S.No.122

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON **07-02-2022** AT 10:30 A.M. THROUGH VIDEO CONFERENCE.

Company Petition IB/207/2021
U/s 7 of IBC, 2016

IN THE MATTER OF:

Prudent ARC Ltd **...Financial Creditor**

Vs

Indu Techzone Pvt Ltd **...Corporate Debtor**

CORAM:-

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. VEERA BRAHMA RAO AREKAPUDI, HON'BLE MEMBER (TECHNICAL)

ORDER

Orders in Company Petition IB/207/2021 pronounced vide separate sheets. In the result, this Company Petition is admitted into in Corporate Insolvency Resolution Process (CIRP).

Sd/-

MEMBER (T)

Sd/-

MEMBER (J)

Srinivas

NATIONAL COMPANY LAW TRIBUNAL
BENCH-1, HYDERABAD

CP (IB) NO. 207/7/HDB/2021

APPLICATION UNDER SECTION 7 OF IBC, 2016, R/W RULE 4 OF I & B (AAA) RULES, 2016

Between

Prudent ARC Limited
611, D Mall, Plot No. A1
Netaji Subhash Place, Pitampura
New Delhi – 110034

... Petitioner/
Financial Creditor

Versus

Indu Techzone Private Limited
"INDU FORTUNE FIELDS
1009, 13th phase, Kukatpally
Hyderabad – 500072

...Respondent/
Corporate Debtor

Date of order: 07.02.2022

Coram:

Dr N.Venkata Ramakrishna Badarinath, Hon'ble Member (Judicial)

Shri Veera Brahma Rao Arekapudi, Hon'ble Member (Technical)

Appearance

For Applicant: Shri Krishna Grandhi, Advocate

For Respondent: Shri M. Anil Kumar, Advocate

SD/-

SD/-

PER BENCH

O R D E R

1. This Petition is filed by Prudent ARC Limited under Section 7 of Insolvency and Bankruptcy Code (hereinafter to be referred as "Code"), read with Rule 4 of Insolvency and Bankruptcy admission of the petition, seeking initiation of Corporate Insolvency Resolution Process (CIRP), granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon, contending that the Respondent defaulted in the payment of alleged debt of Rs 131,94,41,832/- (Rs. One hundred Thirty one Crores, Ninety four lakhs, forty one thousand and eight hundred and thirty two only) as on 31.05.2021.

2. The averments in brief are: -

(1) Indu Tech Zone Private Limited (herein after referred to as Corporate Debtor) is engaged in the business of setting-up IT parks in Special Economic Zones and construction of IT SEZ. During the course of business, it had availed term loan facility to the tune of Rs. 60 crores vide Rupee Loan Agreement dated 08.09.2008 (herein after referred to as "***Rupee Loan Agreement")*** entered between the Corporate Debtor and Infrastructure Development Finance Company Limited (IDFC). An amount of Rs. 45 crores was disbursed to Corporate Debtor on 11.09.2008 against the term loan of Rs. 60 crores under the Rupee Loan Agreement.

(2) Subsequently, a Common Rupee Loan Agreement dated 27.02.2009 (herein after referred to as ***"Common Rupee Loan Agreement"***) was entered into between Indu Techzone, IDFC, Andhra Bank, IFCI and SREI Infrastructure Finance Limited for a composite term loan of up to Rs. 160 crores, wherein IDFC was acting as a confirming party.

(3) Pursuant to the Common Rupee Loan Agreement, an Inter-Creditor Agreement dated 27.02.2009 was entered into between IDFC, AB, IFCI and Indu Tech Zone (herein after referred to as "***Inter-Creditor Agreement")*** in which IDFC has been mentioned as 'confirming party' in respect of facility amount of Rs. 60 crores under the Rupee Loan Agreement and that it shall have pari pasu security interest in the securities pledged by Indu Tech Zone, pursuant to Rupee Loan Agreement along with other lenders in *Common Rupee Loan Agreement*.

(4) IDFC Limited had assigned all its rights, title and interests, benefits in and to the debts due and payable by the Corporate Debtor, together with any incidental rights thereto including the assignment of and benefits under financial instruments, to ***Edelweiss Asset Reconstruction Company Limited (EARC)*** under a valid Assignment Agreement dated 24.12.2013 (Assignment Agreement-1).

(5) It is stated that the Corporate Debtor has utilised the loan amount but failed to pay the dues regularly and further committed various defaults of its obligations under the documents executed with regards to the credit facility. Owing to non-payment of the

outstanding dues, the loan account of Corporate Debtor was declared as Non-Performing Asset (NPA) on 13.10.2013. Further, EARC filed OA No. 721 of 2015 before the Debts Recovery Tribunal under Section 19 of Recovery of Debts due to Institutions and Financial Institutions Act, 1993, for the recovery of Rs. 49,12,33,098/- plus interest thereto.

(6) It is further stated that, while the OA was pending before DRT, EARC and Indu Tech Zone entered into a Settlement of Financial Assistance on 12.03.2018 vide Edel ARC/3875/2017-18 (settlement letter) wherein Corporate Debtor was to pay Rs. 15,00,12,830/- which includes outstanding debt of Rs. 40,64,41,066/- plus applicable interest at 15.5% originally owed to IDFC, in three trenches as under: -

(i) First Instalment of Rs. 4,25,12,830/- and Rs. 25,00,000/- by 27.03.2018.

(ii) Second instalment of Rs. 50,00,000/- by April, 2018.

(iii) Third instalment of Rs. 7,40,18,345/- and Rs, 2,59,81,655/- by 31.03.2020.

(7) It is further stated that the Corporate Debtor cleared till 2nd payment trench i.e Rs. 5,00,12,830/- as per the settlement letter. The settlement letter was recorded and filed with the DRT. The terms of the settlement letter as recorded in the settlement letter are as under:

"In the event of any default of payment of the amounts in accordance with the settlement letter, the settlement shall stand terminated automatically, without any further notice to Indu

(Corporate Debtor) and EARC shall be entitled to recover the IDFC outstanding amount".

(8) It is stated that the debt granted to the Corporate Debtor by IDFC, which was later assigned to EARC vide Assignment Agreement-1 was further assigned by EARC to Prudent ARC Limited/Financial Creditor herein vide Assignment Agreement dated 04.09.2020. (Assignment Agreement 2).

(9) It is further stated that when the Corporate Debtor failed to pay the third tranche of payment i.e. Rs. 10,00,00,000/- by 31.03.2020, notice dated 23.12.2020 was issued to the Corporate Debtor by Prudent ARC Limited seeking payment of the amount as per the contractual rate of interest less the amount paid, as per the terms and conditions mutually agreed upon by EARC and Corporate Debtor under the Settlement Letter dated 12.03.2018. The date of default is reckoned as 31.03.2020 when the Corporate Debtor failed to pay the amounts as provided under the Settlement Letter. Thus, submitting, the Ld. Counsel for the Petitioner / Financial Creditor prayed the Tribunal to admit the petition and order initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

3. The Corporate Debtor filed counter, inter-alia, contending that neither IDFC nor EARC Ltd nor the Applicant intimated the Corporate Debtor about the assignment of loan between them and violated terms of clause 7.6 of Inter-Creditor Agreement dated 27.02.2009, wherein it is stated that M/s IDFC Limited is incapable to assign loan unless Deed of Adherence

is entered with the Respondent/Borrower and other Lenders. In other words, without Deed of Adherence new lender (by assignment or induction) shall not deemed to be party to the respective Rupee Loan Agreements under which the Respondent availed loans. According to the Respondent, the assignment agreement dated 24.12.2013 and 04.09.2020 are not legally enforceable more so because they are not registered under Section 17 of the Registration Act, 1908 and Assignment Agreement dated 24.12.2013 is inadequately stamped.

4. In response to para 10 of the averments that by virtue of Assignment Agreement-2, the Applicant became the full and absolute legal owner and is legally entitled to receive the repayment of the said debts owed by the Corporate Debtor, the Corporate Debtor vehemently denies the statement contending that, M/s EARC Limited has transferred its *legally not enforceable rights* to the Applicant and hence the Applicant cannot become the full and absolute legal owner and is not entitled to receive the repayment of the said debts owned by the Corporate Debtor. The Respondent though admits that it had availed financial facility of Rs. 60 crores from IDFC Limited, but the same is not due to the Financial Creditor/Petitioner herein by virtue of the fact that it is not a party to the Assignment Agreement through which it is claiming to be a Financial Creditor.

5. It is the contention of the Corporate Debtor that clause 11.3 (b) of Rupee Loan Agreement dated 08.09.2008 invoked by the Applicant in the present petition to prove financial debt is superseded by clause 7.6 of Inter-Creditor Agreement dated 27.02.2009. The Corporate Debtor further strongly submits that IDFC Limited has no power to assign loan

under clause 11.3(b) of Rupee Loan Agreement dated 08.09.2008 without the consent of the borrower i.e. Corporate Debtor. Thus, submitting, since there is no legal debt payable or due to or defaulted to the Applicant, the Learned Counsel prayed the Adjudicating Authority to dismiss the application.

6. In the light of the contest put-forth by the Corporate Debtor, the points that emerges for consideration by this Tribunal is.

1. Whether this Tribunal, under its residuary power contained in Section 60 (5) (C) of I&B Code, entertain the plea of legality or otherwise of the assignment of debt in favour of the Petitioner?

2. Whether the documentary evidence furnished with application show that a debt is due and payable and has not been paid by the corporate debtor?

7. We have heard the Learned Counsel for Financial Creditor, Shri Krishna Grandhi and Shi B. Anil Kumar, Learned Counsel for the Corporate Debtor, perused the record and the case law.

POINT No.1

Whether this Tribunal, under its residuary power contained in Section 60 (5) (C) of I&B Code, entertain the plea of legality or otherwise of the assignment of debt in favour of the Petitioner?

8. At the outset it may be stated that, this being a petition filed under Section 7 of IBC at the behest of the financial creditor for initiation of CIRP against the Respondent/Corporate Debtor herein, as regards scope of

enquiry in this petition, we refer to the authoritative ruling of the Hon'ble Supreme Court of India, *in re*, *Mobilox*, where in it was held that,

"On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e., payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise." (Emphasis is ours).

9. A mere perusal of the counter filed by the corporate debtor, *especially* para 9 reveals that corporate debtor in categorical and unambiguous terms admitted availing of term loan of Rs. 60 crores from M/s IDFC Ltd, the native lender, which is also the assignor of the subject debt in favour of the applicant herein. That apart, owing to non-payment of the outstanding dues, the loan account of Corporate Debtor was declared as Non-Performing Asset (NPA) on 13.10.2013. Further, EARC filed OA No. 721 of 2015 before the Debts Recovery Tribunal, against the corporate debtor herein for the recovery of Rs. 49,12,33,098/- plus interest thereto.

10. It is further stated that, while the OA was pending before DRT, EARC and the corporate debtor Indu Tech Zone entered into a Settlement of Financial Assistance on 12.03.2018 vide Edel ARC/3875/2017-18 (settlement letter). wherein the Corporate Debtor was to pay Rs. 15,00,12,830/- which includes outstanding debt of Rs. 40,64,41,066/- plus applicable interest at 15.5% originally owed to IDFC, in three trenches as under: -

(iv) First Instalment of Rs. 4,25,12,830/- and Rs. 25,00,000/- by 27.03.2018.

(v) Second instalment of Rs. 50,00,000/- by April, 2018.
(vi) Third instalment of Rs. 7,40,18,345/- and Rs, 2,59,81,655/- by 31.03.2020.

11. The settlement letter was filed with the DRT, and the same was recorded with the following clause,

"In the event of any default of payment of the amounts in accordance with the settlement letter, the settlement shall stand terminated automatically, without any further notice to Indu (Corporate Debtor) and EARC shall be entitled to recover the IDFC outstanding amount".

Therefore, it is as clear as crystal, that the financial debt in this case stands admitted.

12. However, the Ld. Counsel for the Corporate Debtor would contend that the very assignment of the debt by the native lender in favour of the M/s EARC Limited, which in turn transferred its *legally not enforceable rights* to the Applicant herein, being illegal and violative of the provisions of SARFAESI Act, the subject debt also became illegal and un enforceable.

13. Ld. Counsel in support of his submission also relied on the ruling of Hon'ble Supreme Court of India, in the matter *between ICICI Bank Limited vs. Official Liquidator* of *APS Star Industries Ltd. & Others.* where in it was held that.

"Rights under a contract are always assignable unless the contract is personal in its nature or unless the rights are incapable of assignment, either under the law or under an agreement between the parties. A benefit under the contract can always be assigned. That, there is, in law, a clear distinction between assignment of rights under a contract by a party who has performed his obligation thereunder and an assignment of a claim for compensation which one party has against the other for breach of contract".

14. Since, the question before us being, whether or not this Tribunal, under its residuary powers contained in section 60 (5) (C) of I&B Code can entertain the above plea challenging the *legality* of the clause *relating to assignment* contained in the Inter-Creditor Agreement dated 27.02.2009, we first refer to Section 60 of I&B Code, which is as below.

60. (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate persons located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or [1][liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor] shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or [2][liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor] pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) **any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.**

(6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.

15. A mere look at the clause 5 (b) of section 60 of I&B Code, manifestly state that in order to exercise the residuary power as above, **any question of priorities or any question of law or facts, should arise out of or in relation to the *insolvency resolution or liquidation proceedings* of the corporate debtor** or corporate person under this Code. Thus, the *sine qua non,* for exercising the residuary power being, the 'question' must arise either out of or in relation to corporate debtor or corporate person , it is to be seen whether the above plea of the corporate debtor satisfies this test.

16. The SARFEASI Act 2002, provides for acquisition of rights or interest in a financial asset by an Asset Reconstruction Company ARC. The relevant proviso is section 5 of the Act, which is as below.

Acquisition of rights or interest in financial assets.-

(1) Notwithstanding anything contained in any agreement or any other law for the time being in force, any securitisation company or reconstruction company may acquire financial assets of any bank r financial institution-

(a) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between hem; or

(b) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.

(2) If the bank or financial institution is a lender in relation to any financial assets acquired under sub- section (1) by the securitisation company or the reconstruction company, such securitisation company or reconstruction company shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.

(3) Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powers- of- attorney, grants of legal representation, permissions, approvals, consents or no- objections under any law or otherwise and other instruments of whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset under sub- section (1) and to which the concerned bank or financial institution is a party or which are in fa our of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favour of the securitisation company or reconstruction company, as the case may be, and may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, securitisation company or reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favour of securitisation company o reconstruction company, as the case may be.

(4) If, on the date of acquisition of financial asset under sub- section (1), any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the hird proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial ass t by the securitisation company or reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the securitisation company or reconstruction company, as the case may be.

17. There is no quarrel that M/s EARC Limited which has assigned its rights to the applicant is an Asset Reconstruction Company and that the assignment agreement was only between the ARC and the native lander and the corporate debtor herein is not a party to the assignment agreement. Indisputably, the subject assignment agreement has been entered much prior to the initiation of the CIRP against the Corporate debtor herein.

18. It is an admitted fact that on the strength of the very same assignment agreement the assignee financial creditor herein, has moved DRT, Hyderabad, for recovery of its dues against the very same corporate debtor herein, wherein, the corporate debtor has agreed to pay the sum of Rs. 15,00,12,830/- which includes outstanding debt of Rs. 40,64,41,066/- plus applicable interest at 15.5%, in trenches, however breached the agreement, which ultimate compelled the applicant herein to trigger CIRP against the corporate debtor. Therefore, having accepted to discharge the debt in a manner as afore mentioned, the corporate debtor, firstly, is *estopped* from questioning the *locus,* of the applicant. Nextly, from raising the question as to the legality of the said assignment or clauses of the said assignment.

19. Even otherwise, it can easily be noticed that the question as to the legality of the assignment neither arose out of or in relation to the insolvency resolution proceedings of the corporate debtor herein, in as much as it was an independent agreement between the asset recovery company and the secured creditor. under the provisions of the SARFEASI Act. Thus, the so-called 'question' raised by the corporate debtor is undoubtedly extraneous to the insolvency resolution of the corporate debtor herein and invariably falls outside the scope of Section 5 (b) of section 60 of I&B Code.

20. Hon'ble Supreme Court of India in the matter between, Tata Consultancy Services Ltd vs Vishal Ghisulal Jain Resolution Professional, held that,

"The residuary jurisdiction of NCLT Under Section 60(5)(c) of IBC provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. If the jurisdiction of NCLT were to be confined to actions prohibited by Section 14 of IBC, there would have been no requirement for the

legislature to enact Section 60(5)(c) of IBC. Section 60(5)(c) would be rendered otiose if Section 14 is held to be exhaustive of the grounds of judicial intervention contemplated under IBC in matters of preserving the value of the corporate debtor and its status as a "going concern". We hasten to add that our finding on the validity of the exercise of residuary power by NCLT is premised on the facts of this case. We are not laying down a general principle on the contours of the exercise of residuary power by NCLT. However, it is pertinent to mention that NCLT cannot exercise its jurisdiction over matters dehors the insolvency proceedings since such matters would fall outside the realm of IBC. Any other interpretation of Section 60(5)(c) would be in contradiction of the holding of this Court in Satish Kumar Gupta [Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta, MANU/SC/1577/2019 : (2020) 8 SCC 531: (2021) 2 SCC (Civ) 443].

21. The case of hand *squarely* falls within the purview of the above ruling, hence we hereby hold that the above plea of the corporate debtor is liable to be rejected and we accordingly hereby reject the same. So much so, the only plea as above put forth by the Corporate Debtor, since held to be unsustainable.

22. As regards to the ruling of Hon'ble Supreme Court of India, in the matter of ICICI Bank Limited vs. Official Liquidator of APS Star Industries Ltd. & Others, relied by the Corporate Debtor is concerned, it may be stated that the same is not at all applicable to the case in view of the total fact change situation of the present case.

The Point is answered accordingly.

Point No 2.

Whether the documentary evidence furnished with application show that a debt is due and payable and has not yet been paid by the corporate debtor?

23. In our discussion under the above point, we have held that and the existence of financial debt and its default by the corporate debtor are *ex*

facie, clear and stand admitted. We therefore, reiterate the said finding herein.

The Point is answered accordingly.

24. In the light of our discussion on the above points, we firmly hold that this is a fit case to order CIRP, against the CD herein. Hence, the 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:

(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;

(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.

(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.

(4) That the order of moratorium shall have effect from date of this order 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) This Bench hereby appoints Mr. Krishna Komaravolu, Insolvency Professional, having Registration No. IBBI/IPA-002/IP-N00562/2017-2018/11699, #R/o H.No. 7-1-214, Flat No. 409, Vamsikrishna Apartments, Dharam Karam Road, Ameerpet, Hyderabad – 500016, contact no. 9010226641, email. Id. kkvolu@gmail.com, as Interim Resolution Professional.

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

(7) 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.

SD/-

(Veera Branma Rao Arekapudi)
Member (Technical)

Sd/-

(Dr. N. Venkata Ramakrishna Badarinath)
Member (Judicial)

Binnu