

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No.1181/MB-IV/2021

Under Section 7 of the IBC, 2016

In the matter of

IL&FS FINANCIAL SERVICES LIMITED.

[CIN: U65990MH1995PLC093241]

...Financial Creditor

v/s.

**GHV HOTEL (INDIA) PRIVATE
LIMITED.**

[CIN: U55204MH2007PTC17694]

...Corporate Debtor

Order Delivered on: 03.01.2024.

Coram:

Ms. Anu Jagmohan Singh
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Financial Creditor:

Ms. Pooja Balra a/w Mr. Amol Rasal
i/b Manilal Kher Ambalal & Co., Ld.
Counsel.

For the Corporate Debtor:

Mr. Astha Ojha a/w Mr. Samihan
Vinchurkar i/b AOR, Ld. Counsel.

ORDER

1. This is a Company Petition filed under section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC) by IL&FS Financial Services Limited (“Financial Creditor”) through Resolution Professional Mr. Anshul Pathania, seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of GHV Hotel (India) Private Limited., the Corporate Debtor.
 - 1.1 The petition is filed on 23.08.2021 and the total outstanding amount of debt granted is Rs. 1,56,83,55,500/- (Rupees One Hundred and Fifty-Six Crores Eighty-Three Lakhs Fifty-five Thousand Five Hundred Only) which is in default alongwith interest @ 14% p.a as on 12.03.2021. The date of default as Specified in Part IV of the petition is 28.08.2018.

Submissions of the Financial Creditor:

2. The Financial Creditor extended a Short-Term Loan facility to the Corporate debtor, to the tune of Rs. 100,00,00,000/- vide offer letter dated 25.05.2017 elucidating the terms and conditions. The Directors of the Corporate Debtor passed a Board Resolution on 26.05.2017, where they resolved to approve and create an exclusive charge by way of hypothecation on the amounts arising or created from the proceeds of the facility.
 - 2.1 The Financial Creditor on 30.05.2017 disbursed the first tranche of Rs. 35 Crores and on 31.05.2017 the second tranche of Rs. 65 Crores was disbursed by the Financial Creditor to the Corporate Debtor. The Statutory Auditors for the Corporate Debtor issued a End-use certificate on

05.08.2017, affirming that the Corporate Debtor has availed a term loan of Rs. 100 Crores.

2.2 On 23.11.2017, the Loan agreement was executed between the Financial Creditor and the Corporate Debtor and the deed of Undertaking was executed by the Corporate Debtor confirming that an additional loan of Rs. 30,00,00,000/- was availed by the Corporate Debtor.

2.3 The Corporate Debtor on 28.08.2018 failed to meet the obligations as specified in the Loan Agreement and Deed of Undertaking. On 29.10.2018, the Financial Creditor issued a demand notice to the Corporate Debtor, calling upon them to immediately pay the overdue amount within 7 days from the receipt of the said notice. Furthermore, the Financial Creditor addressed a Demand Notice vide dated 08.07.2019 to the Corporate Debtor, notifying the breaches committed and calling upon them to make the payment of all amounts payable including interest and other charges.

2.4 The Corporate Debtor addressed a letter vide dated 19.07.2019 to the Financial Creditor in response to the demand notice, stating that the Corporate Debtor have filed applications in Company Appeal no. 9208/2019 and 9209/2019 before NCLAT and Civil Appeal No. 6403/2019 before Hon'ble Supreme Court praying to adjust the debt owed by Corporate Debtor to Financial Creditor against the principal and interest outstanding amount due to Corporate Debtor and GHV Hospitality by SSTL.

2.5 The Financial Creditor vide Loan Recall Notice dated 17.03.2021 called upon the Corporate Debtor to make the payment for the outstanding

amount of Rs. 156,83,55,500/- as on 12.03.2021 along with all the applicable interests. However, the Corporate Debtor failed to honour the said notice issued by the Financial Creditor.

Submissions of the Corporate Debtor:

3. It is submitted that Infrastructure Leasing & Financial Services Limited ("IL&FS") is the Parent Holding Company of the Applicant. IL&FS had approached the Corporate Debtor with a proposal for a financial arrangement for taking funds from the Financial Creditor and lending it to ILFS Transport Network Limited ("ITNL"), a subsidiary of IL&FS, and then subsequently to Srinagar Sonamarg Tunnelway Ltd ("SSTL"), another subsidiary of IL&FS.

3.1 The IL&FS group had themselves stated that such financial arrangements were made with other entities to fund its other group entities. The said transaction was meant to be a short-term financial arrangement and the parties entered into an agreement for the said transaction. Therefore, the said transaction was merely a service which the Corporate Debtor was rendering it to the Applicant by facilitating the transaction between the group companies of the Applicant.

3.2 The amount of Rs. 30,00,00,000/- (Rupees Thirty Crores Only) was paid back to the Applicant on 11.05.2018. Further, the rest of Rs. 100,00,00,000/- (Rupees One Hundred Crores Only) had been immediately transferred to ITNL (a subsidiary of IL&FS) through Loan Agreement dated 30.05.2017 and through three Novation Agreements

dated 22.09.2018, and then thereafter to SSTL, another subsidiary of the Applicant.

3.3 Applicant has also not disclosed the material fact that it had entered into similar arrangement with other companies, for indirectly lending money to its subsidiaries and saving them from being declared as NPAs. A complaint bearing number Criminal Complaint No. 20 of 2019 has also been filed by Serious Fraud Investigation Office ("SFIO") against the Applicant before Ld. Addl. Sessions-cum-Special Judge (Companies Act), Greater Mumbai.

4. Therefore, it becomes clear that the Corporate Debtor amongst many other companies were given various loans, in order to extend them further to the subsidiary companies of Financial Creditor, in order to save them from being declared as NPAs. Further, this Hon'ble Tribunal while dealing with an identical application, filed by Applicant against one Avance Technologies Ltd. ("Avance") wherein Applicant had given a loan to Avance, to be ultimately paid to ITNI, a subsidiary of IL&FS, had been dismissed by this Hon'ble Tribunal vide Order dated 05.01.2023 in CP (IB) No.1184/MB-IV/2020.

4.1 A bare reading of the aforesaid order would prove that the Applicant has approached this Hon'ble Tribunal to initiate CIRP against many similarly affected companies who were granted loans, only to be paid to the group companies of IL&FS. In fact, those group companies since presently are under CIRP themselves, the Corporate Debtor is restrained from recovering any amount from ITNL and SSTL, i.e., the group companies.

4.2 The Corporate Debtor stated that the present Application ought to be dismissed as the grant of Facility Amount by the Financial Creditor to the Corporate Debtor was a mere financial arrangement whereby the Corporate Debtor was supposed to take a loan of Rs. 130,00,00,000/- (Rupees One Hundred Thirty Crores Only) from Financial Creditor and lend it ahead to ITNL and thereafter SSTL, i.e. sister concerns of the Financial Creditor. It is noteworthy that ITNL and SSTL are itself under CIRP, therefore the Corporate Debtor is unable to recover any amounts from them.

4.3 In fact, as per the understanding between IL&FS Group of Companies (IFIN, ITNL and SSTL) and GHV's group of companies (namely, the Corporate Debtor and GHV-Hospitality), IFIN extended a term loan of Rs. 130 Crores to the Corporate Debtor. The same loan amount was in turn transferred / paid back to ITNL, a subsidiary of IL&FS Group Companies and subsequently to SSTL, as asked by ITNL. Further, as desired by ITNL, novation agreements were entered between ITNL, SSTL and Respondent/GHV Hospitality, therefore the obligations of the loan extended by GHV group companies to ITNL was shifted to SSTL. Hence, in order to extend/transfer the Facility Amount by the Corporate Debtor to ITNL, three separate Novation Agreements were executed.

4.4 Therefore, in light of the Facility Amount being either paid to the IL&FS group companies, or being paid back to the Financial Creditor, as on date, no amount of money is due by the Corporate Debtor.

4.5 The Corporate Debtor also issued a reply dated 19.07.2019 in response to the Demand Notice dated 08.07.2019. Therefore, the Applicant despite knowing the aforesaid arrangement between the group companies of the parties, filed the present application with the intent to unjustly enrich itself by seeking the repayment of the allegedly due Facility Amount despite the fact that the said amount had already been transferred to the group companies of the Financial Creditor, on its own demand.

Findings:

5. This bench has gone through the documents and pleadings available on record and considered the arguments.

5.1 On perusal of the documents, this bench finds that there is only one loan agreement dated 23.11.2017 placed on record by the Financial creditor in which the loan amount is not specified. Whereas, the Financial creditor stated that two loan facilities were availed by the Corporate Debtor, thus the loan agreement pertaining to the other loan facility is not a part of the pleadings. Further, no original offer letters are attached in the application, the ones which are placed on record are only the annexures to the offer letter. Therefore, main documents which forms basis of the application u/s 7 of the code are not a part of the pleadings.

5.2 As per the material on record, this bench finds that, the Financial Creditor extended the Short-Term Loan facility of Rs. 100,00,00,000/-. Vide annexure to offer letter dated 25.05.2017, the Financial Creditor sanctioned (no sanction letter is part of pleadings) the Short-Term Loan facility to the

tune of Rs. 100,00,00,000/ to the Corporate Debtor. To secure the credit facilities, the Corporate Debtor executed various security documents i.e., Demand Promissory Note and Deed of Hypothecation. An additional loan of Rs. 30,00,00,000/- was subsequently availed by the Corporate Debtor vide Deed of Undertaking dated 23.11.2017. The Corporate Debtor failed to repay the said Term Loan. Consequently, the Financial Creditor issued two Demand Notices dated 29.10.2018 and 08.07.2019, and on 17.03.2021 the Financial Creditor issued Loan recall notice thereby demanding and recalling for outstanding dues.

- 5.3 As per the material on record, the Corporate Debtor has stated that the said transaction was meant to be a short-term financial arrangement and then only the Corporate Debtor entered into an agreement for the said transaction. Such financial arrangements were made by the IL&FS group with other entities only to fund its other group entities. The Corporate Debtor further stated that from the above transactions, the Corporate Debtor is in actual only a service provider or facilitator who agreed to help the IL&FS Group transfer its funds within the group structure.
- 5.4 Based on the documents placed on record it is clearly evident from the Account statement of the Corporate Debtor, in which entry 189 shows that the amount of Rs. 30,00,00,000/- (Rupees Thirty Crores Only) was paid back by the Corporate Debtor to the Financial Creditor on 11.05.2018 through RTGS. Further, on perusal of the Novation agreements dated 22.09.2018 entered between the Financial Creditor, Corporate Debtor and SSTL (subsidiary of Financial Creditor), wherein the Corporate Debtor had extended the financial assistance of Rs. 60 Crores and Rs. 40 Crores to

SSTL which was accepted by SSTL, subject to the terms and conditions as set out in the Loan agreement/facility letter.

- 5.5 Furthermore, the Bench notes that the complaint was also filed by Serious Fraud Investigation (“SFIO”) against the Financial Creditor bearing Complaint No. 20 of 2019. In the copy of the chargesheet dated 30.06.2019 filed by SFIO, the relevant paragraphs are reproduced by the Corporate Debtor i.e.,

“That case in hand arises out of order of investigation passed by the Central Government i.e. Ministry of Corporate Affairs (herein-in-after referred as "MCA"), whereby, MCA, "in the public interest", on basis of cogent material, framed its opinion that investigation into the affairs of several companies i.e. Infrastructure Leasing and Financial Services Limited (IL&FS) and its subsidiary companies, it necessary to be conducted by SFIO and accordingly, passed an order bearing order Na 03/679/2018/CL-II (WB) dated 09.2018 in this regard in exercise of its powers conferred under section 212(1)(c) of the Companies Act 2013. Annexures C

- 5. That pursuant to the MCA's aforesaid order dated 30.09.2018 Director SFIO, in exercise of its power's u/s 212 (1) the 212 (4) of the Companies Act, 2013, vide Order No. SFIO/I/A05/2018-19 dated 01.10.2018, appointed a team of Inspectors for carrying and the aforesaid investigation Further, the complainant, was designated as an Investigation Officer in terms of section 212(4) of the Companies Act, 2013. Annexure D-*

6. That during investigation it was revealed that IL&FS Financial Services Lid (hereinafter as 'IFIN) is one of the subsidiary companies of the IL&FS Group, whose investigation has also been ordered by MCA as stated above. Accordingly, investigation was conducted as directed vide orders dated 30.09.2018 and Investigation Report was submitted to the MCA on 28.05.2019

DESCRIPTION OF THE ACCUSED VIS-A-VIS THEIR ROLE

3. Investigation revealed that as part of its lending business, IFIN extended loans facilities to external parties (other than its group companies), IFIN extended loans to companies of Siva, ABG, AZZ, Pasmath Group and other companies. A number of these borrowers were not servicing their debt obligation timely. The top management of IFIN(A2-49) were aware of the potential problematic accounts which were getting stressed in the succeeding months from the reports generated through the Management Information System (MIS) of the IFIN. The aforesaid stressed accounts would have adversely impacted the financial statements of IFIN, therefore, the management of the IFIN (A2-A9) adapted fraudulent practices in order not to let aforesaid loan/credit facility be classified as a Non Performing Asset (NPA) and further to avoid provisioning for such NPAs/defaulting loan facilities, which was otherwise required to be done so under the RBI Directions to NBFCS. In this regard, they started lending to other companies belonging to the same aforesaid borrowers for repaying the principal and/or Interest of the aforesaid defaulting borrower. The above acts of the Coterie were known to the independent Directors A-19 to A-23 and

other Directors including the Accused A-17 who was CFO of the IFIN and one of the of the person who process the loan applications

*9. Investigation further revealed one of the other modus operandi used by the A2-A9, whereby they decided to support group entities by lending through vendors/third parties, in order to do so, the books of accounts of fourteen existing borrowers or contractors of IFIN or ITNL such as Beigh Construction, **GHV group**, New India Structures Private Limited Avance Technologies Ltd and Empower India Lad were used for onward lending so ITNL or is subsidiaries SPVs. Investigation revealed that all the loans to these entities have been given on the basis of letter of comfort of ITNL and no security has been taken from these borrowing entities/intermediaries investigation revealed that such fraudulent transactions were taken up to bypass the RBI Directions on group lending*

This clearly brings out the intent of the coterie (A2-A9) to disregard legal Directions for prudential functioning of NBFCs by RBI

*22. Investigation father revealed one of the other modus operandi used by the A2-A9, whereby they decided to support group entities by lending through vendors/third parties. In order to do so, the books of accounts of fourteen existing borrowers or contractors of IFIN or ITNL such as Beigh Construction, **GHV group**, New India Structures Private Limited, Avance Technologies Lad and Empower India Ltd were used for onward lending to ITNL er ta subsidiaries/ SPVs. Investigation revealed that all the loans to these entities have been given on the basis of letter of comfort of ITNI. and no security has been*

taken from these borrowing entities/Intermediaries. The purpose of the loans is very vague and general. Most of these entities were transferring the funds on the same day to the destined ITNL/ITNLSPVs. It has been further revealed that officials of IFIN and group companies approached the contractors/borrowers for taking up the loan from IFIN and thereafter doing onward lending to ITNL." (Emphasis supplied)"

5.6 The Bench further notes that the Corporate Debtor has also pointed out the order of this Tribunal dated 05.01.2023, wherein an identical application was filed by the Financial Creditor against one Avance Technologies Limited (“Avance”). It is observed that in this matter the Financial Creditor provided a loan facility to Avance, to be ultimately paid to ITNL, a subsidiary of the Financial Creditor and the same application has been dismissed by this Tribunal. The relevant paragraphs of the aforesaid order dated 05.01.2023 are reproduced herein that,

“It is established beyond doubt that the lender and the ultimate borrower are the entities belonging to the IL&FS group. Pursuant to the directions passed by Hon'ble National Company Law Appellate Tribunal, at New Delhi for restructuring the IL & FS group, all the entities belonging to the group are treated as a single entity and not restructured separately. However, in the present matter the Financial Creditor is treating this one leg of transaction in isolation as against the complete transaction where the lender and borrower are both IL&FS group. In light of the facts of the case the claim of the Petitioner should be set-off between the IL&FS group companies.

18. The principle set out above applies squarely to the present case. The ability of the Respondent to recover due amounts from ITNL and SSTL entities is restricted due to the moratorium imposed by the NCLAT in unconnected proceedings. Since the Respondent cannot receive the amount from ITNL and SSTL, there is no question of it being required to make payment of the amount to IFIN. Therefore, in light of the serious dispute relating to whether any default has been committed, the present case is not a fit case for initiating CIRP

The Corporate Debtor further submitted that in the above matter the Hon'ble Supreme Court held that this Bench can refuse to admit a Petition under Section 7 of IBC If there are good reasons to do so. In the present case, it is clear that the so-called loan extended by IFIN to the Corporate Debtor is only a part of a larger transaction which involved other IL&F Group entities. The amount deposited by IFIN with the Corporate Debtor was immediately transferred to ITNL. The understanding between the parties was always that ITNL and its subsidiaries will repay the amount with a higher rate of interest after which the Corporate Debtor would transfer the sum to IFIN and complete the transaction. However, the Corporate Debtor has been precluded from recovering the amount from ITNL/SSTL due to the order of the NCLAT Thus, on the one hand, the Corporate Debtor cannot recover the amount due from ITNL/SSTL but on the other hand IFIN (which is a group company) is seeking to recover the amount from the Corporate Debtor.

24. After hearing the submissions end upon perusal of records, we are of the considered view that this is a fit case for dismissal of above Company

Petition by exercising our judicial discretion as per law laid down by the Hon'ble Supreme Court in the above-mentioned judgment of "Vidharbha Industries Power Limited" Vs. Axis Bank Limited (2022) 8 SCC 352."

5.7 In this present case, the Bench noted that loan facility which was extended by IFIN to the Corporate Debtor is only a part of a larger transaction which involved other Group entities of IL&FS. The amount which was deposited by the Financial Creditor with the Corporate Debtor was transferred to SSTL & ITNL immediately. The agreement between the parties was always that SSTL & ITNL will repay the amount with interest after which the Corporate Debtor would transfer the said amount to IL&FS and complete the said transaction as it was agreed upon by the parties. However, it has become impossible for the Corporate Debtor to recover the amount from ITNL/ SSTL due to the order of the NCLAT. Thus, on the one hand, the Corporate Debtor cannot recover the amount due from ITNL/SSTL but on the other hand IL&FS (which is a group company) is seeking to recover the amount from the Corporate Debtor. In a similar case in Coordinate Bench, NCLT in C.P (IB) 1184/(MB)2020, the Bench has taken a view that the Corporate Debtor has acted as a facilitator to relending the amounts lent by the Financial Creditor. In the present case, on perusal of the aforesaid documents provided by the Corporate Debtor, this Bench is of the View that the Corporate Debtor in this case also acted as a facilitator for relending the amounts lent by the Financial Creditor to their own group Companies.

5.8 After hearing the submissions of the parties and without prejudice to our observations supra that the main documents which form basis of the

application u/s 7 of the code are not part of the pleadings. This bench takes cognizance of the report of SFIO and draws strength from order dated 05.01.2023 in Coordinate Bench, NCLT in C.P (IB) 1184/(MB)2020 and takes a considered view that this is a fit case for dismissal of above Company Petition by exercising our judicial discretion as per law laid down by the Hon'ble Supreme Court in the above-mentioned judgment of "*Vidharbha Industries Power Limited*" Vs. *Axis Bank Limited (2022) 8 SCC 352*" Hence, there is no merit in the above Company Petition and the same is dismissed

6. Considering the facts placed before us, this bench is of the view that, the Corporate Insolvency resolution process cannot be initiated against GHV HOTEL (INDIA) PRIVATE LIMITED, the Corporate Debtor. This bench is of the view, that the present case deserves to be dismissed.

ORDER

7. The petition bearing CP(IB) 1181/MB-IV/2021 filed by IL&FS FINANCIAL SERVICES LIMITED ("Financial Creditor"), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of GHV HOTEL (INDIA) PRIVATE LIMITED, the Corporate Debtor is **Rejected.**

8. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The rights of the petitioner before any other judicial forums shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)