

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

IA No. 2288 of 2023

Under Section 60(5) of the I&B Code, 2016

IN

CP (IB) No.377/MB-IV/2021

Under Section 7 of the I&B Code, 2016

Union Bank of India,

...Financial Creditor/Applicant

V/s.

Shailen Shah

... Respondent

In the matter of:

YES Bank Limited

... Financial Creditor

V/s.

Indo Global Soft Solutions and

Technologies Private Limited

... Corporate Debtor

Order Dated: 02.08.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant(s) : Mr. Malhar a/w Mr. Deepak and
Adv. Saheli, Advocates.

For the Respondent No.2 : Mr. Shyam Kapadia a/w Mr.
Abhishek Gupta, Mr. Noopur,
Ms. Poornima, Advocates.

For the Respondent No.3 : Mr. Nausher Kolhi a/w Ms.
Anamika Sing, Mr. Nasrin Shaikh
i/b Induslaw, Advocates.

For the Resolution Professional : Mr. Durgaprasad Sabnis a/w Mr.
Anshul Sehgal, Mr. Mayank
Mishra & Mr. Ankit Rathod i/b
Luthra & Luthra Law Offices,
Advocates.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an Application being IA- 2288/2023 filed by Union Bank of India (“Applicant/Financial Creditor”), under section 60(5) of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking direction to Sh. Shailesh Shah, the Resolution Professional (“RP”), amongst others,
 - a. to reject/not admit the claim of ICICI Bank Limited;
 - b. to classify the claim of Yes Bank/J C Flowers Asset Reconstruction Private Limited as “Unsecured Financial Creditors”, instead of “Secured Financial Creditors”;
 - c. to direct for re-vote, in case the Resolution plan has already been approved basis present classification.
2. During the hearing taken place on 17.7.2023, the applicant submitted that it does not intend to press prayer ‘b’, however, it will retain the right to take up classification of this the claim of Yes Bank/J C Flowers Asset

Reconstruction Private Limited as “Unsecured Financial Creditors”, instead of “Secured Financial Creditors” before Committee of Creditors at appropriate time. Accordingly, the only issue for determination in this application pertains to claim of ICICI Bank Limited, as prayer ‘c’ is consequential to prayer ‘a’.

3. The Applicant submitted that RP suo-moto admitted the provisional claim of ICICI Bank Ltd. in the 20th Committee of Creditors meeting held on 17th May 2023 in the resolution process of the Corporate Debtor, in spite of the fact that ICICI Bank Limited has not clarified its final stand with respect to its acknowledgement and acceptance of the Deed of Cancellation dated February 23, 2022, *inter alia* executed by and between Corporate Debtor and Rohan Developers Private Limited (“RDPL”). This is even in spite of the fact that RP has sought ICICI Bank's stand on the said issue through multiple correspondences as well as in COC meetings and most recently, through an email dated May 13, 2023. RP even filed an IA on 02.03.2023 praying to this Adjudicating Authority to declare the transaction, pertaining to the cancellation of Joint Development Agreement with Rohan Developers Private Limited, a fraudulent transaction u/s 66 of the Code, and same is pending with the Adjudicating Authority. In other words, the respondent RP has himself determined the Deed of Cancellation as a Fraudulent transaction.
4. The Applicant has the first and exclusive charge on Radius Tech Park in terms of clause 5 of the Mortgage Agreement dated 29.3.2019 entered between Applicant and the Corporate Debtor. The Corporate Debtor had warranted in terms of clause 10(b)(iv) that there is no lien or obligations in respect of mortgaged property, and said warranty continues to hold good on each date in terms of sub-clause (xvii) thereof as this sub-clause further warrants that the warranties shall be deemed to be repeated each day from the date of execution of the said agreement. Further, clause 13(a) does not allow any kind of disposition in mortgaged property, except consented by

the Applicant in writing. Yet the Corporate Debtor has illegally and without the Applicant's consent / no-objection created a second charge in favour of Yes Bank / J.C. Flowers Asset Reconstruction Private Limited by way Deed of Hypothecation dated 5th November 2020. Even the charge of J.C. Flowers Asset Reconstruction Private Limited is not registered with Registrar of Companies, which the Respondent has admitted in its letter dated 23rd May 2023 to the Applicant.

5. The brief facts in relation to this transaction are stated as below -

5.1. On April 12, 2016, a Joint Development Agreement was executed between RDPL, the Corporate Debtor and certain tenant companies in respect of the project "Project 7 Hughes" ("JDA"). Under JDA, the Corporate Debtor agreed to pay Rohan Developers an interest-bearing deposit of Rs. 175,00,00,000 and an interest free deposit of Rs. 10,00,00,000. Purportedly for this purpose, the Corporate Debtor took a loan of Rs. 175,00,00,000 from ICICI Bank Ltd. ("ICICI").

5.2. Basis information provided by the Resolution Professional, on February 23, 2022, a Deed of Cancellation of the JDA was executed between the same parties as the JDA. Under this Deed of Cancellation, Rohan Developers Pvt. Ltd. took over the entire liability of ICICI and no money was payable by Rohan Developers to the Corporate Debtor or by the Corporate Debtor to ICICI.

5.3. On April 12, 2022, this Hon'ble Tribunal admitted a Petition under Section 7 filed by Yes Bank Ltd. and the corporate insolvency resolution process of the Corporate Debtor commenced.

5.4. Having learnt of the above Deed of Cancellation, on May 30, 2022, the Resolution Professional asked ICICI for its stand in respect thereof. ICICI claim for approx. Rs. 144,10,00,000 was therefore provisionally admitted by the Resolution Professional in view of the Deed of Cancellation.

- 5.5. On June 2, 2022, ICICI responded to the RP's queries, inter alia, stating that (i) no consent had been taken in respect of the Deed of Cancellation: and (ii) an OTS proposal had been received but the same had neither been accepted nor rejected.
- 5.6. On June 3, 2022, in view of the unclear response from ICICI, the Resolution Professional sought further clarify from ICICI. Pertinently, ICICI was specifically asked by the Resolution Professional as to whether it was aware of the cancellation of Joint Development Agreement by virtue of the Deed of Cancellation and whether it was willing to consent to the same.
- 5.7. On June 4, 2022, ICICI stated that there were ongoing discussions between ICICI and RDPL and ICICI was not aware of the Deed of Cancellation until receipt of the RP's email.
- 5.8. Subsequently, at the 11th and 12th COC Meetings held on December 8, and December 23, 2022 respectively, the Resolution Professional once again requested ICICI to clarify whether it was willing to acknowledge/ accept the Deed of Cancellation. ICICI stated that the matter was under deliberation internally and they would require some to respond to the RP's query on the same.
- 5.9. On December 25, 2022, the RP circulated a draft Transaction Audit Report ("TAR") prepared by the Nangia and Co.. LLP ("Transaction Auditor") seeking their observations. Under the TAR, the Transaction Auditor has raised certain queries / made observations regarding the Deed of Cancellation.
- 5.10. On January 9, 2023, ICICI responded to the TAR and informed the RP that the observations in respect of the Deed of Cancellation, specifically that the same was not in the ordinary course of business, requires to be revisited. It therefore appears that ICICI is supporting the Deed of Cancellation.

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- 5.11. On January 23, 2023, the RP once again sought a clarification from ICICI, however, no response has been received to such email till date.
- 5.12. On May 17, 2023, the Resolution Professional suo moto admitted ICICI's provisional claim inspite of the fact that ICICI has not clarified its final stand with respect to its acknowledgement / acceptance of the Deed of Cancellation
- 5.13. Accordingly, the Applicant has preferred the present Application.
6. The RP has filed Affidavit in reply on 28.06.2023 stating that although he sought a clarification from ICICI regarding the stand on the Deed of Cancellation, the same was never provided. Pertinently, the RP had treated ICICI's claim as a financial creditor as provisional and it is only on account of non receipt of ICICI failing and neglecting to respond to the RP's queries that the RP has chosen to unconditionally admit ICICI's claim. The RP in response to letter dated 11.5.2023 of the Applicant responded vide his letter dated 23.5.2023 making it clear that the ICICI bank Limited has exclusive charge over development rights of "7 Hughes" project of the Corporate Debtor, and the area share of both the Corporate Debtor and RDPL. Further, the ICICI Bank Limited has exclusive charge over the tenancy rights of the tenants for the said project. Considering the fact, the RP has determined the "Deed of Cancellation" as Avoidance Transactions, and the application is pending before this Tribunal in this respect, the RP has admitted claim of ICICI Bank as Secured Financial Creditors, on the premise that such development and tenancy rights in "7 Hughes" project still rests with the Corporate Debtor.
7. The Respondent No 2 ICICI Bank has filed reply dated 07.07.2023 stating that "*no plan should be put for voting unless it includes the third-party securities on which the other lenders have charge and also in case the resolution plan is below the liquidation value*". It has further stated that the applicant is asking this

tribunal to ignore the provisions of IBC 2016 to provide a benefit to the applicant which is not contemplated in the code. Indeed, the Code contemplates Financial Creditors and affords them certain rights and benefits, without any reference whatsoever to the status of their securities. It is further submitted that, ICICI Bank's position as a Financial Creditor emanates from its above-mentioned facility agreements and the underlying sum disbursed to the Corporate Debtor. Neither have been challenged, instead both have been admitted. The Cancellation Deed cannot unilaterally amend the aforesaid facility agreements. Hence, cancellation Deed, in the absence of a written agreement to amend the existing facility agreements, cannot alter ICICI Bank's position as a Financial Creditor.

8. This Bench heard the Counsel and perused the material placed on record.
 - 8.1. This Bench finds that the Corporate Debtor entered into a JDA with RDPL and paid deposits to them out of proceeds of loan obtained from ICICI Bank. The end use of such loan raised from ICICI Bank was known to ICICI Bank. The Corporate Debtor provided securities in form of (i) charge over the property mortgaged with the Applicant without obtaining its consent; (ii) exclusive charge over development rights of "7 Hughes" project of the Corporate Debtor, and the area share of both the Corporate Debtor and RDPL; and (iii) exclusive charge over the tenancy rights of the tenants for the said project.
 - 8.2. It is undisputed fact that the charge in relation to mortgaged property to Yes Bank is not registered with the Registrar of Companies, as required u/s 77(1) of the Companies Act, 2013. Section 77(3) of the Companies Act, 2013 provides that "*Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the liquidator or any other creditor unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by the Registrar under sub-section (2)*". Accordingly, Yes

Bank Limited does not hold any charge in so far as the said mortgaged property is concerned. None the less, this is not relevant as the applicant is not pressing prayer 'b' for the reasons stated in this order.

8.3. It is also undisputed that ICICI Bank Limited has Exclusive charge over various rights in "7 Hughes" project also to secure the amount of loan advanced to the Corporate Debtor. The various rights accrued to the Corporate Debtor in terms of JDA for development of "7 Hughes) project, but this JDA came to be determined vide deed of cancellation dated 23.02.2022, whereby the RDPL had undertaken to pay all debts due to ICICI Bank as well as all liabilities arising from the said JDA on the Corporate Debtor in consideration of Corporate Debtor relinquishing all its rights and claims under the said JDA. It is not in dispute that the rights in "7 Hughes" project accruing to the Corporate Debtor are mortgaged to ICICI Bank as security against the debt owed by the Corporate Debtor, subject matter of ICICI Bank's claim in CIRP of Corporate Debtor.

8.4. The ICICI Bank, in reply to this Application, has neither confirmed nor denied the validity of the Deed of Cancellation. However, ICICI Bank responded to the Transaction Audit Report vide its email dated 09.1.2023, that "*the observation to classify the arrangement as not being in the ordinary course of business needs to be revisited*". The relevant part of the email is reproduced herein below –

" Please note that as per the abovementioned amounts, the total of interest bearing refundable deposit together with the interest as mentioned in the relevant clause of the JDA will not exceed the claim filed by ICICI Bank (the "Bank"). The Bank has filed a claim of Rs. 199.00 crs being as amount due on April 12,2022. Further, considering the interest and penal charges accrued beyond April 12,2022 on the facility of IGSSTPL with bank, the amount due from IGSSTPL to the

Bank would exceed the amount due to be paid by RDPL to IGSSTPL towards the refundable deposit and interest thereon.

Further, as per the Deed of cancellation dated 23rd February, 2022 (hereinafter referred to as “Deed of Cancellation”) and the notice dated July 7, 2021, RDPL has agreed to take over the liability of the Bank amounting to Rs. 176.97 cr. as well as other liabilities highlighted in the deed therein towards full and final settlement of claims of IGSSTPL towards the refundable deposits.

In the light of above, the observation pertaining to undervalued transactions need to be revisited.”

- 8.5. From this email communication this bench feels that, ICICI Bank appears to have no objection to the said deed of cancellation and has only asserted its claim against the Corporate Debtor in so far as such claim exceeds Rs. 176.97 Crores, the amount admitted to have been due to ICICI Bank from RDPL in terms of such deed of cancellation, as such deed of cancellation can be subject matter of avoidance transaction only if such deed of cancellation was not entered in the ordinary course of business.
- 8.6. On perusal of the letter dated 23.05.2023 written by RP to the Applicant, this Bench finds that, the RP has clarified that the security deposits to Neelkamal Realtors Towers Private and refundable deposit to RDPL are both shown as assets of the Corporate Debtor under long term loans and advances as on 31.03.2020. This letter further states that ICICI Bank has no charge on the receivables under the respective projects including such deposits. However, there is no clarity on record how the deed of cancellation was given effect in the books of Corporate Debtor.
- 8.7. This Bench also finds that the RP has not taken into consideration the development & other rights in “7 Hughes” project as asset of the

Corporate Debtor in view of fact that no order has been passed by this Hon'ble Tribunal in respect of avoidance of the said Deed of Cancellation as on date, accordingly the Deed of Cancellation continues to be a valid and subsisting document in law. This Bench does not find the stand of RP acceptable in so far as the rights of the Corporate Debtor in "7 Hughes" project have been kept out of the Resolution Plan on the premise that deed of cancellation still subsists, however, the debt taken over by RDPL under such deed of cancellation, has been found admissible as debt of the Corporate Debtor by the RP. Accordingly, this Bench is of considered view that RP has taken contrary position in so far admission of claim of ICICI Bank is concerned. The RP either ought to have rejected the claim of ICICI Bank also taking whole of deed of cancellation in consideration, which is considered by him as valid and subsisting in the absence of order of this Bench while admitting the claim of ICICI Bank, or included the rights accruing to the Corporate Debtor under the JDA with RDPL.

8.8. We do not find any merit in the argument of the RP that he admitted ICICI's claim as ICICI did not withdraw its claim against the Corporate Debtor despite being aware of the Deed of Cancellation, which runs contrary to his position in not including the valuable development rights in the "7 Hughes" project, if such deed of cancellation is considered to be valid and subsisting as on date in the absence of any order to the contrary from this Tribunal on this aspect. However, the email of the ICICI Bank indicates tacit approval of the ICICI Bank to the Deed of Cancellation.

8.9. The RP ought to have proceeded to adjudicate that the Corporate Debtor owes to ICICI Bank, which is as per the books of accounts of the Corporate Debtor, as under Regulation 13 of the CIRP Regulations, the RP does not have the power to adjudicate a claim,

and the fact whether the Deed of Cancellation is still valid and subsisting could not be decided by him while admitting ICICI's claim.

8.10. Accordingly, this Bench considers it appropriate to direct the RP to admit the claim of ICICI Bank to the extent it is verifiable from the books of accounts taking into effect of Deed of Cancellation, till such Deed of Cancellation is held to be a void document under the Code or any other statute. The RP will be, at liberty, to seek early hearing in the avoidance application in relation to this transaction.

9. **IA-2288/2023 is partly allowed and disposed of with aforesaid direction**, except prayer 'b', which is not pressed before us with a right to take it up before CoC.

Sd/-

PRABHAT KUMAR

Member (Technical)

02.08.2023

Sd/-

KISHORE VEMULAPALLI

Member (Judicial)