

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

CP/IB/144/(MB)/2023

Under Section 7 of the IBC, 2016

In the matter of

IDBI Bank Limited

[PAN-AABC18842G]

...Financial Creditor

Versus

**Arm Infra & Utilities Private
Limited**

[CIN: U45400MH2013PTC244266]

...Corporate Debtor

Order delivered on: **16.06.2023**

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner:

Mr. Rishi Thakur, Ld.
Counsel.

For the Respondent(s)

:

Mr. Rohit Gupta a/w Mr.
Harsh Behany, Ld. Counsel.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is an application being CP (IB) No. **CP/IB/144/(MB)/2023** filed by IDBI Bank Limited, the Financial Creditor/Applicant, filed on 16.12.2022 under Section 7 of the Insolvency & Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the case of Arm Infra & Utilities Private Limited.

1.1. The financial creditor has claimed a default of Rs. 165,45,83,259/- (Rupees One Hundred Sixty-Five Crore Forty-Five Lakh Eighty-Three Thousand Two Hundred Fifty-Nine Only) as on 08.12.2022. The date of default is not specifically stated in part IV. Instead, it is stated in the part IV that “*The Borrower defaulted in payment of its obligations under the Working Capital Facility on 30th September 2019 and under the 125 CR Term Loan Facility on 30th September, 2019 and the account of the Borrower was classified as a Non-performing Asset on 29th December 2019 in accordance with the existing guidelines of Reserve Bank of India.*”

2. The Corporate Debtor is a company incorporated under the Companies Act, 1956 which is engaged in the business of building infrastructure for energy, telecommunications, transportation and utilities.

2.1. In and around November 2008, Siti Networks Limited (erstwhile Wire and Wireless India Limited) (“Borrower”) approached IDBI Bank Limited (Financial Creditor) for credit facilities for the purpose of meeting working capital requirement of the Borrower.

2.2. At the requests of the Borrower, Financial Creditor issued a renewal sanction letter dated 24 November 2008 for a cash credit facility of Rs. 25

crores vide sanction letter dated 24 November 2008; subsequently, in 2009, enhanced to Rs. 50 crores vide sanction letter dated 09 December 2009; enhanced in 2011 to Rs. 60 crores vide sanction letter dated 9 March 2011; enhanced to Rs. 150 crores vide sanction letter 29 May 2012; and further enhanced to Rs. 325 Crores in 2016 sanction letter dated 11 February 2016. This facility is referred as "WC facility". Subsequently, the WC Facility was further renewed vide sanction letter dated 19 July 2017 and sanction letter dated 19 December 2018.

2.3. Besides above, in or around December 2014, at the request of the Borrower, the Financial Creditor provided a term loan facility of Rs. 125 crores ("TL Facility") to the Borrower vide sanction letter dated 26 December 2014 and a loan agreement dated 31 December 2014 came to be executed with the borrower.

2.4. On 31 December 2014, the Corporate Debtor unconditionally, irrevocably and absolutely agreed and guaranteed to pay to the Financial Creditor all or any amount due under the 125 CR Term Loan Facility on such demand being made by the Financial Creditor.

2.5. The enhanced WC Facility of Rs 315 crore is, amongst others, secured by a guarantee of the Corporate Debtor vide supplemental facilities agreement dated 29 February 2016. The TL Facility and WC Facility are collectively called as "Facilities".

2.6. On 29 February 2016, Corporate Debtor unconditionally, irrevocably and absolutely agreed and guaranteed to pay to the Financial Creditor all or any amount due under the WC Facility on such demand being made by the Financial Creditor vide guarantee agreement dated 29 February 2016.

- 2.7. The Facilities are secured, amongst others, by: (a) first charge over the entire moveable and immovable properties and assets of the Borrower both present and future (Secured Assets); (b) maintenance of DSRA for 2 quarters interest for both facilities and one quarter principal in relation to TL Facility (“**DSRA Amount**”); (c) Guarantee of the Corporate Debtor to secure both obligations at (b) and Guarantee of the Zee Entertainment Enterprises Limited to secure obligations in relation to WC facility only.
- 2.8. The security over the Secured Assets was created in favour of the Financial Creditor on various dates by way of deeds of hypothecation dated 31 December 2014 and 29 February 2016 and memorandum of entry dated 11 March 2015 and 27 January 2017.
- 2.9. The Borrower filed Form-CHG-1/Form-8 with the Registrar of Companies (RoC) in terms of the Companies Act, 2013 duly recording hypothecation over the moveable assets, mortgage over the immovable assets of the Borrower for securing the financial assistances.
- 2.10. The Borrower and the Financial Creditor also entered into and executed several omnibus counter guarantee agreements dated 23 March 2011, 03 August 2012 and 29 February 2016.
- 2.11. The Borrower and the corporate guarantor by way of its balance and security confirmation letter dated 24 September 2015 admitted and acknowledged its liability towards the Financial Creditor. The Borrower and the Corporate Debtor by way of its balance and security confirmation letter dated 24th September, 2015 & Letter dated 31st December, 2018 admitted and acknowledged its liability towards the Financial Creditor.

- 2.12. The Borrower and the Corporate Debtor continued to default in their obligations and consequently, the account of the Borrower was classified as Non-Performing Asset (NPA) from on 29 December 2019.
- 2.13. The Borrower defaulted in its obligations under the Facilities and accordingly, the Financial Creditor recalled the entire Facility and demanded and called upon the Borrower to pay Rs 135,70,32,574.77 (out of which Rs 118,71,87,498.16 is towards the Working Capital Facility) within 15 days. The Financial Creditor did not receive any response from the Borrower to this.
- 2.14. On 05 March 2021, Financial Creditor invoked the guarantee provided by the Corporate Debtor under deed of guarantee dated 29 February 2016 in relation to WC facility and called upon the Corporate debtor to pay Rs 60,87,89,718.00 together with further interest from 18 February 2021. The Financial Creditor has not received any response to the invocation letter dated 05 March 2021.
- 2.15. By way of separate letter dated 05 March 2021, Financial Creditor invoked the guarantee provided by the Corporate debtor under deed of guarantee dated 31 December 2014 in relation to TL facility and called upon the Corporate debtor to pay Rs 16,98,45,076.61 together with further interest from 18 February 2021. The Financial Creditor has not received any response to the invocation letter dated 05 March 2021.
- 2.16. The Financial Creditor submits that it has neither received any payment nor any communication from the Corporate Debtor.
- 2.17. The Financial Creditor issued notices on 19 June 2021 & 12th September, 2022 under Section 13(2) and subsequently, under Section 13 (4) of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) for enforcement of security interest created by the Borrower, Corporate Debtor and corporate guarantor.

2.18. The Financial Creditor issued notice dated 21 November 2022 to the Borrower calling upon the Borrower to maintain the DSRA balance. Subsequent to the failure on the part of the Borrower to maintain the DSRA balance, Financial Creditor issued notice dated 09 December 2022 to the Corporate Debtor demanding Corporate Debtor to maintain the DSRA balance.

2.19. The Borrower has acknowledged its liability towards the Financial Creditor in the annual report for the FY 2019-2020, 2020-2021 and 2021-2022.

2.20. A Joint Lenders Meeting (JLM) was held on 15 October 2019 with the Borrower and the lenders of the Borrower to discuss the liquidity issues being faced by the Borrower and the proposal of restructuring was submitted to the lenders. Pursuant to the proposal submitted at the JLM, several joint lenders meetings were held on various dates to discuss the proposal of restructuring some of them being on 15 September 2020, 15 April 2021 and 08 February 2022 where other Corporate Guarantor was also involved. At the last meeting held on 08 February 2022, it was discussed that the restructuring proposal submitted by the Borrower was not acceptable and since the company is enjoying the facilities under multiple banking, all lenders are free to take any action including legal action.

2.21. In accordance with the records maintained by the Financial Creditor in

their regular course of business, the following amount is due and payable by the Corporate Debtor to the Financial Creditor as on 8 December 2022:

Sr.No.	Nature of the Facility	Outstanding along with Principal and Interest (as on 8 December 2022)
1.	Working Capital Loan	Rs.149,60,69,763.39 (Rupees One Hundred Forty-Nine Crore Sixty Lakh Sixty-Nine Thousand Seven Hundred Sixty-Three and Thirty-Nine Paisa Only)
2.	Term Loan	Rs.18,85,13,494.61 (Rupees Eighteen Crore Eighty-Five Lakh Thirteen Thousand Four Hundred Ninety-Four and Sixty-One Paisa Only)

2.22. A copy of statement of accounts duly certified under the Bankers Books Evidence Act, 1891 showing the total outstanding amount in respect of the IDBI Facility, as modified, is annexed hereto and marked as "Annexure AA".

2.23. The Financial Creditor submits that this application is within the limitation period in terms of the Code read with the Limitation Act, 1963.

2.24. In light of the continuing defaults by the Corporate Debtor in making payments of the amount owed to the Financial Creditor, the Financial Creditor is constrained to initiate the present proceedings in its capacity as a financial creditor of the Corporate Debtor. It is stated that the accompanying Form-1 has been filed on account of the financial debt owed by the Corporate Debtor in terms of the Facilities, as modified.

2.25. The Corporate Debtor is unable and/or unwilling to pay its creditor, i.e.

the Applicant and hence, it is just and equitable that insolvency proceedings be initiated against the Corporate Debtor under the provisions of Section 7 of the Code. This is without prejudice to the Applicant's rights to initiate other proceedings available under law.

3. The Corporate Debtor was represented by the Counsel on the date of hearing and submitted verbal arguments, but no written reply or submission has been placed on record. The primary argument of the Corporate Debtor was that the present application is barred by Section 10A of the Code, in view of date of default arising from invocation of Guarantee by the Financial Creditor falls within the period prescribed u/s 10A of the Code.

4. This Bench heard both the Counsels and perused the material available on its record.

4.1. From the perusal of documents, the following facts emerge:

4.1.1. The Corporate Debtor executed a guarantee agreement to secure the Working Capital Facility of Rs. 150 Crores (Fund Based : Rs. 50 Crores and Non Fund Based : Rs 100 Crores) & TL Facility of Rs. 125 Crores, agreed to be provided by Financial Creditor to the principal borrower.

4.1.2. The principal borrower defaulted in its obligations under the Facilities and accordingly, the Financial Creditor recalled the entire Facility and demanded and called upon the Borrower to pay Rs 135,70,32,574.77 (out of which Rs 118,71,87,498.16 is towards the Working Capital Facility) within 15 days.

4.1.3. The principal borrower acknowledged its inability to pay the debt vide email dated 28.02.2020 and Mr. Chetan Sharma for the Corporate Debtor was also marked in the email. Accordingly, the Corporate Debtor had knowledge of such failures. Consequent to it the Financial

Creditor recalled the entire facility and other facilities aggregating to Rs. 1414248696.77/- vide email dated 18.02.2021.

- 4.1.4. The Financial Creditor invoked the guarantee on 05.03.2021 asking the Corporate Debtor to pay forthwith the amount of Rs. 60,67,89,718/-, being outstanding in working facility capital account and another amount of Rs.16,98,45,076.61/-, being outstanding in term loan facility forthwith. The amount of Rs. 60,67,89,718/- includes Rs.50 Crores towards the principal and remaining towards the interest and amount of Rs.16,98,45,076.61/- is towards principal outstanding of term loan.
- 4.1.5. No specific date of default is stated in part IV of the petition. Instead, it is stated that the Financial Creditor invoked the guarantee on 5th March 2021 and a tabular computation an amount of default and days of default is annexure AE to the petition.
- 4.1.6. The guarantee agreement makes the Corporate Debtor obliged till the repayment of complete facility and is irrevocable.
- 4.2. The Financial Creditor argued that the Corporate Debtor has a coextensive liability and once the principal borrower defaults the creditor can be qua the amount from the guarantor relying upon the decisions of Hon'ble Supreme Court in the case of Laxmi Pat Surana Vs. Union of India; and Hon'ble NCLAT, Chennai in S. Elangovan (Promoter and Erstwhile Managing Director of Kaveri Gas Power Pvt. Ltd.) Vs. ASREC (India) Ltd. And others. It was further argued that the intention of the legislature cannot be to have 2 defaults for the same debt for the purpose of section 10A of the Code. Once it is established that the default under the Capital

Facilities, which the guarantee secures, occurred before the Covid period, the corporate guarantor cannot take defense of Section 10A of the Code. Further, clause 7 of the guarantee agreement also requires the guarantor to replenish the DSRA immediately at the request of lender. It is also stated that the liability of the guarantor is continuing one and the guarantor can said to be in default till today. Also, the liability of the guarantors extends to the entire amount under Working Capital Facility and not limited only to the DSRA amount.

4.3. The Corporate Debtor argued that the date of NPA (of the principal borrower) cannot amount to a date of default in respect of the guarantor and that the Financial Creditor is bound to substantiate the date of default qua the guarantor. It is submitted that Section 7 of the Code comes into play when the Corporate Debtor commits a “default”. Merely marking of a copy of communication to the Borrower asking the Borrower to pay the due amount can not said to be a demand from the Guarantor. It was also argued that the Financial Creditor has not even once called upon the Corporate Debtor to pay the amount in default by the principal debtor prior to invocation of guarantee. It was further argued that that in an ‘on-demand’ guarantee (such as the present case) that demand/ invocation is a necessary prerequisite and a condition precedent to the guaranteed amount to become payable under the guarantee and that the liability of the guarantor, in an ‘on-demand’ guarantee, arises only after a demand is made on the guarantor. Correspondingly it is also settled that a default occurs only when such a demand is not honored by the guarantor.

4.4. This Bench has no doubt that the Corporate Debtor had the knowledge of default committed by the principal borrower on 28.02.2020. It is noticed that, the principal borrower defaulted in September, 2019 and this fact was

in knowledge of the Corporate Debtor through emails sent by the Financial Creditor to the principal borrower with copy marked to the Corporate Guarantor also.

- 4.5. It is noticed that the clause 16 of the Agreement dated 31st December, 2014 executed in relation to term loan facility provides that “This Guarantee shall be irrevocable and the obligations of the Guarantors hereunder shall not be conditional on the receipt of any prior notice by the Guarantors or by the Borrowers and the demand or notice by the Lender, as provided in clause 20 hereof shall be sufficient notice to or demand on the Guarantors”. Further, clause 3 of the said agreement provides that “in the event of any default on the part of the Borrower to comply with or perform any of the terms, conditions and covenants contained in the Loan Agreement, the Guarantors shall, upon demand, forthwith pay to the Lender without demur all the amounts payable by the Borrower under the Loan Agreement”. Further, clause 11 of the guarantee dated 29.02.2016 executed in relation to working capital facility provides that “the guarantors shall forthwith on demand made by the bank deposit with the bank such sum or securities or further sum or security as the Bank may from time to time specify””. Further, clause 19 thereof provides that “the guarantors agree that the amount due under or in respect of the facilities and hereby guaranteed shall be payable to the Bank on the bank serving the guarantors with a notice requiring payment of the amount””. Clause 10 thereof makes this guarantee irrevocable and enforceable against the guarantor irrespective of any dispute between bank and guarantor.

- 4.6. This Bench finds that the Financial Creditor has contended that the default is established by multiple documents including (a) emails dated

31.12.2018, 16.01.2019, 02.02.2019, 04.02.2019, 28.02.2020, 02.03.2020 (all before the Covid Period); and (b) 18.02.2021, 05.03.2021 and 09.12.2022. On perusal of email dated 31.12.2018, this Bench finds that the said email pertains to intimation to the principal borrower regarding devolvement of a bank guarantee on 28.02.2018 with request to principal borrower to regularize CC account. The email dated 16.01.2019 for also requires the principal borrower to regularize the account. The email dated 02.02.2019 informs the avoiding possession in account as on 02.02.2019 with request to principal borrower to regularize CC account. The email dated 04.02.2019 is response from the Corporate Debtor assuring the Financial Creditor that the principal borrower's internal accruals and cash flow is enough to take care all the future debts service obligation requirement and sought removal of lien from the cash credit account. Further, email dated 28.02.2020, a copy of which is marked to Mr. Chetan Sharma of the Corporate Debtor, is a communication from the principal borrower seeking suitable restructuring to help the principal borrower to overcome the liquidate issue and requested not to take any legal action against the principal borrower. The email dated 02.03.2020 is an email response from the Financial Creditor to the email dated 28.02.2020 seeking clarity on the restructuring request and informing the avoiding position as on 02.03.2020. The said email communicated that Financial Creditor will be forced to initiate action against the borrower and guarantor company. Communication dated 18.02.2021 and 05.03.2021 is a notice of recall of facilities and notice of invocation of guarantee respectively. This Bench does not find any demand having been made upon the Corporate Debtor asking it to pay the amount outstanding against the principal borrower in these communications except notice dated 05.03.2021.

4.7. This Bench finds that the Financial Creditor has in its demand notice dated

05.03.2021 stated that the Borrower has failed and neglected to pay to IDBI Bank, the interest amounts, which fell due on different dates, in respect of the facilities agreement. The Borrower has also committed some other defaults in terms of the facilities/loan agreement. It further states that as per its letter dated 18.02.2021. In view of these assertions we, IDBI Bank, hereby call upon you and demand from you to pay forthwith to IDBI Bank forthwith.

...”

- 4.8. It follows from the language of said demand notice that it was the first notice demanding payment from the Corporate Debtor under the guarantee. Though, it is undisputed facts that the Corporate Debtor had the knowledge of default at the end of the principal borrower, this Bench feels that such knowledge implies existence of an obligation on the part of Corporate Debtor and such obligation is a debt under Section 3 (11) of the Code. This Bench further notes that Section 3(12) defines default to “means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not (paid) by the debtor or the Corporate Debtor, as the case may be”.
- 4.9. In other words, the debt and default are two distinct propositions. Mere existence of debt, which undoubtedly came into being at each incidence of failure to pay in accordance with loan/facility agreement, cannot be equated with existence of default.
- 4.10. The Ld. Counsel for the Financial Creditor has relied upon the decision in the case of S. Elangovan the Promoter and Erstwhile Managing Director of Kaveri Gas Power Pvt. Ltd. Vs. ASREC (India) Ltd. (2022) ibclaw.in 311 NCLAT to contend that the ‘liability’ of the ‘Guarantor’ is coextensive with that of ‘Principal Debtor’, unless it is otherwise provided by the

`Contract'. It is the prerogative of the `Creditor' alone to move against the `Principal Debtor' or the `Surety'. `Clauses' in the `Letter of Guarantee' are binding on the `Guarantor'. Ignorance is not a valid ground. This Bench finds that the Hon'ble NCLAT stated so at para 47. This Bench finds that, having stated so, the Hon'ble NCLAT held at para 48 that "it is relevantly pointed out that the term `Guarantee' is a continuous one and therefore, the `right to sue accrues' when the `Guarantee Agreement' was invoked and the date when the `Corporate Debtor' had failed to discharge its obligation, in terms of `Guarantee'". This Bench further finds that in the case of Archana Deepak Wani Vs. Indian Bank (2023) ibclaw.in 287 NCLAT, it was held at para 31 that "When we look into the above clauses of Deed of Guarantee, it is clear that although the Guarantor immediately become liable on any default committed by the Principal Borrower but for initiating any action against the Guarantor, a demand is to be made. Without there being any demand to the Guarantor, it cannot be accepted that period of limitation against the Guarantor shall commence". It was finally held at para 32 thereof that "The above notice was issued to the Guarantor in reference to the Deed of Guarantee and the Corporate Guarantor was called upon to discharge their dues and the time was granted for 60 days to make the payment. We, thus, are of the view that default on the part of the Guarantor cannot be treated to be on 31.12.2016, when the Principal Borrower committed Default." The Hon'ble NCLAT upheld the order dated 24.02.2023, passed by this Bench in the case of Corporate Debtor i.e. M/s N Kumar Housing and Infrastructure Pvt. Ltd. We find that the reliance placed by the Financial Creditor on the decision in Elangovan case (Supra) is misplaced.

4.11. In the present case, it is undisputed facts that the first demand notice was

addressed to the Corporate Debtor on 05.03.2021 to pay an amount of Rs. 60,67,89,718/-, being outstanding in working facility capital account and another amount of Rs.16,98,45,076.61/- upon receipt of the notice, accordingly, the default qua Corporate Debtor took place on the date when the demand notice dated 05.03.2021 was served upon it. The Financial Creditor has not claimed that the service of the demand notice was complete on after 24.03.2021. Accordingly, this Bench is of the considered view that the Corporate Debtor committed the default in discharge of its obligation under guarantee agreement dated 31.12.2014 and 29.02.2016 during the period specified in Section 10A of the Code. As per the provisions of Section 10A of the Code, no application for initiation of corporate insolvency resolution process can be filed in respect of a default that has occurred on or after 25th March, 2020 till 24th September, 2020. By a notification dated 24th September 2020 the applicability of Section 10A was extended for a further period of three months till 25th December, 2020. Thereafter, by a notification dated 22nd December, 2022 the applicability of section 10A was further extended by a period of three months till 25th March, 2021. Thus, Section 10A bars absolutely and forever, the filing of any application under Sections 7, 9 and 10 of the Code, for defaults committed on or after 25th March, 2020 upto 25th March, 2021.

- 4.12. In view of the forgoing discussion, this Bench is of the considered view that the present application is barred by Section 10A of the Code. This application is also not maintainable on the ground that it is not in accordance with the intent and purport of the Code.

ORDER

5. The petition bearing C.P. (IB) No. 144/MB/C-IV/2023 IDBI Bank Limited, the Financial Creditor/Applicant, under Section 7 of the Insolvency & Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the case of Arm Infra & Utilities Private Limited is **dismissed**.

6. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition as it barred by the law.

Sd/-
PRABHAT KUMAR
MEMBER (TECHNICAL)
16.06.2023.
SVR.

Sd/-
KISHORE VEMULAPALLI
MEMBER (JUDICIAL)