

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH - I
KOLKATA**

CP (IB) No.1411/KB/2018

In the matter of:

Under section 7 of the Insolvency and Bankruptcy Code, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

Dena Bank (now known as Bank of Baroda)

... Financial Creditor

Versus

In the matter of:

Abhijeet Toll Road (Karnataka) Limited [CIN: U45400WB2011PLC162615]
having its registered office at FE-83, Sector-III Salt Lake City, Ground Floor
Kolkata – 700106, West Bengal.

... Corporate Debtor

Coram:

Shri Rajasekhar V.K. : **Member (Judicial)**
Shri Balraj Joshi : **Member (Technical)**

Appearances (via video conferencing):

For Bank of Baroda : Mr. Pankaj Jain, Adv.
For Corporate Debtor : Mr. Mainak Bose, Adv.
: Mr. S.Ganguli, Adv
: Mr. M.S.Tiwari , Adv.

Date of hearing: 16 March, 2022
Order pronounced on: 31 March, 2022

ORDER

Rajasekhar V.K., Member (Judicial)

Prologue

1. This court convened *via* video conferencing.
2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Dena Bank (*'Financial Creditor'*), by Mr. Siddharth Singh, Assistant General Manager¹ for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against Abhijeet Toll Road (Karnataka) Limited (*'Corporate Debtor'*).
3. The present Petition was filed on 03 October, 2018 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted in payment of ₹9,68,82,082/- (Rupees Nine Crore Sixty Eight Lakh Eighty Two Thousand Eighty Two only), including interest, towards outstanding loan (*'Loan'*). The date of default is **30.09.2014**.
4. The Government of Karnataka and Karnataka Road Development Corporation Limited (*'KRDCL'*) and the Corporate Debtor had entered into a concession agreement dated 03 June, 2011 to undertake improvements to the Chikkanayakanahalli-Tiptur-Hassan Road (*'Project'*). The total cost of construction and of the Project was estimated to be ₹3,18,98,00,000/- (Rupees Three Hundred and Eighteen Crore and Ninety Eight Lakh only).
5. In order to part finance the Project, the Corporate Debtor approached the Financial Creditor, State Bank of India (*'SBI'*), India Infrastructure Finance Company Limited (*'IIFCL'*) and Bank of India (*'BOI'*). The Financial Creditor *vide* its letter dated 22 December, 2011 sanctioned a loan of ₹25

¹ Power of Attorney dated 21 December, 2011, Annexure – 2

Crore to the Corporate Debtor². However, the same was revised to a sum of ₹17 Crore @ 13% interest on 23 May, 2012.³

6. On 05 January, 2012, a loan agreement (**'Common Loan Agreement'**) was entered between the SBI, IIFCL and BOI as Lender's Agent⁴ and the Corporate Debtor. As per the terms and conditions of the Common Loan Agreement the lenders had agreed to a term loan of an aggregate principal amount not exceeding ₹1,33,00,00,000/- to the Corporate Debtor and the repayment of such amount with all interest, additional interest, default interest, prepayment premium, upfront fees and other interest fees, costs, charges, expenses and all other amount stipulated shall be secured by way of mortgage over the Mortgaged Properties⁵ in favour of SBICAP Trustee Company Limited (**'Security Trustee'**) for the benefit of the lenders. Accordingly, the Security Trustee on behalf of the lenders called upon the Corporate Debtor to create the security by way of mortgage.
7. Subsequently, an Indenture of Mortgage⁶ (**'IOM'**) dated 02 February, 2012 was executed between the Security Trustee and the Corporate Debtor. As per the IOM, particulars of the property/assets against which the charges were created were divided into seven categories i.e., First Mortgaged Property⁷, Second Mortgage Property⁸, Third Mortgage Property⁹, Fourth Mortgage Property¹⁰, Fifth Mortgage Property¹¹, Sixth Mortgage Property¹², and General Assets¹³. Such charges were also filed with the ROC.

² Annexure – 12 of the Petition.

³ Page 184 of the Petition.

⁴ Point No.4 of the Rejoinder.

⁵ "Mortgage Property" or "Mortgage Properties" shall mean collectively the First Mortgaged Property, Second Mortgage Property, Third Mortgage Property, Fourth Mortgage Property, Fifth Mortgage Property, Sixth Mortgage Property and General Assets;

⁶ Annexure – 5 of the Petition.

⁷ Clause 3.1 (i) of the IOM.

⁸ Clause 3.1 (ii) of the IOM.

⁹ Clause 3.1 (iii) of the IOM.

¹⁰ Clause 3.1 (iv) of the IOM.

8. On 17.03.2012, a Deed of Novation¹⁴ to the Common Loan was executed between the Financial Creditor, SBI, BOI, IIFCL (*hereinafter referred to as 'Lenders'*) and the Corporate Debtor. By virtue of such Deed of Novation the Financial Creditor was inducted as one of the lenders. Subsequently, the Corporate Debtor filed modified charges with the ROC on 16 April, 2012.

9. ***Submissions on behalf of the Financial Creditor***

9.1 As per the arrangement between the Financial Creditor and the Corporate Debtor, the Financial Creditor had disbursed a sum of ₹6.73 Crore till 30 December, 2013 under consortium finance with SBI, IIFCL and BOI for completion of a highway at a stretch of 76.221 km within twenty-four months i.e., 31 March, 2014, in Chennai.¹⁵ However, neither the project was operative since May, 2013 nor any regular interests were received by the Financial Creditor from March, 2014.¹⁶

9.2 Several reminders/communications were sent by the Financial Creditor and also by the SBI to the Corporate Debtor to remit the overdue interest. Subsequently, on 06 December, 2013¹⁷ all the lenders of the Consortium held meeting at Mumbai, where Mr. Manoj Jayaswal, Chairman of the Corporate Debtor stated that the Corporate Debtor would be starting the project within one week and would complete 11 km stretch of State Highway at the earliest.

9.3 Further, Mr Atul Rajwadkar, GM (Finance) of the Corporate Debtor also apprised that they have not received any clarity on the time of release of grant through the Government of India. On the contrary, the lenders expressed their concern on the delayed servicing of interest and advised the Corporate Debtor to regularise the interest to save the account from being classified as NPA.

¹¹ Clause 3.1 (v) of the IOM.

¹² Clause 3.1 (vi) of the IOM.

¹³ Clause 3.1 (vii) of the IOM.

¹⁴ Annexure - 11 of the Petition.

¹⁵ Page 188 of the Petition.

¹⁶ *Ibid.*

¹⁷ Pages 228 – 230 of the Petition

- 9.4 In the meeting dated 25 July, 2014 the lenders advised the Corporate Debtor to arrange the payment of interest immediately in order to improve the asset classification. They also mentioned about the account of the Corporate Debtor was becoming NPA because they had paid interest only upto January, 2014.¹⁸
- 9.5 In spite of several meetings between the consortium of lenders and the Corporate Debtor, the Corporate Debtor failed to make the payment of the outstanding credit facilities. Subsequently, the SBI on behalf of the Consortium of lenders issued a legal notice dated 21.12.2016 to the Corporate Debtor.¹⁹
- 9.6 Reliance has been placed on *Hedge & Golay Limited v. State Bank of India*²⁰, where the Hon'ble High Court at Karnataka has held that the acknowledgement of liability contained in the balance sheet of a Company establishes a fresh point of limitation even if the acknowledgement has not been communicated to the Creditor (*Para 43*).
- 9.7 The Financial Creditor has also relied on *M.K.Dhir v. Punjab National Bank* (para 34,38,43 and 45)²¹, *Reliance Asset Reconstruction Company Limited v. Hotel Poonja International Private Limited* (para 26)²², *Pandam Tea Co. Limited* (Para 4)²³, *Bengal Silk Mills Company v. Ismail Golam Hossain Ariff* (Para 13)²⁴, *Dena Bank v. C. Shivakumar Reddy* (para 138-142,144).²⁵

10. Submissions on behalf of the Corporate Debtor

- 10.1 The KRDCCL issued a Letter of Acceptance dated 30 April, 2011 to the consortium comprising of Abhijeet Infrastructure Limited and Corporate Ispat

¹⁸ *Ibid.*

¹⁹ Pages 255 – 260 of the Petition.

²⁰ 1985 SCC OnLine Kar 428

²¹ Company Appeal (AT) (Ins) No.453 of 2021

²² (2021) 7 SCC 352

²³ 1973 SCC OnLine Cal 93

²⁴ 1961 SCC OnLine Cal 128

²⁵ (2021) 6 SCC 366

Alloys Limited (*'Consortium'*). As per the Letter of Acceptance, the consortium was required to promote and incorporate a Special Purpose Vehicle to undertake and to perform the obligations of the consortium under the Letter of Acceptance. Accordingly, the Corporate Debtor was incorporated in the year 2011 and was accepted as a concessionaire for the project. On 03 June, 2011, a Concession Agreement was entered into between the Government of Karnataka, KRDCCL and the Corporate Debtor.

- 10.2 The Corporate Debtor had placed its bid for the project on assumption that KRDCCL would provide the vacant access and Right of Way (*'ROW'*) including land free from all encumbrances for successful and timely completion of the project.
- 10.3 In accordance with the Concession Agreement, KRDCCL was required to hand over 90% of the total required vacant access and ROW before the Appointed Date and 100% of the total required vacant access and ROW not later than ninety days from the Appointed Date (*clause 10.3.2 and 10.3.5 of the Concession Agreement*). Further, it was also to release the Viability Gap Fund to the Corporate Debtor.
- 10.4 However, the KRDCCL in violation of the terms of the Concession Agreement handed over 11.40% of the vacant access and ROW (hindrance free) against the requirement of 90% on the Appointed Date, which has consequential effect on the project. On the contrary, the Corporate Debtor had incurred an expenditure of ₹153 Crore (Equity of as ₹92.99 Crore and ₹47.03 Crore Bank Loan) as on 23 August, 2014 on the project.
- 10.5 The Corporate Debtor *vide* its letter dated 08 September, 2014 terminated the Concession Agreement and requested the KRDCCL to release the Performance Bank Guarantee. Various disputes arose between the Corporate Debtor and KRDCCL and to sort out such disputes the Corporate Debtor approached the Hon'ble High Court of Karnataka at Bangalore.²⁶

²⁶ Annexure – H of the Reply.

- 10.6 The Corporate Debtor had invested the credit facility availed from the lenders in the said project and it is due to the default of KRDCCL that the project has been terminated by the Corporate Debtor. The lenders were kept in loop of all the arrangements between the Corporate Debtor and KRDCCL.
- 10.7 The disputes that arises in this purported proceeding is already pending before the Ld. Debt Recovery Tribunal, Kolkata and till the time the dispute is adjudicated this instant proceeding is premature and liable to be dismissed.
- 10.8 Further, while dealing with an application under section 7 of the Insolvency and Bankruptcy Code, 2016 existence of default is required to be ascertained and a default does not exists if the debt is disputed. However, in this present case the debt is disputed and the litigation is already pending.

11. *Supplementary Affidavit filed*

- 11.1 Pursuant to the Order dated 17 February, 2020 passed by this Adjudicating Authority, the Financial Creditor filed a Supplementary Affidavit
- 11.2 The Financial Creditor submits that his application is not barred by limitation because the Corporate Debtor had acknowledged the debt in their revival letter dated 30 June, 2014²⁷. Further, the Corporate Debtor has also acknowledged the debt in its balance Sheet for the Financial Years ending on 2014-15, 2015-16, 2016-17 and 2017-2018.²⁸

- 12.** The Corporate Debtor in its reply to the Supplementary Affidavit submits that the cause of action arises on and from the first date of failure to pay interest. In this present application, the date of default i.e. 30 September, 2014 as mentioned by the Financial Creditor is in complete contravention to the NPA Certificate which states that the account was classified as NPA on 26 September, 2014. The first date of default ought to have occurred ninety days prior from the date of classification as NPA.

²⁷ Annexure - 1 of the Supplementary Affidavit.

²⁸ Annexure - 2 of the Supplementary Affidavit.

13. *Issues arising out of this instant petition can be broadly classified into following segment;*

- 13.1 Is there a default? If yes, then what is the date of default?
- 13.2 Is the default barred by limitation?
- 13.3 Whether the dispute between the Corporate Debtor and KRDC and its pending adjudication before the Karnataka High Court has any nexus with this proceeding?

Analysis and Findings

- 14. We have heard the Ld. Counsel appearing on behalf of the Financial Creditor and the Corporate Debtor and perused the records.
- 15. As defined in Clause 2.1.2 (i) of the RBI Circular²⁹ a loan or advances becomes an NPA when installment of principal remain overdue for a period of more than ninety days in respect of a term loan. The Financial Creditor submits that the Corporate Debtor has not paid the interest from 31 March, 2014 and the date of NPA was stated to be 26 September, 2014. In the light of the RBI Circular, the date of NPA should ideally be ninety days from the date of non-payment of installment. Later, the same has been recapitulated by the Financial Creditor in their Additional Affidavit, where they have mentioned the date of NPA as 30 June, 2014. Nevertheless, it is pertinent to mention that the proceedings before this Adjudicating Authority and Debt Recovery Tribunal are independent and separate proceedings. The concept of the NPA is only for the purpose of SARFAESI Act, 2002, it has nothing to do with the proceedings under the Insolvency and Bankruptcy Code, 2016.
- 16. The pre-eminent question that needs to be adjudicated is the '***existence of Default***'. As recorded by the financial creditor in ***FORM – I*** the date of default is *30 September, 2014* but on a query put forth by this Adjudication Authority, the Financial Creditor by way of Additional Affidavit sought to change the date of default as *30 June, 2014*. Further, the NeSL also records the date of default as 30 June, 2014. But on perusal of the computation before

²⁹ DBOD.No.BP.BC.17 /21.04.048/2009-10

us,³⁰ we are of the view that the date of default should be *30 January, 2013*. However, be that as it may, nothing really turns on this: the Corporate Debtor in its revival letter dated 30 June, 2014³¹ has categorically acknowledged the outstanding debt. Moreover, the default of ₹61,57,01,827/- has been evidently recorded in the secretarial audit of the Corporate Debtor for year ending on 31 March, 2015³², which forms a part of the Board Report [*Asset Reconstruction Company (India) Limited v. Bishal Jaiswal and Another (para 33)*]³³.

17. Further, from time to time the default has been duly acknowledged by the Corporate Debtor, for instance, in the Auditor's Report for the year ending on 31 March, 2016³⁴, in the Balance Sheet for the year ending on 31 March, 2017³⁵ and 31 March, 2018³⁶. In the light of the Judgment of *Laxmi Pat Surana V. Union Bank of India & Anr.*³⁷ we can construe that there has been continuous acknowledgement of the debt and default from the year 2014 till 2018, hence, the period of limitation kept on getting a fresh lease of life under section 18 of the Limitation Act, 1963.
18. In *Rajendra Narottamdas Sheth and Another v. Chandra Prakash Jain and Another*³⁸, the Hon'ble Supreme Court, speaking through L. Nageswara Rao, J., has held that question of applicability of section 18 of the Limitation Act, 1963 to an application filed under section 7 of the Code has been well established by now. When an application under section 7 is filed beyond the period of three years from the date of default and the financial creditor furnishes the required information relating to the acknowledgement of debt, in

³⁰ Page 39 of the Petition

³¹ Annexure – 1 of the Supplementary Affidavit.

³² Page 42 of the

³³ 2021 (6) SCC 366

³⁴ Page 106 of the Supplementary Affidavit

³⁵ Page 223 of the Supplementary Affidavit

³⁶ Page 296-297 of the Supplementary Affidavit

³⁷ Civil Appeal No. 2734 Of 2020

³⁸ 2021 SCC OnLine SC 843

writing by the corporate debtor, before the Adjudicating Authority, with such acknowledgement having taken place within the initial period of three years from the date of default, a fresh period of limitation commences and the application can be entertained, if filed within this extended period (**Para 23**).

- 19.** It is also pertinent to mention that the ground taken by the Corporate Debtor that the question of default is required to be ascertained and a default does not exist if the debt is disputed, does not hold water because there are ample documents on record to contradict the same. Further, the dispute or litigation pending between the Corporate Debtor and KRDCCL has got no strings attached to this present application.
- 20.** The present petition made by the Financial Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time
- 21.** In the light of the above facts and circumstances, it is, hereby ordered as follows:-
- (a) The application bearing CP (IB) No. 1147/KB/2020 filed by Dena Bank (now Bank of Baroda), the Financial Creditor, under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Abhijeet Toll Road (Karnataka) Limited, the Corporate Debtor, is **admitted**.
 - (b) There shall be a moratorium under section 14 of the IBC.
 - (c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

- (d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (e) **Mr. Anil Matta**, registration number **IBBI/IPA-001/IP-P00223/2017-18/10422**, email: **mattaassociates@gmail.com**, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- (f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- (g) The IRP/RP shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- (h) The Financial Creditor shall deposit a sum of **Rs.3,00,000/- (Rupees Three Lakh only)** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- (i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp

immediately, and in any case, not later than two days from the date of this Order.

- (j) Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

22. **CP (IB) No. 1141/KB/2018** to come up on **22 June, 2022** for filing the periodical report
23. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

This order is pronounced on 31st day of March, 2022

Safura A., LRA