

IN THE NATIONAL COMPANY LAW TRIBUNAL  
COURT NO. 1, MUMBAI BENCH

MA Nos.1296/2019 &2439/2019

in

C.P. (IB) 3219 of 2018

(Under Section 60(5) of the IBC, 2016)

Supreme Manor Wada Bhiwandi  
Infrastructure Pvt Ltd

... Applicant in both MAs

Vs

Union Bank of India

... Respondent in both MAs

In the matter of

Union Bank of India

.... Petitioner

v/s.

Supreme Manor Wada Bhiwandi  
Infrastructure Pvt Ltd

.... Corporate Debtor

Order dated: 11.08.20

Coram:

Hon'ble Smt. Suchitra Kanuparthi, Member(Judicial)

Hon'ble V. Nallasenapathy, Member (Technical)

For the Petitioner: Mr. Nirman Sharma, a/w Mr. Rahul Sarda  
and Mr. Dhruvad Vajhani, i/b Economic  
Laws Practice.

For the Corporate Debtor: Mr. Shyam Kapadia, i/b Siddharth  
Jain

*Per: V. Nallasenapathy, Member (T)*

## **ORDER**

### **CP 3219 of 2018**

1. This petition is filed by Union Bank of India (hereinafter called as 'the Petitioner') against Supreme Manor Wada Bhiwandi Infrastructure Pvt Ltd (hereinafter called as "the Corporate Debtor") for initiating CIRP against the Corporate Debtor under Section 7 of Insolvency & Bankruptcy Code, 2016 (Code) read Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (Rules) alleging that the Corporate Debtor defaulted in making payment to the extent of Rs.165,19,44,297/-
2. The following were the facilities sanctioned by the Petitioner to the Corporate Debtor:

Types of facilities granted	Amt granted (Rs.)	Amt claimed to be in default as on 31.7.2018 (Rs.)	Date of Default
Term Loan I	60,00,00,000	59,65,37,049.22	29.10.2016
Term Loan II	83,66,00,000	76,98,28,676.05	30.9.2016
FITL I	5,56,00,000	3,64,94,288.33	28.2.2018
FITL II	12,45,00,000	7,98,56,891.22	30.6.2017
Non Convertible Debentures	12,45,00,000	16,92,27,392	
TOTAL	168,83,00,000	165,19,44,296.81	

3. The pleadings reveals that the Corporate Debtor was under Joint Lenders Forum (JLF) Restructuring Package and the petitioner is the lead member of JLF. However, the financial position of the corporate debtor continued to deteriorate and there were irregularities found in the payment mechanism in respect of JLF Restructuring Package. Hence corrective action plan measures were adopted by Lenders and Strategic Debt Restructuring (SDR) was invoked with reference date as 24.11.2016 and in principle approval for change of management outside SDR by invocation of pledged shares was approved in the JLF meeting held on

24.11.2016. Consequently, the lenders including the applicant invoked pledge of 51% shares as part of exercise of change of management. The consortium lenders deliberated on inviting various bidders and accordingly, bids were received from few parties and finally the bid submitted by one Kalyan Toll Infrastructure Ltd (KTIL) was in principle agreed in the JLF meeting held on 4.4.2018. However, in the JLF meeting held on 11.5.2018, the process advisor apprised the members of JLF that the credit rating company has issued a credit opinion of RP5 to the bid submitted by KTIL involving change in ownership into KTIL.

4. The lenders post discussion on this issue, noted that in view of the circular dated 12.2.2018 issued by RBI on the resolution of stressed assets revised framework, the bid involving change in ownership could not be considered for implementation as it did not received credit opinion of RP 4 or better.

5. In the aftermath of the above said position, the Petitioner issued a recall notice on 1.6.2018 requiring the corporate debtor to make the payment of the loan to the extent of Rs.160,80,69,112/- as on 30.1.2018. The notice reveals that the account has been classified as NPA as per the prudential norms of RBI guidelines with retrospective effect from 24.11.2016. It further adds that despite repeated reminders, the Corporate Debtor failed and neglected to

regularize the credit facilities. Hence it is not possible for the petitioner to continue the credit facilities any further. The notice further says that if the repayment is not received within a period of 10 days from the receipt of the notice, the petitioner will be constrained to initiate the following recovery action against the corporate debtor, its debtors and the guarantors:

- a. Enforce security by way of initiating action under SARFAESI Act and filing suit before DRT
- b. Invoke the personal guarantee issued by the guarantors in favour of the bank
- c. Exercise such other rights and remedies as may be available to the petitioner.
- d. Reporting directors names to RBI under willful defaulters list and also to CIBIL
- e. File winding up petition/bankruptcy proceedings against the company under the provisions of the Companies Act/Indian Bankruptcy Code, 2016

**MA 1296/2019**

6. This MA is filed by the Corporate Debtor praying that the above said company petition has to be dismissed in the light of the judgement of the Hon'ble Supreme Court of India in *Dharani Sugars and Chemicals Ltd vs. Union of India &Ors.* wherein it was held:

- a. the circular dated 12.2.2018 issued by Reserve Bank of India (RBI) was held as ultra virus the provisions of the

Banking Regulation Act and declared to be of no effect in law.

- b. consequently all the actions taken under the said circular including actions by which insolvency code has been triggered must fall alongwith the circular. As a result, all cases in which debtors have been proceeded against by Financial Creditors under Section 7 of the Code, only because of the operation of the impugned circular, will be proceedings which being faulted at the very inception are declared to be non est.

The applicant in view of this judgement seeks for dismissal of this Petition.

7. The Applicant submits that the loan account of the corporate debtor was under the phase of implementation of the O-SDR Scheme of restructuring under the then prevailing guidelines of RBI and thereafter, the RBI on 12.2.2018, issued a circular directing interalia the immediate scrapping of the restructuring which were currently under the implementation phase under the various guidelines/circulars. Because of this action of RBI, the restructuring scheme of the Corporate Debtor which was at a much advanced stage was also scrapped and gave raise to default in the account. The Respondent issued a loan recall notice dated 1.6.2018,

calling upon the applicant/Corporate Debtor to pay a sum of Rs.160,80,69,112/-.

8. The applicant submits that this Company Petition is filed inspite of the fact that O-SDR scheme was invoked by the Joint Lender Forum (JLF) and the same is under implementation.
9. It is submitted that Hon'ble Supreme Court of India by an order dated 2.4.2019, in the case of Dharani Sugars and Chemicals Ltd, set aside the circular of RBI dated 12.2.2018 as ultra virus provisions of the Banking Regulation Act and it was also held that all cases in which debtors have been proceeded by financial creditors under Section 7 of the Code only because of the operation of the impugned circular are declared as non-est.
10. The applicant submits that the present CP filed by the Petitioner/Financial Creditor is consequent to the circular dated 12.2.2018 and request that the petition shall be dismissed.
11. The applicant in the compilation of document enclosed the minutes of JLF meeting held on 11.5.2018 sent by Union Bank of India, to other JLF members on 30.5.2018 and the same is extracted below:

SUB: A/C - M/s. Supreme Manor Wada Bhiwandi Infrastructure Pvt. Ltd. Consortium meeting held on 11.05.2018

- A. Venue: Union Bank of India, Industrial Finance Branch ("IFB"), 1<sup>st</sup> Floor, 239, Vidhan Bhawan Marg, Mumbai - 400 021
- B. Attendance: List of officials participated in the meeting is enclosed.
- C. Brief Background: Supreme Manor Wada Bhiwandi Infrastructure Private Limited is an SPV promoted by Supreme Infrastructure India Limited for the purpose of construction of 4 laning of Manor Wada Bhiwandi Section from SH-35 km 49.10 to 89.01 and Manor Wada Road SH No. 34 km 29.55 to 53.18 including a Bypass from SH-35 at Vishwabharati Phata - Bhinar - Vadpa Junction (KM 0/000 to 7/900 - Total Length - 7.90 kms) on BOT basis ("Account" or "Company").
- D. Proceedings of the Meeting: The meeting was chaired by Mr. Abhijeet Basak, Dy. General Manager, IFB Mumbai, Union Bank of India ("UBI"). He welcomed the Lenders, Company Officials, Edelweiss representatives (Advisor) and Mr Samir Jagad from S J Law (LLC). The meeting proceeded as under:

Confirmation of the Minutes of the last Meeting: Mr. K. Sridhar Babu, AGM requested Lenders to confirm the minutes of the previous meeting held on 04.04.2018. As there were no observations, minutes were considered to be confirmed.

Mr Sridhar Babu, Asst. General Manager of UBI informed the forum that CARE Rating Ltd ("CARE") vide their letter dated 04.05.2018 had issued a credit opinion of RP5 to the Resolution Plan ("RP") involving Change in Ownership by Kalyan Toll Infrastructure Limited ("KTIL").

Lenders post discussion on the same noted that as per Resolution of Stressed Assets - Revised Framework dated 12.02.2018 issued by Reserve Bank of India ("Revised Framework"), the present RP involving Change in Ownership cannot be considered for implementation as it did not receive credit opinion of RP4 or better.

Post deliberation on the same, Lenders requested Edelweiss Representatives to update the forum on way forward in the Account.

In turn, Edelweiss informed that as RP involving Change in Ownership had received a credit opinion of RP5 from CARE, following options may be explored by the Lenders:

- Formation of New Resolution Plan;
- Sale of exposure to other entities/investors (OTS);
- Legal measures including reference of the Account to NCLT under Insolvency Bankruptcy Code 2016 ("IBC")

Post deliberations on way forward, few Lenders showed their discomfort towards formation of new Resolution Plan as already a lot of time was spent in resolving the Account considering process of Change in Management had commenced in November 2016.

Mr Sridhar Babu Asst General Manager informed that lenders have recovered Rs2.00 crore out of toll deposits during the period from 01-Apr-2018 to 10-May-2018. Member lenders viewed that toll deposits in the account is less than expected level. Lead bank informed that CMS and concurrent auditor KPMG is already appointed in the account. Matter was taken up with the Company representative for shortage of toll deposits. It is informed that some of the expenses which are under reconciliation with auditors (KPMG) are under process and also informed that all toll collection is deposited in collection account maintained with lead Bank. Lenders were not satisfied with the replies of Company and authorized lead bank to take all available measures to control toll leakage in the account.

Further, Edelweiss representatives informed the Lenders that as per their Service cum Engagement Letter dated 21.02.2017 entered into with Lead Bank (on behalf of Lenders) for carrying out Change in Management in the Account under O-SDR mechanism ("Transaction"), Edelweiss was entitled for a Professional Fee of Rs 1.40 Crs (0.35% of total o/s debt in the Company). Out of the total Rs 1.40 Crs, Edelweiss had raised invoices to the tune of Rs 0.325 Crs based on milestones achieved; balance Rs. 1.075 Crs was payable by Lenders on approval/implementation of the Transaction.

Edelweiss stated that though they were successful in obtaining a Final Binding Term Sheet from KTIL which was duly approved by Lenders as well. However the Transaction could not be taken forward on account RP5 rating as per Revised RBI Circular dated 12<sup>th</sup> Feb, 2018 which was not the criterion in earlier O-SDR mechanism. Considering the efforts deployed for making the Transaction successful under erstwhile O-SDR framework as well as Revised Framework, Edelweiss requested the Lenders to consider payment of at least 75% of its balance Professional Fees as the non consummation of the transaction was entirely due to changed RBI guidelines not in the hands of Advisor. Further, Edelweiss also agreed to handhold the transaction even reference is made under IBC/ any other resolution within the framework of RBI.

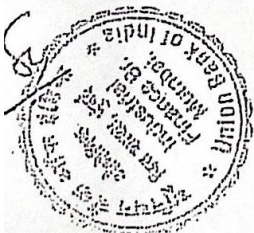
Lenders post discussion, highly appreciated the efforts put in by Edelweiss towards the Transaction including diligent scouting of investors, multiple negotiations with shortlisted parties, solving queries of investor/Traffic Study agency despite reluctance from company side and pursuing hard with CARE officials for rating. However, releasing of 75% of the balance fees felt on a higher side and post negotiation, members present in the meeting mutually agreed for -

- (i) to release 50% of the balance Professional Fees i.e. Rs 53.75 Lakhs (excl. Taxes) to Edelweiss from the escrow account.
- (ii) Retain Edelweiss as advisor to lenders going forward any resolution in the account

Edelweiss has agreed the decision of the consortium and thanked the forum for its positive consideration.

With no other matter pending to be discussed, Mr. Abhijeet Basak thanked all the representatives of Lenders, Company and Advisors for taking part in the meeting.

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12. In the above minutes, the JLF discussed about the circular of RBI dated 12.2.2018 and concluded that the present resolution plan involving change in ownership cannot be considered for implementation as it did not receive credit opinion of Resolution Plan 4 (RP4) . The Annexure 2 to the RBI's Circular dated 12.2.2018 defines RP 4 as debt facilities/instruments with this symbol are conceded to have moderate degree of safety regarding timely servicing of financial obligations such debt facilities/instrument moderate credit risk.
13. After the deliberations in the JLF meeting, the lenders requested Edelweiss representative to update the forum on way forward account and consequently Edelweiss informed that as RP involving change in ownership had received a credit opinion of RP5 from CARE, the following options may be explored by the lenders:
- a. Formation of new resolution plan;
  - b. Sale of exposure to other entities/investors;
  - c. Legal measures including reference of the account to NCLT under IBC, 2016;
14. The MoM further reveals that few lenders showed their discomfort towards formation of new Resolution Plan as already lot of time was spent in resolving the

account considering process of change in management has commenced in Nov. 2016.

15. The MoM further reveals that though Edelweiss was successful in obtaining final binding termsheet from KTIL which was duly approved by the lenders, the transaction could not be taken forward on account of RP5 rating as per revised RBI circular dated 12.2.2018 which was not the criterion in earlier O-SDR mechanism
16. The above details clearly reflects that this company petition has been filed against this Corporate Debtor only on the basis of the circular of RBI dated 12.2.2018, which has been set aside as ultra virus the provisions of the Banking Regulation Act with a consequential direction that those petition filed under the Code were also declared as non-est in law, by the Hon'ble Supreme Court.
17. In view of the above discussion, the applicant/Corporate Debtor clearly proved that the main petition is based on the RBI circular only and in view of this, the application is allowed and consequently the petition filed by the Petitioner is dismissed as non-est, with liberty to the petitioner to proceed in accordance with law.

**MA 2439/2019**

18. This MA is filed by the Applicant /Corporate Debtor against the Respondent, seeking the following reliefs:
- a. To dismiss the company petition No.3219 of 2018;
  - b. Direction to the applicant to follow the procedure as laid down in the circular dated 7.6.2019 issued by RBI;
  - c. Pending the hearing and final disposal of the above MA, all further proceedings in the CP No.3219 of 2018 be stayed and/or suspended.
19. On hearing the counsel for the applicant and on going through the pleadings the following are the observations of this Bench:
- a. CP 3219/2018 is already dismissed in view of the order passed in MA 1296/2019. Hence this prayer to dismiss the company petition becomes infructuous.
  - b. The applicant is seeking a direction against the Respondent to follow the procedure as laid down in the circular dated 7.2.2018 issued by RBI.
  - c. We feel that this Adjudicating Authority does not have any jurisdiction to entertain this application and issue direction to the Respondent to follow the procedure as

laid down in the circular dated 7.2.2018 issued by RBI.

- d. The applicant has to approach the appropriate forum for this relief and accordingly this MA is dismissed.

-sd-

V. Nallasenapathy  
Member (T)

-sd-

Suchitra Kanuparthi  
Member (J)