051.

Brief facts on behalf of the Petitioner:

4. The Petitioner issued facility letter to the borrower on 28.06.2018 sanctioning a term loan of Rs. 750,00,00,000/- with facility set up fees if Rs. 1,000 MM (plus applicable taxes) on the total facility amount (payable on acceptance of sanction). The loan is secured by a registered mortgage of the development rights over the project land.
5. The Corporate Debtor has executed a corporate guarantee dated 27.09.2018, whereby the Corporate Debtor undertook to pay the entire amounts including interest in respect of the obligation of the borrower in the event of default. The Corporate Debtor further was liable under the guarantee deed which was irrecoverable/ continuing and joint and several along with the borrower.
6. The Petitioner has enclosed the following documents in order to prove the existence of financial debt, the amount and date of default:
 - a. Board Resolution dated 28th June 2018 of the Borrower for availing credit facilities aggregating to Rs. 750 crores from the Financial Creditor.
 - b. Facility letter dated 28th June 2018 bearing reference no. YBL/MUM/CF/FL/0130/2018-2019 from the financial Creditor to the Borrower.
 - c. Board Resolution dated 1st September 2018 of Corporate Debtor for providing unconditional and irrevocable corporate guarantee to secure financial facilities availed by the Borrower from the Financial Creditor.
 - d. Board Resolution dated 1st September 2018 of Wadhawan Holdings Pvt. Ltd., Corporate Guarantor providing unconditional and irrevocable corporate guarantee to secure financial facilities availed by the Borrower from the Financial Creditor.

- e. Security Trustee Agreement dated 12th September 2018 executed between the financial Creditor, IDBI Trusteeship Services Ltd. And the Borrower in respect of the Term Loan availed by the Borrower.
- f. Addendum to the Facility Letter dated 20th September 2018 bearing reference no YBL/MUM/CF/FL/0424/2018-2019 from the Financial Creditor to the Borrower.
- g. Deed of Pledge dated 27th September 2018 executed by Pledgors in favour of the Financial Creditor to secure the credit facility aggregating to Rs. 750 crores availed by the Borrower from the Financial Creditor.
- h. Addendum to the Facility Letter dated 27th September 2018 bearing reference no YBL/MUM/CF/FL/0446/2018-2019 from the Financial Creditor to the Borrower.
- i. Loan Agreement dated 27th September 2018 executed between the Borrower and the Financial Creditor to avail Term Loan aggregating to Rs. 750 crores.
- j. Deed of Personal Guarantee dated 27th September 2018 of Mr. Dheeraj Wadhawan in favour of the financial Creditor to secure the Term Loan aggregating to Rs. 750 crores availed by the Borrower from the Financial creditor.
- k. Deed of Personal Guarantee dated 27th September 2018 of Mr. Kapil Wadhawan in favour of the financial Creditor to secure the Term Loan aggregating to Rs. 750 crores availed by the Borrower from the Financial creditor.
- l. Deed of Corporate Guarantee dated 27th September 2018 executed by the Corporate debtor in favour of the financial Creditor to secure the Term Loan aggregating to Rs. 750 crores availed by the Borrower from the financial Creditor.

- m. Deed of Corporate Guarantee dated 27th September 2018 executed by the Wadhawan Holdings Pvt. Ltd., Corporate Guarantor in favour of the financial Creditor to secure the Term Loan aggregating to Rs. 750 crores availed by the Borrower from the financial Creditor.
- n. Deed of Simple Mortgage dated 27th September 2018 Borrower and Wizard Construction (India) Private Limited in favour of IDBI Trusteeship Services Limited, acting as security trustee for the Financial Creditor.
- o. Letter dated 12th November 2018 sent by IDBI Trusteeship Services Ltd. (Security Trustee) to the Financial Creditor confirming registration of charge for mortgage over certain immovable properties to secure the Term Loan aggregating to Rs. 750 crores availed by the Borrower from the Financial Creditor.
- p. Loan Recall Notice and invocation of guarantees dated 18th November 2019 bearing reference No. YBL/ARM/2019-20/0143 addressed by the Financial Creditor to the Corporate Debtor calling upon to repay the outstanding amount of Rs. 777,98,10,382.26/- as on 15th November 2019, under the credit facility availed by the Borrower from the Financial Creditor.
- q. Pledge Invocation Notice dated 18th November 2019 addressed by the Financial Creditor to all Pledgors.
- r. Letter dated 28th November 2019 addressed by the Borrower to the Financial Creditor in response to the letter dated 18th November 2019 sent by the Financial Creditor to the Corporate Debtor.
- s. Letter dated 28th November 2019 addressed by the Corporate Debtor to the Financial Creditor in response to the letter dated 18th November 2019 sent by the Financial Creditor to the Corporate Debtor.

t. Letter dated 28th November 2019 addressed by the Wadhawan Holdings Pvt. Ltd. to the Financial Creditor in response to the letter dated 18th November 2019 sent by the Financial Creditor to the Corporate Debtor.

7. Thus, the Petitioner submits that the Borrower has committed a default in the repayment of loan to the extent of Rs. 839,59,87,999/- as on 01.08.2019 including interest and due to the non-payment of debts, the Petitioner has filed this Petition u/s 7 of the IBC.

8. The Petitioner issued loan recall notice and invocation of guarantees on 18.11.2019 falling upon the borrower and the Corporate Debtor being a corporate guarantor to repay an outstanding amount of Rs. 777,98,10,382.26/- as on 15.11.2019 under the credit facility availed by the borrower by the Petitioner. The Petitioner also invoke the pledge vide notice dated 18.11.2019

Brief facts on behalf of the Corporate Debtor:

9. The Corporate Debtor has filed an Interlocutory Application bearing No. 589 of 2021 raising issues of maintainability of the present Application and sought stay of Original Application of 256 of 2020. The Corporate Debtor did not file reply and the contents of IA are construed to be a reply in the main Petition.
10. The Corporate Debtor pointed out that the entire facility was originally proposed to be obtained from the Applicant by the borrower to a tune of Rs. 1700 crores, however, the loan was split into two tranches; one amounting to Rs. 750 crores in favour of the borrower and Rs. 950 crores in favour of one RKW Project Management Private Limited (RKW Project). Therefore, it was agreed that the entire facility for a loan of Rs. 1700 crores would be

disbursed upfront from the loan of Rs. 750 crores granted to the borrower.

11. The perusal of facility letter reveals that the entire duration of the facility was 84 months from disbursement and the first payment towards the principal amount was only to be made after 39 months from the date of disbursement. The processing fee amounting to Rs. 118 crores (Rs. 100 crores towards fee and Rs. 18 crores towards GST) was levied on this facility. The processing fee was levied towards entire facility of Rs. 1700 crores.
12. The Borrower was regularly paying interest and after a period of 2 months sometime in November 2018, the Corporate Debtor requested as per the understanding between the parties, RKW projects to cancel the sanctioned facility of Rs. 950 crores. It was agreed that the proportionate processing fee and GST paid thereon which had already been deducted in regard to Rs. 950 crores facility will be duly refunded/ adjusted towards the dues of the borrower. the proportionate processing fee charges and GST amounts to Rs. 55.88 lakhs. However, no action was taken by the Petitioner on refund of proportionate processing fee. A partial reimbursement of processing amount aggregating to Rs. 10 crores was made on 24.09.2019.
13. The Corporate Debtor pointed out that the borrower paid interest up to June 30th, 2019 amounting to Rs. 61.95 crores which includes penal interest of Rs. 91,10,700.37/- which was levied by the Petitioner despite having excess amount that were to be refunded to the borrower. The Corporate Debtor further claimed that an amount of Rs. 44.84 crores are lying to the credit of the borrower and has not adjusted the same towards dues and facility and have declared the account as NPA on 30.10.2019. The Petitioner have recalled the loan and invoked the corporate guarantee as on 18.11.2019.

14. Upon receipt of the recall notice/ invocation of corporate guarantee, the Corporate Debtor replied vide letter dated 20.11.2019 requested the Petitioner not to take any action against the invocation of corporate guarantee.
15. The Corporate Debtor further contended that a sum of Rs. 45,88 lakhs was lying in excess to be adjusted towards payment due and has been illegally retained by the Petitioner. The table sets out the calculation regarding the amounts retained by the Petitioner.

Amount illegally retained by the Applicant	INR 45,88,00,000.00
Amount paid by this Defendant towards penal interest (for March 2019- June 2019) wrongfully levied by the Applicant despite retaining amount of INR 45.88 crores.	INR 91,10,700.37
Total	46,79,10,700.37
Interest dues (excluding penal interest which could not have been levied) on Facility 1 from July 2019 to 1 st February 2020 (as per statement annexed at Exhibit F)	46,98,49,315.07

16. In view of the above, the Corporate Debtor claimed that there is no default in the payment of interest and therefore the ex facie issuance of recall notice and invocation of corporate guarantee dated 18.11.2019 is immature and incorrect. Further, they also claimed moratorium of 3 months of all loan instalments falling due between 1st March, 2020 and 31st March, 2020 in defect of all accounts

classified as standard as on 29.02.2020. further the moratorium was extended up to 31.08.2020. the Corporate Debtor further relied upon the interim orders of the Hon'ble Supreme Court on 03.09.2020 in W.P. No. 825 of 2020 (*Gajender Sharma vs. Union of India and anr.*) wherein it was held that the accounts which were not declared NPA till August, 2020 shall not be declared NPA till further orders. Therefore, the Corporate Debtor contended that the account of borrower has been declared NPA contrary to the judgement of Hon'ble Supreme Court.

Reply to the IA 589 of 2021 on behalf of the Petitioner:

17. The Petitioner claimed that the IA is a gross abuse of process of law and has been filed with a sole purpose of delaying the adjudication process of present Company Petition.
18. The application is filed on the basis of certain charges which was levied by the Petitioner as processing facility fee as per terms of sanction, which was subsequently cancelled. The borrower M/s. belief Realtors Private Limited are thus seeking proportionate amount of the facility fee and the Corporate Debtor is relying upon an application filed by the borrower before the Hon'ble DRT. The Application proceeds on the pretext that there was a cash payout by the borrower for which a refund is being sought, this is patently false.
19. The present company petition is maintainable as there is debt and default which the Corporate Debtor is liable to pay to the Petitioner. The Corporate Debtor and the borrower failed to consider that even in excess of Rs. 46 crores were to be adjusted, for the sake of argument, an amount in excess of Rs. 700 crores is liable to be paid by borrower and Corporate Debtor as corporate guarantor.

20. The Petitioner also pointed out that the borrower had requested for a total credit limit of Rs. 1700 crores, however, the Petitioner sanctioned a sum of Rs. 750 crores and another company called RKW Project Management Private Limited belonging to the same group requested for credit facility of Rs. 950 crores. The processing fee for both the facilities was approx. Rs. 100 crores. Was accepted by the borrower while signing the agreement dated 27.09.2018. Subsequently, RKW Project vide letter dated 13.12.2018 was sought to be cancelled.

21. The Petitioner on 7th March 2019 addressed a letter to the borrower pointing out pendency of material covenants and that there had been negligible progress and that the borrower's account was overdue as interest receivable for the month of February 2019 was yet to be receive. Additionally, the borrower had also defaulted for Rs. 20 crores in the form of FD.

22. The borrower addressed the letter dated 29.07.2019 seeking refund of proportionate amount of facility fee to the tune of Rs. 55.89 crores. In view of the cancellation of Rs. 950 crores sanctioned to RKW Projects. The Petitioner have refunded an amount of Rs. 10 crores to be paid to various contractors/ vendors/ PMC engaged in the project. The request of the borrower to refund the amount of RS. 45.88 crores is untenable in view of the fact that the borrower proceeds on the assumption that it was entitle to refund in the first place. It is pertinent to state that the borrower is liable to service interest or principle which cannot be done by simply making adjustment entry as sough to be contended. The Petitioner further reiterated that the borrower had undertaken to bear the facility fee of Rs. 118 crores, pursuant to the request of the borrower agreed to refund Rs, 10 crores while negotiating this issue the petitioner claimed that the borrower has placed reliance on the office memorandum which

nowhere admitted or acknowledge any liability to refund/ repay further sum towards facility fee.

23. The Petitioner replied upon the judgement of Innovative Industries Case sought for the admission of petition.

Findings:

24. The only issue for consideration is whether in terms of deed of guarantee there is any default upon payment of monies by the Corporate Debtor.

25. The Petitioner had admittedly granted a loan of Rs. 750 crores vide agreement of loan on 28.06.2018. the date of disbursement of loan was on 28.09.2018. The total outstanding as on 28.06.2020 is an amount of Rs. 839,59,87,999/- and the date of default occurred on 01.08.2019. The Petitioner enclosed the statement of account of Belief Realtors Pvt. Ltd. (borrower) as on 26.06.2020. The Corporate Debtor executed corporate guarantee in favour of petitioner on 27.09.2018.

26. The corporate deed of guarantee further envisages at clause 8 that the guarantor's liability shall be irrevocable continuing and joint and several with that of the borrower. Clause 8 is reproduced below:

"8) the Guarantor's liability hereunder shall be irrevocable, continue and joint and several with that of the Borrower."

27. The deed of guarantee also provided at Clause 19 that rights of the lender shall remain in full force and effect notwithstanding any arrangement which may be reached between the lender/ beneficiary, notwithstanding release of any other liability. Clause 19 is as follows:

"19) The rights of the Lender(s)/ beneficiary against the Guarantor(s) shall remain in full force and effect notwithstanding any arrangement which may be reached between the Lender(s)/ Beneficiary and any one or more of the Guarantor(s) or other Guarantor/s or any other Person, or notwithstanding the release of that other or others from liability and notwithstanding that any time hereafter the other guarantor/s may cease for any reason whatsoever to be liable to the Lender(s)/ Beneficiary. The Lender(s)/ Beneficiary shall be at Liberty to require the performance by the Guarantor(s) has at all times been solely liable to perform the said obligations."

28. The Petitioner issued recall notice and invoked the deed of guarantee on 18.11.2019. the Corporate Debtor on 28.11.2019 requested the Petitioner not to take any action.
29. The only defense raised by the Corporate Debtor is that the total debt of Rs. 1700 crores was granted at the request of borrower on 05.06.2018 and an amount of Rs. 750 crores was sanctioned to borrower and balance Rs. 950 crores was to be sanctioned to RKW Project Management Pvt. Ltd. belonging to the same group company of the Corporate Debtor. It was agreed that a processing fee of Rs. 118 crores would be paid for sanction of both the loans. However, at the request of RKW Project the sanction of Rs. 950 crores was cancelled and therefore the borrower sought an adjustment of Rs. 45.88 crores towards refund of fees of the cancelled facility. The Corporate Debtor further claimed that excess money was lying with the Bank to the tune of Rs. 45.88 crores and hence the account could not be declared as NPA and also claimed that recall notice dated

18.09.2019 is premature and incorrect.

30. The issue regarding adjustment of the processing fee was addressed in the reply to the IA by the Petitioner and they confirmed that vide internal office memorandum dated 31.09.2019 has adjusted the amount of Rs. 10 crores. The internal office memorandum mentions that while the issue is being negotiated at the borrower an interim refund of Rs. 10 crores to be paid to various vendors/ contractors/ PMC engaged in the project. There is no agreement to pay any additional amount towards facility.
31. The dispute regarding adjustment of processing fee is to the extent of Rs. 45.88 crores, however, the claim of the Petitioner as outstanding is to the tune of Rs. 839,59,87,999/-. The borrower has not just failed to serve the monthly interest payment but has also failed to fulfill the terms and condition in respect of the project. The petitioner thereafter issued recall notice and invoked the bank guarantee on 18.11.2019. Despite invocation of bank guarantee, the Corporate Debtor has not been able to repay the debts payable under the deed of guarantee. The default towards interest payable first occurred far back in February 2019. However, the interest was serviced up to June 2019 and therefore, the payment towards interest accrued along with additional penal interest. The RBI circular dated 27.03.2020 r/w 11 circular dated 17.05.2020 were applicable for the period between 1st March 2020 to 31st August 2020 and default occurred much before the moratorium of the RBI. Therefore, regardless of the issue whether any proportionate facility fee was due or not the borrower is still liable to pay outstanding amount.
32. The Petitioner also confirmed that there was no actual payout to the

facilities by the borrower in respect of which refund is being sought, the facility fee was debited from loan account and therefore, there is a clear debt amounting to approx. Rs. 800 crores due and payable by the Corporate Debtor and the Corporate Debtor has defaulted in repaying the same. Hence, the Petition is admitted.

33. Ongoing through the submissions made by the Learned Counsel for the both the sides and on perusing the documents produced on record, it is understood that the Corporate Debtor has defaulted in repayment of debt. The Corporate Debtor has acknowledged the disbursement of various financial facilities and its liability to repay the same. However, the Corporate Debtor failed to pay. Hence, owing to the inability of the Corporate Debtor to pay its dues, this is a fit case to be moved u/s 7 of the I&B Code.
34. The above facts clearly reveal that the Corporate Debtor is liable to pay the Petitioner and defaulted in making the payment to the Petitioner.
35. Considering the above facts, we come to conclusion that the nature of Debt is a "Financial Debt" as defined under section 5 (8) of the Code. It has also been established that there is a "Default" as defined under section 3 (12) of the Code on the part of the Debtor. The two essential qualifications, i.e., existence of 'debt' and 'default', for admission of a petition under section 7 of the I&B Code, have been met in this case. Besides, the Company Petition is well within the period of limitation.
36. As a consequence, keeping the aforesaid facts in mind, it is found that the Petitioner has not received the outstanding Debt from the

Respondent and that the formalities as prescribed under the Code have been completed by the Petitioner, we are of the conscientious view that this Petition deserves 'Admission'.

37. Further that, we have also perused the Form – 2 i.e., written consent of the proposed Interim Resolution Professional submitted along with this application/petition by the Financial Creditor and there is nothing on record which proves that any disciplinary action is pending against the said proposed Interim Resolution Professional.
38. The Financial Creditor has proposed the name of Insolvency Professional. The IRP proposed by the Financial Creditor, Mr. Ajit Sood, having Email ID- ajitsood14@gmail.com and having registration No. IBBI/IPA-002/IP-N00709/2018-19/12146, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.
39. Having admitted the Petition/Application, the provisions of Moratorium as prescribed under Section 14 of the Code shall be operative henceforth with effect from the date of order, and shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or services to the "Corporate Debtor" shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.
40. That as prescribed under Section 13 of the Code on declaration of Moratorium the next step of Public Announcement of the Initiation of

Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.

41. That the Interim Resolution Professional shall perform the duties as assigned under Section 15 and Section 18 of the Code and inform the progress of the Resolution Process and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.
42. In view of the above, the Bench "Allows" the Company Petition No. 30 of 2021 u/s.7 initiating CIRP against the Corporate Debtor RKW Developers Private Limited. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order.
43. Ordered Accordingly.

Sd/-
Chandra Bhan Singh
Member (Technical)

sd/-
Suchitra Kanuparthi
Member (Judicial)