

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, DELHI
BENCH III**

CA/565/C-III/ND/19 filed in
CP/401/IB/2017 under Section 60(5) of the
Insolvency and Bankruptcy Code, 2016

*In the matter of **Earth Infrastructure Limited.***

Earth Gracia Buildcon Private Limited through its R P (Manisha Rawat)
...Applicant

Versus

Earth Infrastructure Limited through its R P (Akash Singhal)
...Corporate Debtor/Respondent

Order delivered on 8th of January, 2020

CORAM:

CH. MOHD SHARIEF TARIQ, Member (Judicial)
K.K. VOHRA, Member (Technical)

*For Applicant : Mr. Sandeep Bisht, Mr. Anuj Tiwari, Mr. Shikhar
Shrivastava, Mr. Joy Bajaj, Advocates*
For Respondent: Ms. Ishita Srivastava, Mr. Anurag Bhatt, Advocates

ORDER

PER: CH. MOHD SHARIEF TARIQ, Member (J)

1. The Resolution Professional viz., Manisha Rawat for **Earth Gracia Buildcon Private Limited** (Applicant) has filed CA/565/C-III/ND/2019 in CP/401/IB/ND/2017 under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, (in short 'I&B Code, 2016'). The Applicant seeks a direction to the Resolution Professional for Respondent (CD) viz., *Earth Infrastructure Limited*,

to recognize the claim made by the Applicant as a 'Financial Debt' under Section 5(8) of the I&B Code, 2016 and consequently, as "Financial Creditor" of the Corporate Debtor, which is undergoing CIRP w.e.f. 17.01.2019 under the I&B Code, 2016.

2. The detail of reliefs prayed for by the Applicant is as follows:

a. Pass an order directing the Resolution Professional of the Corporate debtor / Respondent to admit the claim of the Applicant;

or

b. Pass any such order or further orders as this Hon'ble Adjudicating Authority may deem fit and proper in the facts and circumstances of present case.

3. Brief facts of the case on hand are that the Applicant company (which is also under CIRP) claims to have advanced a sum of INR 16,82,17,052/- to the Respondent/Corporate Debtor viz., *Earth Infrastructure Limited*. It is contended that the amount advanced is a Financial Debt and accordingly the Applicant is a Financial Creditor (FC) of the CD in terms of Explanation to Section 5(8) of the Insolvency and bankruptcy Code, 2016 ('the Code'). The Applicant has filed requisite Form 'C' dated 08.04.2019 before the Resolution Professional for collating the claim amounting to INR 20,78,13,695/-, which was rejected by him on 25.07.2019 for want of loan agreement.

4. The Applicant Company contends that its claim is based on the transactions of five Banks i.e., Yes Bank, Corporation Bank, HDFC Bank,

Indian Bank and Axis Bank, showing transfer of amount from the accounts of the Applicant to the bank account of the CD. It is also contended that the claim is supported by the ledger of the Applicant and loan account summary of the CD itself, which was received by the RP of the Applicant from the Economic Offence Wing, Delhi Police (EOW).

5. The Applicant states that though the loan amount credited by the Applicant to the Corporate Debtor is more than what is reflected in the latter's loan account summary. It is further stated that the fact that a part thereof is reflected as loan in debtor's own loan account summary clearly goes to show that the said amount in question had been advanced as loan by the Applicant to the corporate debtor.

6. The Applicant contends that RP of the CD has erred in ignoring the fact that the Applicant is a company under CIRP, the records available are subject to pragmatic limitations, and there is no co-operation from the ex-management. It is stated that RP further erred in not appreciating the ledger account statement on the sole reason that the loan agreement is not produced, thereby dismissed the claim of the Applicant.

7. Besides the above, the Applicant company has filed an additional affidavit and placed on record a copy of Memorandum of Association and Balance Sheet of the Applicant company for the year ending 31.03.2015 to prove that an amount of INR 18,75,76,212 was advanced to others as loan.

8. The Resolution Professional for the CD has filed the **reply** by submitting that the present application is baseless and without any merits. It is submitted that the prayer of the Applicant cannot be granted, as it failed to bring on record any document, which could establish that the claim of the applicant is a financial debt, so in the absence of such document, the claim of the Applicant cannot be accepted as financial debt. It is further stated that the Applicant was requested through phone calls and e-mails to provide the copy of the Loan Agreement, if any, executed between the Applicant and the Corporate Debtor, for further verification of claim. The same was categorically reiterated in e-mail dated 28 June 2019 that if the Loan Agreement and other relevant documents will not be made available, then the claim could not be verified.

9. As per the submissions of the RP for the Corporate Debtor, the Applicant has given various reasons for not provide the copy of the Loan Agreement and any other document to ascertain the nature of the transactions happened between the parties. It is stated by the Resolution Professional for the Corporate Debtor that since no document is available to substantiate the claim of the Applicant as financial debt; therefore, the same was rejected. It is stated that in the absence of loan agreement and agreement qua payment of interest on the amount, the condition of time value for money is not satisfied. Therefore, the Applicant cannot be treated as Financial Creditor. It is further stated that the Applicant is claiming



itself to be a financial Creditor only on the basis of certain entries, in the books of account and bank transactions but for a debt to be treated as Financial Debt, it is necessary that the debt should be a financial debt as defined U/Sec.5(8) of the IBC 2016.

10. The Resolution Professional for the CD has also placed on record that the Applicant company and the Corporate Debtor are the group companies with Common Directors viz., Atul Gupta, Vikas Gupta, and Mr. Rajneesh Mittal, who are promoters of the Applicant and the CD. On the premises of these submissions, the Resolution Professional for the CD prayed to dismiss the application with exemplary cost.

11. On perusal of the pleadings of the parties, the only issue that arises is as follows:

(a) Whether the claim made by the Applicant Company is falling within the purview of financial debt as defined under sub-section (8) of Section 5 of the IBC, 2016?

Before discussing the issue framed herein above, it is necessary to refer to some of the definitions i.e. debt, financial creditor and financial debt given the IBC, 2016. Sub-clause (11) of Section 3 defines the term 'debt' as follows:

“debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

Sub-clause (7) of Section 5 defines the term ‘financial creditor’ as follows:

“financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

Sub-clause (8) of Section 5 defines the term ‘*financial debt*’ as follows:

“financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the **time value of money** and includes-

- (a) money borrowed against the **payment of interest**;
- (b) any amount raised by acceptance under any acceptance **credit facility** or its de-materialized equivalent;
- (c) any amount raised pursuant to any **note purchase facility** or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any **lease or hire purchase** contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- (e) **receivables** sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under **any other transaction**, including any forward sale or purchase agreement, **having the commercial effect of a borrowing**;

*[Explanation: For the purpose of this sub-clause,-

(i) **any amount raised** from an allottee **under a real estate project** shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any **derivative transaction** entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any **counter-indemnity obligation** in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the **amount of any liability** in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause. (*Emphasis Supplied*)

12. For understanding the term '*financial debt*', it is important to keep in mind the necessary ingredients of the definition given under Sub-clause (8) of Section 5 of the IBC, 2016. The definition provides that the transaction for being treated as '*financial debt*' must have the element(s) as follows:

time value of money, payment of interest, credit facility, note purchase facility, lease or hire purchase, receivables, any other transaction having the commercial effect of a borrowing, any amount raised from an allottee under a real estate project, derivative transaction, counter-indemnity obligation, and amount of any liability.

13. If any transaction is claimed to be '*financial debt*' the same must have any one of the elements mentioned above being supported with the consideration for the *time value of money*. In case a debt which is claim to be financial debt does not contain any one of the elements of the definition being supported with the consideration for the time value of money, then such debt cannot be treated as financial debt. In other words, not every transaction can be falling within the purview of the definition of the financial debt. Therefore, it is necessary that before treating any transaction as financial debt, we must look at the nature of the transaction to find out that any of the ingredients of the definition of financial debt being supported with the consideration of the time value for money is present or not.

14. In the case on hand, the Applicant company is relying upon the statements of bank accounts and the balance sheet. But there is nothing on record to suggest that crores of rupees i.e., Rs16,82,17,052/- claimed to have been transferred to the accounts of the corporate debtor were advanced as loan. Because the ingredient of the definition of financial debt are not found in relation to the transactions in question and more particularly the element against the consideration for the time value of money is missing. The claim of the Applicant company appears to be based on presumptions, which cannot take place of proof.

15. Besides the above, it is admitted fact that the Applicant company and the corporate debtor are group companies; the directors on the Boards and promoter are common. The transactions in question have no backing of the board resolutions and there is no record to show that the CD was in need of huge money (as loan) involved in the transactions, and there is no agreement. Even, the money claimed to be financial debt did not change the hands, as it remain in the same hands of the directors and promoters, who are common in both the companies, which are undergoing CIR process. In other words, there appears to be a round tripping process involved in the transactions, under which the money is not changing the hands. The term 'round-tripping' denotes a trip where a person or thing returns to the place from where the journey began. The accounting slang term "**round tripping**" refers to a series of transactions between companies that bolster the revenue of the companies involved but that, in the end, don't provide real economic benefit to either company. It is

noted that the matter is under investigation of the Economic Offence Wing, Delhi Police.

16. From the discussion made above, it can safely be concluded that the transactions claim to be financial debt are not falling within the purview of the ingredients of the definition of the financial debt and not supported with the consideration for the time value of money, as claim by the Applicant company. It is further noted that the Applicant company has recorded in the application that a sum of INR 16,82,17,052/- was advanced to the CD, and has filed requisite Form 'C' dated 08.04.2019 before the Resolution Professional of the CD claiming an amount of INR 16,82,17,052/- plus interest @ 12% p.a., which is not substantiated with any documentary evidence. Whereas, the Applicant in its application has mentioned claim amount of INR 20,78,13,695/- It is further noted that the Balance Sheet of the Applicant company for the year ending 31.03.2015 shows loan and advance of INR 18,75,76,212 to others, but there is no mention of the name of the CD. This reflects that all these are sham transactions that involve round tripping of the huge amount. The Resolution Professional for the CD has rightly rejected the claim of the Applicant Company for want of loan agreement.

17. In the light of the above, the application for seeking direction to the resolution professional for the CD to treat the claim of the Applicant company as financial debt is devoid of merits and therefore, the same stands rejected.

18. However, there is no order as to cost. The order is pronounced in the open court.

S—d

(K.K. VOHRA)

MEMBER (TECHNICAL)

S—d

(CH. MOHD SHARIEF TARIQ)

MEMBER (JUDICIAL)

Rule 151 - 1) Any member of the Bench may pronounce the order for and on behalf of the Bench.

Kushboo/V 2) when an order is pronounced under the Rule, the Court master shall make a note in the order sheet, that the order of the Bench consisting of President and Members was pronounced in open court on behalf of the Bench.

(NADHU NARULA)
Court Officer
Court-III