NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Comp. App. (AT) (Ins.) No. 953 of 2021

[Arising out of Order dated 27.09.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court No.V, in CP No. 30/(IB)-MB-V/2020]

In the matter of:

Dheeraj Wadhawan
Resident of 13th, 14th, 15th and 16th floor,
D.B. Breeze, 16th Road, Khar (West),
Mumbai 400 052
Presently in judicial custody,
Maharashtra
Email: mail@aglaw.in

....Appellant

Vs.

1. **Yes Bank Ltd.**
   Having registered office at:
   Yes Bank House, Off Western Express Highway,
   Santacruz East,
   Mumbai- 400 055
   Email- sharehlders@yesbank.in

2. **RKW Developers Private Limited**
   Through Interim Resolution Professional, Mr. Ajit Sood
   Having registered office at:
   4th Floor, HDIL Towers,
   Anant Kanekar Marg, Bandra (E),
   Mumbai 400 051
   Email- ajitsood14@gmail.com

...Respondents

For Appellant: Mr. J. P. Sen, Sr. Advocate with Mr. C. Rashmikant, Mr. Mahesh Agarwal, Mr. Rohan Dakshini, Mr. Divyang Chandiramani, Mr. Ankur Saigal, Mr. Pranav Narsaria and Mr. Shivam Shukla, Advocates

For Respondents: Mr. Ritin Rai, Senior Advocate with Mr. Aman Sharma, Ms. Anamika Singh, Mr. Bhargav Kosuru and Ms. Sushmita Gandhi, Ms. Vaishnavi Rao, Advocates for R-1.
Mr. Aniruth Purusothaman, for R-2, IRP

JUDGMENT

(16th March, 2022)

Ashok Bhushan, J.

1. This Appeal has been filed challenging the order dated 27.09.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court No.V, admitting the Application filed by the Respondent No.1- 'Yes Bank Limited' (Financial Creditor). The Appellant, Suspended Director of the Corporate Debtor- 'RKW Developers Private Limited' (Respondent No.2), aggrieved by the impugned order has come up in this Appeal. The brief facts of the case and sequence of events necessary to be noted for deciding this Appeal are:

(i) 'Belief Realtors Pvt. Ltd.' (Principal Borrower) approached the 'Yes Bank Limited' (hereinafter referred to as "Bank") for disbursement of a term loan of Rs. 1,700 crores for development of a part of the property situated at Bandra (West) Mumbai. The loan to be given by the Bank was split into two tranches, 1st tranche of Rs. 750 crores to be issued to the 'Belief Realtors Pvt. Ltd.' (Principal Borrower) and the 2nd tranche of Rs. 950 crores to be issued to 'RKW Project Management Pvt. Ltd.'.

(ii) By facility letter dated 28.06.2018, disbursement of 1st tranche of the loan of Rs. 750 crores to Principal Borrower by the Bank was sanctioned. The facility letter recorded the Facility Fee for the loan as Rs. 118 crores (Rs. 100 crores facility fees + Rs. 18

crores GST). The loan was secured by a registered mortgage of the development rights over the project land.

(iii) On 27.09.2018, a corporate guarantee was issued by the Corporate Debtor as well as the Appellant before us. On 27.09.2018, the first loan of Rs. 750 Crores was disbursed and facility fee of Rs. 100 Crores was deducted from the borrower accounts. Under the terms of the loan agreement, the borrower would be liable to make payments towards the principal amounts only after 36 months from the date of the first disbursal made by the Bank i.e. after 26th September, 2021 and until then, only interest instalments were required to be paid.

(iv) 'RKW Project Management Pvt. Ltd.' by letter dated 12.12.2018 requested the Bank for cancellation of the facility of INR 950 Crores.

(v) On 13.12.2018, Bank issued a letter to the 'RKW Project Management Pvt. Ltd.' cancelling the facility of Rs. 950 crores.

(vi) The Principal Borrower continued to deposit amounts towards the interest instalment till June, 2019. The Borrower followed with the Bank for the refund of the proportionate facility fee or to have the same adjusted towards the interest payments which were required to be paid under the facility letter dated 28.06.2018.

(vii) On 29.07.2019, the borrower send a letter to the Bank seeking the refund of proportionate facility fee to the extent of the second tranche of the loan which was cancelled i.e. of Rs. 55.88 Crores.

The Bank did not respond to the aforesaid letter dated 29.07.2019.

(viii) On 23.09.2019, Internal Credit Memorandum of the Financial Creditor was issued stating that on the basis of original understanding between the Group and the Bank, fees of INR 1000 MM (+ GST INR 180 MM) was agreed on the credit facility of INR 17000 MM. The entire facility fee was recovered from the disbursement of facility of INR 750 Crore and with regard to facility of Rs. 950 Crores, NIL facility fee was proposed. The request of the borrower was noticed where the borrower has prayed for refund of facility fee towards the term loan of Rs. 950 Crores. The Internal Credit Memorandum of the Financial Creditor further stated that they are negotiating with the Company on the same, meanwhile, recommendation was made to refund of INR 10 Crores to the Borrower.

(ix) On 24.09.2019 and 25.09.2019, partial reimbursement of the facility fee aggregating to Rs. 10 Crores was made by the Financial Creditor to the borrower. On 30.10.2019, the Bank declared the account of the borrower as NPA. The date of default claimed on the part of the borrower was 01.08.2019.

(x) On 18.11.2019, Bank issued a recall notice to the borrower and the Corporate Debtor. On 28.11.2019, a letter was addressed by Principal Borrower and the Corporate Debtor to the Bank in response to the recall notice requesting the Bank not to take any action until they respond.

(xi) On 17.12.2019, a letter was sent on behalf of the Borrower to the Bank asking them to adhere to the understanding between the parties and to adjust the interest instalments against the balance facility fees due and payable to the borrower.

(xii) In July, 2020, the Bank filed an Original Application before the Debt Recovery Tribunal seeking to recover the loan from the borrower as well as the Corporate Debtor.

(xiii) In January, 2021, the Bank filed an Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 claiming an amount of Rs. 839,59,87,999/- alongwith interest from the Corporate Debtor. The Corporate Debtor on 12.03.2021 filed an I.A No. 589 of 2021 challenging the maintainability of the Company Petition. The borrower pleaded in the Application that in fact there was no default by the Principal Borrower on the date of issuance of the recall notice dated 18.11.2019, therefore, all actions on the basis of such recall was illegal. Before the DRT in the Original Application, the borrower filed Written Statement and Counter Claim. The Bank filed its Reply to the I.A. filed by the borrower before the Adjudicating Authority to which a rejoinder was also filed by the Corporate Debtor. During the hearing the Corporate Debtor submitted before the Adjudicating Authority that contentions, submissions, and averments in the I.A. be treated as its reply to the Company Petition. The Corporate Debtor as well as Bank filed their written submission before the Adjudicating Authority. On 27.09.2021, impugned

order was passed by the Adjudicating Authority admitting the Application under Section 7.

2. We have heard Shri J.P. Sen, Learned Senior Counsel for the Appellant, Shri Ritin Rai, Learned Senior Counsel for the Respondent and Shri Aniruth Purusothaman, Learned Counsel for the Interim Resolution Professional.

3. Shri J.P. Sen, Learned Senior Counsel appearing for the Appellant submits that there was no default committed by the Corporate Debtor on 01.08.2019 on basis of which default the Application under Section 7 was filed by the Bank. It is submitted that the total loan sanctioned by the Bank was in two tranches, 1st tranche of Rs. 750 crores to 'Belief Realtors Pvt. Ltd.' (Principal Borrower) and the 2nd tranche of Rs. 950 crores to 'RKW Project Management Pvt. Ltd.'. The entire facility fee for the loan of Rs. 1700 crores was decided by the Bank to recover from 1st tranche of loan of Rs. 750 Crores which was disbursed on 27.09.2018. On disbursal of Rs. 750 Crores, total facility fee of Rs. 100 Crores for entire loan alongwith Rs. 18 Crores as GST was recovered from the borrower's account. According to the loan agreement, there was Moratorium for 36 months and first instalment was to be paid after 36 months i.e. after 26.09.2021. The Principal Borrower was only obliged to pay the interest which was diligently paid by the borrower till June, 2019. A request was made by the Bank for getting the 2nd tranche i.e. facility of Rs. 950 Crores to be cancelled due to certain financial constraints on the Bank. Acting on such request, a request was made by the Corporate Debtor on 12.12.2018 for cancellation of a facility of Rs. 950 Crores. The

Bank on the next day i.e. on 13.12.2018 issued a letter cancelling the facility of Rs. 950 crores. After cancellation of facility of Rs. 950 Crores, the Bank was obliged to reverse the facility fee for loan of Rs. 950 Crores for which the Bank was persuaded by the principal borrower. A letter dated 29.07.2019 was written by the principal borrower to the Bank for refund of proportionate facility fee to the extent of Rs. 55.88 crores for the second tranche of the loan which was cancelled. The Bank did not submit any reply to letter dated 29.07.2019 but Internal Credit Memorandum of the Bank dated 23.09.2019 clearly noted that there was understanding between the Bank and the borrower that facility fees of Rs. 100 Crores was agreed on the credit facility of Rs. 1700 Crores. The Internal Credit Memorandum further decided to reverse Rs. 10 crores towards the facility fee pending negotiation with the borrower. On 24.09.2019 and 25.09.2019, Rs. 10 crores was refunded towards facility fee regarding second tranche. The amount of Rs. 45.88 crores which was due to be refunded or adjusted by the Bank was illegally retained and only Rs. 10 crore was given in September, 2019. Hence, no default was committed by the borrower on 01.08.2019. The interest was serviced by the borrower till June, 2019 and in case the amount of Rs. 45.88 crores which was still due to the Bank is adjusted towards interest liability, payment of the interest upto February, 2020 was sufficient. On 18.11.2019 when recall notice was issued by the Bank, the Borrower was not in default by taking into consideration the proportionate facility fee which was required to be reversed by the Bank. All actions subsequent to 18.11.2019 were illegal and unauthorised there being no default on 01.08.2019 by the Corporate Debtor. The Application filed under Section 7 was unfounded and could not

have been admitted. The Application which has been filed under Section 7, the date of default was clearly mentioned as 01.08.2019 and in the event the Bank has acted fairly and adjusted and reversed the facility fee which was obtained by the Bank on the disbursement of 1st tranche, there was no default on the part of the borrower. It is the Bank which has by its omission and commission of not reversing proportionate facility fee has engineered the default on the part of the Corporate Debtor. The Bank cannot be allowed to take benefit of its own wrong and push the Corporate Debtor to Insolvency.

4. Shri Ritin Rai, Learned Senior Counsel for the Bank refuting the submission of Shri J.P. Sen, Learned Senior Counsel for the Appellant submits that the entire facility fee of Rs. 100 crore was to be paid on disbursement of 1st tranche of Rs. 750 crores which was clearly mentioned in the facility letter dated 28.06.2018 as well as the loan agreement. The facility fee for the 2nd tranche of Rs. 950 crore was shown as NIL meaning thereby the facility of Rs. 100 Crores was to be paid on the disbursement of 1st tranche of Rs. 750 crores. There is no entitlement of borrower to claim any reversal of the facility fee. The loan agreement clearly mentioned that facility fee is non-refundable. The borrower and the Corporate Debtor were in default w.e.f. 01.08.2019, hence, Application for initiating Insolvency Process against the Corporate Debtor was rightly filed by the Bank in July 2021. The Internal Credit Memorandum of Bank dated 23.09.2019 on which reliance is placed by the Appellant does not contain any representation by the Bank that Bank has agreed for refund of proportionate facility fee. Rs. 10 Crores was decided to reverse on account of financial difficulties of the Corporate

Debtor and the said amount was disbursed for payment to the contractors and other claimants. The case of the Appellant at best is, dispute regarding reversal of proportionate facility fee which need to be pursued by the Appellant before the Competent Court and the said issue could not have gone into in the proceeding of Section 7. The Bank has not committed any wrong. The Appeal filed by the Appellant lacks merit and is filed on unsubstantiated grounds. The borrower/ Corporate Debtor cannot go away from the payment obligation under the loan agreement. Interest payment was made only till June 2019 and admittedly, no payments were made by the borrower despite being contractually liable to make monthly interest payment. Borrower has defaulted since 01.08.2019.

5. When this Appeal was first heard on 26.11.2021, pointed query was made to Shri Ritin Rai, Learned Senior Counsel for the Bank regarding guidelines, office memorandums and circulars of the Bank for charging of facility fee on the borrowing. This Appellate Tribunal asked the Learned Counsel for the Respondent to bring on record any relevant guidelines of the Yes Bank or any other material regarding charging of facility fee on borrowing.

6. We have heard Learned Counsel for the parties and have perused the record.

7. We need to first notice particulars of the Application filed under Section 7 by the Bank. Part-IV of the Application which gives 'particulars of the financial debt' including, the date of default is as follows:-

"PART-IV

<table>
<tr><th colspan="3">PARTICULARS OF FINANCIAL DEBT</th></tr>
<tr><td>1.</td><td>TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT</td><td>Nature of loan: Term Loan
Date of First Sanction: 28th June 2018
Date of Disbursement: Disbursed on 28th September 2018
Total Amount Disbursed: Rs.750,00,00,000/- (Rupees Seven Hundred and Fifty Crores only)</td></tr>
<tr><td>2.</td><td>AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)</td><td>Amount in Default:
(in Rs.)
<table>
<tr><td>Term Loan</td><td>750,00,00,000/-</td></tr>
<tr><td>Principal outstanding</td><td>750,00,00,000/-</td></tr>
<tr><td>Normal Interest at the rate of 10.90% calculated from 27th Sept 2018 till June 26, 2020</td><td>62,36,74,503/-</td></tr>
<tr><td>Penal Interest at the rate of 2% calculated from 27th Sept 2018 till June 26, 2020</td><td>27,23,13,496/-</td></tr>
<tr><td>Total outstanding</td><td>839,59,87,999/-</td></tr>
</table>
Total outstanding amount as on 26th June, 2020: Rs.839,59,87,999/- (Rupees Eight Hundred Thirty Nine Crores Fifty-Nine Lakhs Eighty Seven Thousand Nine Hundred Ninety-Nine Only)

The Date on which Default occurred: 1st August 2019

The Statement of Accounts of the Belief Realtors Private Limited (hereinafter referred to as the "Borrower") as on 26th June 2020 is annexed hereto and marked as <u>Exhibit "C".</u></td></tr>
</table>

8. A perusal of Part-IV of the Application indicates that interest is calculated from 27.09.2018 along with the penal interest and the whole term loan of Rs. 750 Crores is shown to be outstanding. The date of default as mentioned in Column-2 is 01.08.2019.

9. The principle submission which has been pressed by Counsel for the Appellant in this Appeal is that there was no default on 01.08.2019, hence, filing of the Application under Section 7 on the ground of default on 01.08.2019 is not maintainable. The ground on which it is claimed that no default occurred on 01.08.2019 has been noticed above. To recapitulate, the

submission is, loan of Rs. 1700 Crores was to be disbursed in two tranches, 1st tranche of Rs. 750 Crores and the 2nd tranche of Rs. 950 Crore. The facility fee charged by the Bank was Rs.100 Crore on the entire loan of Rs. 1700 Crores. However, the facility fee of Rs.100 Crores with GST of Rs.18 Crores was deducted after disbursement of 1st tranche on 27.09.2018 itself. Subsequently, when 2nd tranche was cancelled on 13.12.2018 by the Bank on the request made by the Corporate Debtor, the proportionate facility fee was not reversed. The proportionate fee for Rs. 950 Crore which loan was never disbursed was Rs.55.88 Crores. Further, as per the loan agreement, there was Moratorium of 36 months i.e. repayment of the principal amount was to restart on 26.09.2021 and only interest amount per month was to be serviced by the borrower. The Appellant's case is that the interest upto June, 2019 was paid by the Appellant and had the Bank reversed the facility fee which was taken at the disbursement of 1st tranche or had adjusted in the interest there was no default. The amount of facility fee which was to be reversed was sufficient to take care of the interest instalment till February, 2020. The default is claimed by the Bank as 01.08.2019 and partial reversal of the facility fee of Rs.10 Crore was made on 24.09.2019 and 25.09.2019. Thus, if the balance proportionate facility fee of Rs.45.88 Crores was reversed or adjusted, there could have been no default on 01.08.2019.

10. As noted above, the submission of the Appellant that Appellant was entitled for reversal of the adjustment of proportionate fee has been vehemently disputed by the Bank. The Bank's case is that the entire facility has been charged on the disbursement of 1st tranche of Rs.750 Crore and in

the 2nd tranche which was to be disbursed of Rs. 950 Crores, the facility fee was NIL. Hence, the facility fee was payable only on first disbursal and no facility fee was payable on 2nd tranche, hence, there is no claim of reversal of the facility fee.

11. The main question to be considered and answered in the present Appeal is as to whether the Appellant was entitled for refund of the facility fee on account of cancellation of the 2nd tranche of Rs. 950 Crore on 13.12.2018.

12. The 'facility fee' has been defined in P. Ramanatha Aiyar, Advanced Law Lexicon, 6th Edition, in following words:-

> ***"Facility fee.*** *An annual percentage fee payable to a bank providing a credit facility on the full amount of the facility, whether or not utilised."*

13. The Banks and financial institutions charge a facility fee/ process fee for advancing loan and other financing, from the borrower who is beneficiary of such financing. In the present case, Yes Bank has charged facility fee of Rs. 100 Crores on a loan which was asked for Rs. 1700 Crores. We, on the first hearing of the case, have asked the Learned Counsel for the Yes Bank to find out whether there are any guidelines, circulars, office memorandums for charging the facility fee and whether there are any cap/limit on the charging facility fee and what are the parameters for charging facility fee from borrower. Although Reply has been filed by the Bank in the present Appeal but in the reply, no details of any guidelines and circulars regarding facility

fee has been brought on record nor there is any pleading in the reply as to what are the parameters and basis for charging facility fee from the borrower. Learned Senior Counsel for the Bank during oral submission has submitted that facility fee is charged on case to case basis taking into consideration the nature of borrowing and extent of borrowing.

14. When we look into the extent of facility fee i.e. Rs. 100 Crores charged on a loan of Rs. 1700 Crores, it appears to be exorbitant and unreasonable. Learned Senior Counsel for the Appellant, however, has very fairly submitted that since the Appellant has accepted the loan on the payment of facility fee of Rs. 100 Crore, they cannot raise any grievance about the extent of facility fee.

15. One of the reasons for our enquiring from the Bank regarding parameters of the facility fee was also to adjudge as to whether as per norms facility fee of Rs. 100 Crores, as charged, can be proved to be charge on Rs. 1700 Crores loan or only on the 1st tranche of Rs. 750 Crores as is the case of the Bank but no guidelines, parameters having been filed, we have to consider the question on the materials which are available on the record and were before the Adjudicating Authority.

16. Before proceeding further, we may notice the credit facility of Rs.750 Crores was sanctioned by letter dated 28.06.2018. Facility details as contained in the letter dated 28.06.2018 are to the following effect:-

"YBL/MUM/CF/FL/0130/2018-2019
June 28, 2018

Belief Realtors Private Limited
HDIL Towers, 4th Floor,
Anant Kanekar Marg,
Bandra East,
Mumbai- 400051

Dear Sirs,

Re: Credit Facilities.

We (the "Lender") have pleasure in offering you (the "Borrower") the following facilities (the "Facilities") on the terms and conditions set out below:

S. No.	***Facility Description***	***Interest/ Commission***	***Security***
1.	***Facility: Term Loan 1 (TL 1)*** *Amount: INR 7500,000,000/- (INR Seven Thousand Five Hundred Million)* *Nature: Non Revolving* *Purpose:* *Towards construction, development and associated expenses of the Project including mobilisation advances, property affairs etc. and including reimbursement of unsecured loans infused towards project expenses* *Project:* *Residential project under SRA 33(10) scheme, with plot area of ~10,305 square meters having minimum saleable carpet area of ~5.51 lac sq ft located at Bandra,* *Clubbed with land parcel at alternate site for development of Rehab component with minimum carpet area of 5.27 lac sq ft.* *Land Parcel 1:* *Plot area of ~10,305 square meters located in Bandra, Mumbai to generate minimum saleable carpet area of*	***Pricing:*** *Spread of 0.95% p.a. over 1 year YBL MCLR* *Facility set up fees: INR 1,000 MM (plus applicable taxes) on the total Facility amount of INR 7500 MM (payable on acceptance of sanction) (non-refundable)* *Escrow Fees: INR 500,000 plus taxes as applicable per annum* *Interest Payment Dates: monthly* *Condition Precedent: As per Note 2 given below*	***As per Note 1 given below***

	~5.51 lac sq. ft. *Land Parcel 2:* *Land parcel for development of Rehab component on alternate site with minimum carpet area of 5.27 lac sq ft for Rehab portion* *Tenor & Repayment: 84 Months* *Door to door tenor of 84 months including a moratorium period of 36 months from first disbursement and followed by structured quarterly instalments as per below schedule. Installments shall be due on last day of respective quarter.* *Prepayment penalty: Nil* *Availability period: Till 36 months from date of first disbursement* *SCOD: 30th September 2025*		

17. The above letter clearly mentioned that facility fee of Rs. 100 Crores on total facility amount of Rs. 750 Crores is payable on acceptance of sanction which was non-refundable. The next facility fee for the 2nd tranche was issued on 29.08.2018 to the 'RKW Project Management Pvt Ltd.'. The facility details of the 2nd tranche of Rs. 950 Crores is as follows:-

"YBL/MUM/CF/FL/0384/2018-2019
August 29, 2018

RKW Project Management Pvt. Ltd.
HDIL Towers,
4th Floor, Anant Kanekar Marg,
Bandra East, Mumbai- 400051

Dear Sirs,

Re: Credit Facilities.

We (the "Lender") have pleasure in offering you RKW Project Management Pvt. Ltd. (the "Borrower") the following facilities (the "Facilities") on the terms and conditions set out below:

S. No.	Facility Description	Interest/ Commission	Security
1.	***Facility: Term Loan 1 (TL 1)*** *Amount: INR 9500,000,000/- (INR Nine Thousand Five Hundred Million)* ***Nature:*** *Non Revolving* ***PMC projects:*** *SRA Residential projects to be developed under DCR 33(10)* ***Purpose:*** *Towards Rehab construction, relocation, property Affairs/ Liasioning Cost, approval cost and allied cost(s) including placement of refundable deposits as part of "PMC Agreement(s)" to be entered by the borrower with "PMC Counterpart(ies)"* ***Tenor & Repayment:*** *84 Months* *Door to door tenor of 84 months including a moratorium of 36 months from first disbursement and followed by structured quarterly instalments as per below schedule. Installments shall be due on last day of respective quarter. (Schedule as per clause 2.1.2)* ***Prepayment penalty:*** *Nil* ***Availability:*** *36 months from date of first disbursement*	***Pricing:*** *Spread of 0.95% p.a. over 1 year YBL MCLR* ***Interest Payment Dates****: monthly* ***Facility Set up fees:*** *Nil* ***Legal Fees:*** *Nil* ***Escrow Fees:*** *Nil* ***Pre disbursement condition:*** *As per Note 2 given below*	***As per Note 1 given below***

18. The above two letters clearly indicate that the Bank has charged the facility fee of Rs. 100 Crores on sanction of 1st tranche of Rs. 750 Crores. There being dispute between the submissions of both the parties on the question as to whether facility fee was payable on entire loan of Rs. 1700 Crores or only on 1st tranche of Rs. 750 Crores, we need to look into other materials on record to find out as to whether facility fee of Rs.100 Crore was payable on Rs.1700 Crores loan so as to entitle the Appellant to get refund of proportionate facility fee on the cancellation of 2nd tranche loan of Rs. 950 Crores. The Appellant's case is that after cancellation of the 2nd tranche of the loan, they persuaded the Bank to refund the proportionate fee amounting to Rs. 55.88 Crores which was payable on Rs. 950 Crores loan. The borrower on 29.07.2019 has written to the Bank claiming refund/ adjustment of excess processing fees. It is useful to extract the aforesaid letter dated 29.07.2019, which is to the following effect:-

"Date- 29th July 2019

To,

1. *Ms. Lata Pillai,*
   Group President, Corporate Finance,
   Yes Bank,
   Mumbai.
2. *Mr. Satya Mahapatra,*
   Sr. Vice President,
   Yes Bank,
   Mumbai.

Sub: Refund/ Adjustment of Excess Processing Fees

Ref: (1) Sanction letter Reference no. YBL/NUM/CF/FL/0130/2018-19 dated 20th June 2018.

(2) Sanction letter Reference no. YBL/NUM/CF/FL/0384/2018-19 dated 29th August, 2018.

Dear Sirs,

We had approached your bank, for availing credit facilities for meeting the cost construction of rehab tenements, relocation of the Slum dwellers, Liasoning cost, payment of refundable cost and other allied expenses for development of our upcoming SRA Residential project to be developed under the provisions of DCR 33(10), situated at Village Bandra, Bandra Reclamation, Mumbai.

Vide the above-referred sanction letters your bank was pleased to sanction us an aggregate credit facility of Rs.1700 Crores i.e., Rs. 750 Crores in favour of Belief Realtors Pvt. Ltd. and Rs.950 Crores in favour of RKW Project Management Pvt. Ltd. on the terms and conditions as set out therein including the payment of processing fees of Rs. 100 Crores applicable on the entire loan.

Pursuant thereto, while your bank has disbursed the first loan amount of Rs. 750 Crores in favour of Belief Realtors Pvt. Ltd., your bank was scheduled to disburse the balance loan of Rs.950 Crores sanctioned in favour of RKW Project Management Pvt. Ltd. in due course which sanction was subsequently withdrawn. However, your bank has collected the entire processing fee of Rs. 100 Crores applicable on the aforesaid loan amount of Rs. 1700 Crores.
We therefore request you to refund us the proportionate amount of Rs. 55:89 Crores which will enable us to make the overdue interest payment to your bank.

For Belief Realtors Pvt. Ltd.

-sd/-
Authorized Signatory"

19. No reply was given to the letter dated 29.07.2019 by the Bank. However, Bank officials internally examined and an O.M dated 23.09.2019 was issued by the Bank in the above context. The said O.M is part of the Application which was filed by the Appellant in Company Petition No. 30 of 2020 seeking dismissal of the Company Petition. The subject of the O.M

"Subject:- Reversal of partial fee paid by the Company to YBL towards facility set-up fee for sanction of Term Loan Facility of INR 7,500 MM". O.M notices background facts which are relevant to be noticed are to the following effect:-

"***Background:***

- ✓ *The Company had proposed a total debt requirement of INR 17000 MM at the time pf submission of proposal for the Bandra Reclamation project. Post evaluation of proposal, YBL sanctioned the following facility:*
  - *TL facility of INR 7500 MM to the project SPV viz Belief Realtors Pvt. Ltd. (BRPL) for construction, development and associated expenses of the Project including mobilization advances, property affairs etc. and including re-imbursement of unsecured loans infused towards project expenses.*
  - *YBL retained the Right of first refusal (ROFR) for tie-up of balance debt of INR 9500 MM in the project.*
- ✓ *The Group approached YBL for debt requirement of INR 9500 MM in another group Company viz. RKW Project Management Pvt. Ltd. (RKW) around the same time. RKW was in the business of undertaking all activities relating to slum rehabilitation work on PMC basis. Post evaluation of proposal, YBL sanctioned TL facility of INR 9500 MM to RKW towards rehab construction, relocation, property affairs/ liasoning cost, approval cost and allied cost(s) including placement of refundable deposit as*

part of PMC agreements proposed to be entered by RKW with PMC counterparties.

- ✓ *Basis the original understanding between the Group and YBL, fees of INR 1000 MM (+GST INR 180 MM) was agreed on the credit facility of INR 17000 MM.*
- ✓ *However, basis subsequent discussions with the client, entire fees of INR 1000 MM (+GST INR 180 MM) was charged and recovered from the disbursement of TL facility of INR 7500 MM in BRPL. Accordingly, NIL fee was proposed in the sanction of TL facility for RKW.*
- ✓ *Further, owing to market conditions, RKW vide letter to YBL dated 12 Dec' 18 informed YBL that they wish to discontinue/ exit with the proposed EPC/PMC business and accordingly the sanction of INR 9500 MM be cancelled. Considering client request, YBL sanction of TL of INR 9500 MM was cancelled."*

20. Two more sentences of the O.M which needs to be noticed are to the following effect:-

> *"Basis above, the Company has requested for fee refund wrt sanction of INR 9500 MM which was never disbursed. We are negotiating with the Company on the same, meanwhile, we recommend refund of INR 100 MM.*
> *The refund amount will be paid to various Contractors/ Vendors/ PMC payments engaged by the group companies."*

21. The O.M recommends refund of INR 10 Crores. The said O.M was implemented by the Bank immediately, on 24.09.2019 and 25.09.2019 the Bank aggregate reversed the facility fee amounting to Rs. 10 Crore. The Bank statement of the account of the principal borrower has been brought on the record from 02.07.2018 to 02.12.2019 where bank entries of 24.09.2019 and 25.09.2019 is to the following effect:-

TXN DATE	VALUE DATE	DESCRIPTION	REFERENCE	DEBITS	CREDITS	BALANCE
24-SEP-2019	24-SEP-2015	402212313257000 2- FACILITY FEES REVERSED -BANDRA (E)	000000000000	0.00	76,778,101.00	76,778,101.00
25-SEP-2019	25-SEP-2019	402211419268000 2- FACILITY FEES REVERSED -BANDRA (E)	000000000000	0.00	23,224,899.00	23,224,899.00

22. The Office Memorandum dated 23.09.2019 of the Bank as well as the Bank entries of 24.09.2019 and 25.09.2019 as above clearly indicate that what was reversed in the account of the principal borrower was reversal of facility fee although it was only Rs. 10 Crores on the aforesaid date. The Office Memorandum dated 23.09.2019 which has been relied by the Appellant has not been disputed by the Bank either before the Adjudicating Authority or before this Tribunal. The Office Memorandum as well as reversal of Rs. 10 Crores of facility fee clearly support the case of the Appellant that facility fee of Rs. 100 Crores was taken by the Bank against total loan of Rs. 1700 Crores. Had it not been related to total sanction of Rs.1700 Crores, there was no question of Bank reversing any facility fee in September, 2019. The above clearly indicates that Appellant was represented by the Bank that the facility fee of Rs. 100 Crores is of the entire loan of Rs.

1700 Crores. Although Bank deducted the entire facility fee on the disbursement of the 1st tranche only which is as per the agreement between the parties but when loan of Rs.950 Crores was cancelled, the Appellant was clearly entitled for reversal of the entire proportionate facility fee of Rs.950 Crores.

23. The above case of the Appellant also finds support from the reply filed by the Bank before the Adjudicating Authority to I.A filed by the Appellant for dismissing the Section 7 Application. In para 8 of the reply, the Bank has made following pleadings:-

> *"8. It was mutually agreed between the Financial Creditor and the borrower group entities that the facility fees of approx. Rs.100 Crores (plus approx. Rs.18 Crores towards GST) which was applicable on both the loans, would be charged against the first facility of Rs.750 Crores sanctioned to the Borrower. This was based on mutual discussion and understanding between the parties and the Borrower had duly accepted the same, without any demur or protest. In the first facility letter dated 28 June 2018 to the Borrower, it was stipulated that a facility fee shall be applicable to the tune of Rs.100,00,00,000/- (Rupees Hundred Crores Only) and the same was duly accepted by the Borrower while signing the loan agreement dated 27 September 2018 and other facility documents. Whereas, in the second Facility Letter dated 29 August 2018, the facility fees is mentioned as "NiL", which indicates the undisputed understanding between the parties."*

24. The statement made in para 8 to the extent *"it was mutually agreed between the Financial Creditor and the borrower group entities that the facility fees of approx. Rs. 100 Crores (plus approx. Rs. 18 Crores towards GST) which was applicable on both the loans, would be charged against the first facility of Rs.750 Crores sanctioned to the Borrower"* clearly indicates that facility fee of Rs. 100 Crores was chargeable on both the loan i.e. loan of Rs.750 Crores and Rs. 950 Crores. However, the entire facility fee to be deducted from the disbursal of first loan. When Bank charges facility fee on borrowing, it cannot be accepted that on a loan of Rs. 1700 Crores facility fee shall be charged on the first tranche of Rs. 750 Crores and no facility fee was chargeable on 2nd tranche of Rs. 950 Crores. The payment of facility fee was received by the Bank on disbursement of 1st tranche which was facility fee for both the tranches and when 2nd tranche of Rs.950 Crores stood cancelled, the Bank was obliged to refund the proportionate facility fee. The action of Bank in not refunding/ adjusting the proportionate facility fee is unjust enrichment by the Bank at the cost of borrower. The relationship between a banker and borrower is of trust. The purpose of all financing is for the purpose of promotion and completion of project by different borrowers. Bank is supposed to extend a helping hand and to act as a facilitator in carrying out the project.

25. In the present case, we find that Bank has not acted fairly and even after cancellation of 2nd tranche of Rs.950 Crores, it did not of its own refunded the proportionate facility fee which it ought to have been done in all fairness so as the borrower may be relieved from some financial burden but

instead of refunding the proportionate fee, the Bank has pushed the borrower into serious financial constraint. The payment of monthly interest which was to be made for a period of 36 months was substantial amount of more than Rs.6 Crores per month and refund of proportionate facility fee would have brought great help to the borrower to meet the interest instalment. Bank who was obliged to reverse/ refund the proportionate facility fee, it could not be allowed to withhold the aforesaid facility fee and contend that borrower has committed default on 01.08.2019. Had the facility fee on the account of borrower adjusted in the interest instalment, there was no occasion of any default on 01.08.2019. We, thus, are of the view that it was omission or commission of the Bank in not refunding the facility fee to the borrower due to which Bank cannot contend that any default was committed by the borrower on 01.08.2019. We, thus, are satisfied that in above view of the matter, there being no default on principal borrower on 01.08.2019, the Bank also cannot proceed against the Corporate Debtor by filing of Application on the basis of default dated 01.08.2019.

26. The Adjudicating Authority in its impugned judgment has noted the above submission of Counsel for the Appellant in paras 10, 12 and 13 of the judgment, which is to the following effect:-

> *"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.

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."

27. It was pleaded by the Corporate Debtor that there was no default on 01.08.2019 on the part of the Appellant when credit is given of Rs.45.88 Crores to the Appellant which Appellant was entitled to be refunded as proportionate facility fee. The Adjudicating Authority although noticed the above submissions and also considered the same in para 29 and also noticed that Rs.10 Crores was refunded and noticed that adjustment of processing fee of Rs.45.88 Crores was asked for but since the outstanding against the Appellant is Rs.839,59,87,999/-, regardless of the issue whether proportionate facility fee was due or not the borrower is still liable to pay outstanding amount. In para 31, following is the discussion of the Adjudicating Authority in the above context:-

> *"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 fulfil 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."

28. The Adjudicating Authority failed to consider the submission that after given credit of Rs.45.88 Crores, there was no default on the part of the Appellant on 01.08.2019 which is the basis of initiating proceeding under Section 7. It is now settled law that for initiating proceeding under Section 7, the Financial Creditor has to prove that default has occurred, thus, the crucial question for admitting Section 7 Application is that whether a default has been committed by the Corporate Debtor. The Adjudicating Authority has not correctly appreciated the above aspect and without returning any finding that default was committed by the Corporate Debtor on 01.08.2019 has proceeded to admit the Application. The Bank cannot be allowed to take benefit of its own wrong by withholding of an amount of Rs.45.88 Crores which was liable to be reversed after 13th December, 2018, default is not proved on the part of the Appellant rather it was omission and commission on the part of the Bank in unfairly denying to reverse/adjust the aforesaid amount.

29. Learned Counsel for the Respondent has laid much emphasis on the fact that default has been reflected in the record of the information utility in whose record, the default is recorded. Learned Counsel for the Appellant has relied on the record of National E-Governance Services Limited. Learned

Counsel for the Appellant submits that in the record dated 31.12.2019, date of default in the information utility was 01.08.2019 and further in the information utility record, the date of default was clearly mentioned and the information utility before recording the default issued notices as contemplated in the Regulations i.e. 'The Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017' and when no reply was received by the borrower, the record of default was deemed approved.

30. With regard to the aforesaid, it is relevant to notice that the record of default and in the information utility record where subsequent to issuance of loan, recall notice issued by the Bank dated 18.11.2019. The loan recall notice dated 18.11.2019 was issued by the Bank on the ground that default has been committed in respect of loan of Rs.750 Crores by the principal borrower. The loan recall notice was issued on the ground that principal borrower has committed default on 01.08.2019.

31. As noted above, there being no default by the principal borrower on 01.08.2019, all subsequent action by the Bank on the alleged default dated 01.08.2019 are unsustainable. Hence, information recorded in the information utility on the strength of loan recall notice dated 18.11.2019 in no manner can be read as material to prove that default was committed by the Bank on 01.08.2019. Under the statutory scheme, the record of information utility is relevant but record of information utility is not conclusive proof of any default and a Corporate Debtor is always at liberty to disapprove the statement as contained in the information utility record.

32. We, thus, are of the view that sufficient ground was raised by the Appellant in I.A which was filed by the Appellant in Section 7 Application on which ground Section 7 Application deserves to be rejected. The Adjudicating Authority committed error in admitting the Application under Section 7 on the ground that default was committed by the Appellant on 01.08.2019. In view of the foregoing discussions, we hold that there was no default on the part of the Appellant on 01.08.2019 and it was commission and omission on behalf of the Bank of which no benefit can be taken by the Bank.

33. In result, we allow the Appeal, set aside the order passed by the Adjudicating Authority and dismiss Section 7 Application filed by the Respondent Bank. The Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Ashok Kumar Mishra]
Member (Technical)

[Dr. Alok Srivastava]
Member (Technical)

New Delhi
Anjali