S.No.3

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
VC AND PHYSCIAL (HYBRID) MODE
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
21-12-2023 AT **10:30 AM**

Company Petition IB/39/2021
u/s. 7 of IBC, 2016

IN THE MATTER OF:
Indian Overseas Bank **…Financial Creditor**

VS

M/s. Adilabad Expressway Pvt Ltd **…Corporate Debtor**

C O R A M:-
DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

O R D E R

Orders pronounced. In the result, Having carefully examined the facts of this case as put forth by both sides, we are of the confirmed view that the ruling of Hon'ble NCLAT, in re. "**Mr.Rakshit Dhirajlal Doshi Vs IDBI Bank Ltd and Others**" is squarely applicable to this case. Hence, we hold that the present petition as filed, is not maintainable and is liable to be dismissed. Accordingly, **we hereby dismiss the same**. However, without costs.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

BEFORE THE HON'BLE COMPANY LAW TRIBUNAL

HYDERABAD BRANCH, HYDERABAD

CP NO. 39/7/HDB/2021

U/s. 7 of the Insolvency and Bankruptcy Code, 2016

IN THE MATTER OF M/S ADILABAD EXPRESSWAY PRIVATE LIMITED

Between:

Indian Overseas Bank,
Large Corporate Branch, Near Jubilee
Hills check post, Banjara Hills,
Hyderabad- 500034. …Applicant/ Financial Creditor

VERSES

M/s Adilabad Expressway Pvt Ltd.,
Rep by its Managing Director, Regd.
Office at Plot no. 14, Banjara Hills,
Hyderabad- 500034. …Corporate Debtor/ Corporate Debtor

Order pronounced on: 21st November 2023

Corum:

Dr. Venkata Ramakrishna Badarinath Nandula
Hon'ble Member (Judicial)

Shri Ch aran Singh
Hon'ble Member (Technical)

Appearance:

For applicant: Alluri Krishna Raju and D. A. Suryanarayana Raju

For Corporate Debtors: SVS Chowdary

PER BENCH

The main petition is filed by the by Indian overseas bank (Financial Creditor) under section 7 of Insolvency and Bankruptcy Code, 2016. The petition was filed for non-payment of an amount of Rs. 89.77 Crores borrowed by M/s Adilabad Expressway Private Limited (Corporate Debtor), and to initiate corporate insolvency resolution process against the Corporate Debtor. Stating the same the applicant prayed for the following reliefs:

i. *Appoint Mr. S. Kasturi Rangan as the Interim resolution professional in terms of Section 16 of the Code.*

ii. *Declaring a moratorium in terms of Section 13 and 14 of the code.*

iii. *Directing that a public announcement of the corporate insolvency resolution process be made in terms of section 13 and 15 of the code.*

2. Brief averments of the Applicant/Financial Creditor in the main petition are as follows:

2.1 It is averred that the Corporate Debtor was incorporated on 13-10-2006 with an authorized share capital of Rs. 15,50,00,000/- and its paid-

up capital is Rs. 11,17,40,000/-, having its registered office at Plot no. 14, Avenue- 4, Banjara Hills, Hyderabad- 500034. It is submitted that the corporate debtor is in the business relating to construction and engineering works and it was awarded a project by National Highways Authority of India on annuity basis for a period of 20 years by way of exclusive right. For the purpose of implementing the said project, the Corporate Debtor approached the Applicant and other Financial Creditors to provide financial assistance to meet a part of project cost and they agreed to give aggregate principal amount not exceeding Rs. 350.00 Crores, the lender's agent and security trustee entered into a common loan agreement dated 14-03-2008. The Applicant bank agreed to release loan amount of Rs. 80.00 Crores out of the aggregate loan amount of Rs. 350/- crores.

2.2 It is averred that the applicant and the other financial creditors as lenders and the Corporate Debtor as borrower executed Lenders Agent Agreement dated 14.-03-2008 appointing Punjab National Bank (erstwhile OBC) as lenders agent giving authorization to represent the lenders. Along with the lenders and the borrower a security trustee agreement dated 14-03-2008 was executed appointing OBC as security trustee. The Corporate Debtor achieved COD on 24-06-2010 against the original COD fixed as 31-01-2010 which was revised to 30-04-2010. The

Corporate Debtor availed Rs. 79.25 crores against the term loan of Rs. 80.00 Crores sanctioned by the applicant bank.

2.3 It is averred that the aforementioned Common loan agreement dated 14-03-2008 was amended vide Amendment to common loan agreement dated 22-11-2012 executed by the Corporate Debtor as borrower. It is submitted that Rs. 70.00/- crores were lent at the request of the corporate debtor and further financial assistance was sanctioned by IIFCL for an amount of Rs. 64,28,57,143/- by way of takeout financing for the purpose of part pre paying/taking over the part of outstanding loan amount of the applicant have revised repayment schedule there in the common loan agreement is substituted with the schedule detailed in Para no. 11. As the substitution the half yearly instalments shall be paid on or before 31-12-2012 and subsequently half yearly instalments on every 30th June and 31st December and the last instalment is payable on 30-06-2023.

2.4 It is averred that aforementioned term loan was agreed to be paid in 22 half yearly instalments with effect from 31-12-2012 after takeover of part of the loan component by IIFCL in terms of amendment to the Common Loan Agreement and substitution of amortization of schedule as recorded in Para no. 1.11 of Amendment to Common Loan Agreement.

2.5 It is averred that to fund major maintenance cost of Rs. 48.25 Crores, the Corporate Debtor approached the applicant and other lenders to sanction another Term Loan and the applicant sanctioned an amount of Rs. 9.77 crores as their share out of Rs. 48.25 crores as Sub-debt. It is alleged that the said term loan was agreed to be repaid in 18 ballooning stretched half yearly instalments commencing from 30-06-2017 and ending on 31-12-2025 under step up method. The interest rate fixed was 11.25% till commercial operation date and it has to be a reset at COD and also every two years thereafter. It is submitted that in consideration to sanctioning of Rs. 34.12 Crores to carryout major maintenance to the project, the Corporate Debtor, the applicant and other financial creditors as MMR Lenders and OBC as facility agent entered into MMR facility consortium agreement dated 15-03-2017. It was recorded that the MMR lenders as mentioned in ***Schedule- III***, the rate interest chargeable by each lender in relation to MMR facility was recorded in ***Schedule- IV***, the amortization schedule in relation to this loan was recorded in ***Schedule-V***.

2.6 It is averred that the Corporate Debtor, who availed term loan of Rs. 80 Crores and Rs. 90 Crores failed to adhere to the repayment schedule agreed under Common Loan Agreement dated 14-03-2008 and as

amended vide amendment to Common Loan Agreement dated 22-11-2012 and MMR facility Consortium agreement dated 15-03-2017 and consequently, the loan accounts of the Corporate Debtor have been classified as NPA on 31-08-2018 as per RBI guidelines. It is submitted that the applicant bank vide notice of demand dated 12-02-2019 called upon the Corporate Debtor to pay an amount of Rs. 43,47,55,759/- due as on 12-02-2019 in both the Term loans together within a period of 15 days failing which the bank shall initiate CIRP proceedings. The Corporate Debtor replied vide letter dated 27-02-2019 admitting the default but with impertinent explanation.

2.7 It is averred that due to the continuing irregularity in the payment the applicant bank gave an opportunity to the corporate debtor to regularize the accounts vide letter dated 07-11-2019 the same was not given attention, another letter dated 30-11-2019 was issued to extent cooperation to the Corporate Debtor upgrade their accounts proved futile and called upon the corporate debtor to remit overdue amount immediately. As the same was not paid despite several opportunities given, the applicant bank vide demand notice dated 03-12-2019 called up the corporate debtor to pay the total amount due as on 30-11-2019 with up

to date interest within 60 days from the date of receipt of the notice, but the due was not paid.

2.8 It is averred that the corporate debtor agreed to pay the interest at the rate mentioned in the loan documents along with the rate of interest which may be modified by the applicant in terms of directions issued by RBI. The corporate debtor also agreed to pay the overdue interest of Rs. 46,10,744/- in addition to regular rate of interest in the event of default. It is submitted that the applicant bank is presently charging interest at 11.50% p.a., with monthly rests in the term loan I; 11.50% p.a., with monthly rests in MMR loan Accounts as per rate fixed by the applicant in terms of the guidelines issued by RBI in addition to charging overdue interest of 2.00% p.a. and also as per the terms and conditions agreed under the documents.

2.9 It is averred that as per the Extract of statement of accounts along with certificates under amended bankers book, the summation of dues reflecting the total dues is Rs. 39,02,59,932.30/- as on 01-12-2020.

	Loan sanctioned	**Amount due**
1.	Term Loan of Rs. 80.00 Crores	Rs. 28,89,33,760.00
2.	MMR Loan of Rs. 9.77 Crores	Rs. 10,13,26,172.30
	Total	Rs. 39,02,59,932.30

2.10 Stating the above submissions, the Applicant bank prayed to admitted the application and appoint an interim resolution professional.

Written arguments filed on 14-10-2023:

2.11 It is denied that debt serving ability was impacted due to breach committed by the financial creditor and failure to align of interest rate in line with Lead bank. As there are no reasons assigned or attributed to the bank. It is submitted it is not mandatory on part of the financial creditor under the financial documents on the alignment of interest rate as it provides interest rate not to be lower than the MMR lenders benchmark rate. ***(Page no. 597 at vol 3)***.

2.12 It is averred that the corporate debtor has executed a common loan agreement dated 14-03-2008 ***(Page no. 35-146 at vol 2)*** which provides the following aspects;

Interest-Events of Default- Rights of Lender

S. No.	Schedule/ Clause	Provides for	Page no	Volume
1.	Schedule IV	Particulars of Interest	132	2
2.	Schedule V	Amortisation Schedule	132	2
3.	Clause 2.6	Interest etc.,	56	2
4.	Clause 7.1	Events of default (Para A & B)	112	2
5.	Clause 7.2	Consequences of default	116	2

6.	Clause 10.6	Accounts, calculations & evidence of debt (Para c)	124	2
7.	Clause 10.10	Delay etc., not to impair the rights of the lenders	125	2

2.13 It is alleged that evidently the Corporate Debtor is not in a position to regularize the accounts even after the Notice dt 30.11.2019 issued by the Financial Creditor. The negotiations to assign the debt to ARC's or prospective purchasers evidence the same from the documents filed by the Corporate Debtor. It is further submitted that there is no pre-existing dispute between the Financial Creditor and Corporate Debtor nor the same claimed in the reply to the Demand Notice by the Corporate Debtor, instead the overdue position claimed according to the Corporate Debtor vide its Reply letter D1.27.02.2019 to the Notice of Demand Dt 12.02.2019 issued by the Financial Creditor has explained the reasons that contributed to the delay and default as under,

> *"NHAI deducted an amount of Rs 23.44Crs from the 17th annuity payment towards recovery of damages for alleged delay in completion of renewal of wearing surfaces and recovery of dues on account of reimbursement" as evident from the reply to the Demand Notice issued by the Financial Creditor* ***(page no. 597-598 at Vol 3)****, therefore there is no valid and bona fide dispute prior to filing of the application nor there is a Pre-existing dispute with regards to the current*

> *position of the Corporate Debtor attributable to the Financial Creditor"*

2.14 It is averred that both the loan accounts were classified as NPA with member banks since 31.08.2018 ***(page no. 602 para no-3 at Vol 3)***. Demand Notice dated 12.02.2019 ***(page no. 596 at Vol 3)***, was issued as the account was irregular so the same were classified NPA on 31.08.2018 as per RBI guidelines. It is further submitted that the Financial Creditor has not violated any norms nor guidelines of the RBI and the RBI guidelines dt 24.09.2015 referred by the Corporate Debtor do not constitute any violation on part of the Financial Creditor. Further, the said circular of the RBI speaks about restructuring of the account and that the existing lenders will have an option to exit their exposure completely by selling their exposure to a new or existing lender(s) within the prescribed timeline for implementation of the agreed CAP.

> *"In view of this, it has been decided that dissenting lenders who do not want to participate in the rectification or restructuring of the account as CAP, which may or may not involve additional financing, will have an option to exit their exposure completely by selling their exposure to a new or existing lender(s) within the prescribed timeline for implementation of the agreed CAP. The exiting lender will not have the option to continue with their existing exposure and simultaneously not agreeing for rectification or*

> *restructuring as CAP. The new lender to whom the exiting lender sells its stake may not be required to commit any additional finance, if the agreed CAP involves additional finance. In such cases, if the new lender chooses to not to participate in additional finance, the share of additional finance pertaining to the exiting lender will be met by the existing lenders on a pro-rata basis"*

2.15. It is averred that with W.R.T to JLF consent, the Financial Creditor is at liberty under the financial documents to proceed against the defaulted Corporate Debtor independently. It is further submitted that the citations relied by the Corporate Debtor doesn't come to their rescue, stating the same the Financial creditor averred that it is of no matter that the debt is disputed, so long as the debt is due i.e., payable, unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. The financial creditor placed reliance on the Hon'ble Supreme Court of India on May 11, 2023, in the case of, ***M. Suresh Kumar Reddy v. Canara Bank, [Civil Appeal No. 7121 of 2022],*** held that, "If the NCLT finds that there is a debt, but it has not become due and payable, the application under Section 7 can be rejected. Otherwise, there is no ground available to reject the application." Further, that the non-payment of a part of the debt when it becomes due and payable will amount to default on the part of the corporate debtor and an order under Section 7 Insolvency

Bankruptcy Code ("IBC") must follow ***Para.10*** quoting the citation the financial creditor prayed for the application to be admitted.

2.16. The applicant bank filed a memo on 06-11-2023 proposed the name of Shri Rajesh Chillale in place of Shri Kasturi Rangan as Interim Resolution Professional.

3. Brief averments of the Respondent/Corporate Debtor in the main petition are as follows:

3.1. It is averred that the Corporate Debtor is the Concessionaire for the Adilabad Expressway Project ("Adilabad Project"); which is an annuity-based Built-Operate-Transfer (BOT) project of National Highway Authority of India ("NHAI"), which comprises of "Design, Construction, Development, Finance Operation and maintenance of four laning of the existing two lane portion divided carriageway facility of KM.175.00 to KM.230.00 on NH-7 in the state of A.P. under North-South Corridor on, Build, Operate and Transfer (Annuity) basis.

3.2. It is averred that the Corporate Debtor's debt servicing ability severely impacted due to the breach committed by the Applicant, as the applicant refused to adhere to the rules of consortium banking and the agreement reached by all the consortium lenders in the Lenders

consortium (also known as Joint Lenders Forum) of Corporate Debtor/CD of which the Applicant Bank was a member. The Minutes of the various Joint Lenders Forum meetings are annexed hereto to confirm this aspect. The same is clarified vide the Corporate Debtor's letter dated 27-02-2019, which was unfortunately referred to by the Applicant in its application, as 'impertinent explanation'.

3.3. It is averred that the basis of the dispute with the Applicant Bank is with respect to "overdue position" claimed by the Applicant Bank, which arises on account of the "differential interest" between the Applicant Bank's interest rate and the interest rate directed by the Lead Bank of the Joint Lenders Forum.

3.4. It is averred that the MMR facility Consortium Agreement dated 15-03-2017 was executed between Corporate Debtor and its lenders (including the applicant). As per clause 2.5(i) A (e) of this Agreement ***(Page 386 of Annexures (Vol III) of applicant's Section 7 Application)***, the interest rate of all the banks is to be aligned with the interest rate of the Lead Bank (Oriental Bank of Commerce (now PNB consequent to the merger of OBC with PNB). It is submitted that in the joint lenders forum meeting dated 25-01-2018 the lead bank i.e., Oriental Bank of commerce/now Punjab National Bank, has requested all the banks

(including the Applicant herein) to apply uniform rate of interest on the Corporate Debtor/CD loans. And the same was agreed on 15th May, 2018 as an actionable item that all banks will align their rate of interest with that of the lead bank. The Minutes of the Joint Lenders Forum is annexed hereto. The relevant paragraph of the said Minutes is quoted as under:

> *"DGM, OBC inquired the lenders about uniform applicability of ROI in the two term loans by all the Consortium Banks. IOB charged highest among the Lenders and the account is appearing often in SMA 0 for them. IOB and all the Members Banks were advised to apply uniform ROI in line with the Lead Bank and the Company was advised to serve the effective ROI approved by the Competent Authority and to maintain the asset classification as standard with all the Member Banks. Also, Company was advised to take up with all Member Banks for uniform applicability of ROI in line with Lead Bank."*

3.5. It is averred that in the Joint Lenders Forum meeting dated 13-03-2019 the issue of aligning the rate of interests of all the banks was raised and request was made to Member Banks (including the applicant) to align their interest rates with Lead bank. The extract from the minutes if the said meeting is quoted as under:

> *"Company's request for Alignment of Rate of Interest by some Members with the Rol stipulated by the Lead Bank:*

Lead Bank enquired about the status of alignment of RoI in the account from each Member; while mentioning that the matter had been pending for a very long time.

In this regard Company official clarified that some Member Banks continued to charge an RoI on its exposure which was substantially higher than the RoI's stipulated by Lead Bank and other Lenders.

IOB officials clarified that they too were being forced to charge an RoI on their exposure in the account as their sanction stipulated that their RoI had to be identical to the highest RoI stipulated by any of the Member-Banks. However, now they have taken up for alignment of their RoI with Lead bank's RoI.

Lead Bank emphasized that this was a fixed Annuity based project and in case any of the Member-Banks stipulating RoI's that were not in line with those stipulated by the Consortium, then it would lead to a scenario where the revenue would fall short of the amount required for debt servicing and all the consequences thereof.

In this regard, 10B official also informed that in MMR Facility Consortium Agreement between AEPL and the Members, as per Article 2.5 (i):

"The Parties acknowledge that the MMR Lenders shall endeavour to align the Applicable Interest Rate as computed by the lead bank, presently, Oriental Bank of Commerce"

All Members were therefore once again requested to align their RoIs with the Lead Bank.

II. Actionables for the Banks:-

(I) All Member Banks to relook at aligning its RoI in line with the RoI of the Lead Bank.

(II) Lead Bank to write to NHAI and if need be to have a one-to-one meeting with NHAI officials; Other Member Banks to join."

3.6. It is averred that the Lead bank in the joint lenders forum meeting dated 05-12-2019 expressed concern about the long pending delay in alignment of interest rate, so answer query the Corporate Debtor confirmed that it was serving the term loan 1 and 2 of all banks at 10.5% and 9.75% per annum, as per Lead Bank sanction. Member Banks were again requested to align their interest rates with the Lead bank interest rates. The relevant extract of the Minutes of the said meeting is quoted as under:

"6. Any other matter with the permission of the Chair:

Lead Bank enquired about the status of alignment of RoI in the account from each Member; while mentioning that the matter had been pending for a very long time.

All Members were therefore once again requested to align their RoIs with the Lead Bank with value date.

Company informed that it is servicing interest to Consortium Members at 10.50% & 9.75% as per Lead Bank's sanction.

All Members were therefore once again requested to align their RoIs with the Lead Bank.

II. Actionables for the Banks:-

All remaining Members to align their RoIs of both Term Loans in line with the RoIs of the Lead Bank."

3.7. It is averred that Corporate Debtor addressed the following correspondence to the applicant bank on the issue of aligning the rate of interest in line with the other consortium lenders, the same was communicated vide email dated 10-05-2019 to the applicant bank and an email dated 21-10-2019 from IOB/Applicant Bank to Corporate Debtor/CD/AEPL wherein the Applicant Bank confirmed that it is holding sanction to align its interest rate with Lead Bank.

3.8. It is averred that till date the applicant bank failed to align its interest rate with Lead bank and solely on account of this inaction the situation of overdue position arose. This inaction of the applicant bank to change the inflated interest rate is evidently a violation of the consortium agreement and is responsible for the overdue position.

3.9. It is averred that the Debt Dues of the Applicant Bank have been serviced fully upto 31st May, 2021, in line with the interest rates specified by the Lead Bank. However, the overdue position claimed by the Applicant Bank is with respect to the "differential interest" between the Applicant Bank's interest rate and the interest rate directed by the Lead Bank of the Joint Lenders Forum. It is submitted that if the applicant bank complies with the directions for the alignment of interest rate, then there will be no overdues.

3.10. It is further averred that in the recent meeting dated 26-02-2021 the joint lenders forum advised the applicant bank to withdraw the NCLT proceedings against the Corporate Debtor. It is submitted that in the Corporate Debtor and the banks are having discussions on restructuring of the debt and the last Joint Lenders Forum meeting was held in this regard on 12-07-2021.

3.11 It is averred that pursuant to the dispute on the issue of interest alignment and the applicant bank's non-compliance with the agreement is causing the overdue amount outstanding. It is further submitted that the applicant bank cannot invoke the IBC provisions while violating its undertaking given to the Joint Lenders Forum (Consortium Banks) and raise a false and fraudulent demand against the Corporate Debtor /Corporate Debtor. In context of the submission the Corporate Debtor made reference to the decisions of the Hon'ble Supreme Court of India, on the definition of 'Debt' and 'Default'. Innoventive Industries v. ICICI Bank *((2018) 1 SCC OnLine 407) and* Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd *((2018) 1 SC*C 353)

3.12. It is averred that placing reliance on the above-mentioned decisions the Corporate Debtor submitted that by the virtue of the Second Amendment to the Code 2018, the decision in Mobilox was given

statutory recognition. It is submitted that the 'debt' alleged by the Applicant Bank is a disputed claim and that the alleged debt was neither due nor was there any default on the part of the Corporate Debtor. With the above submission the Corporate Debtor prayed for the dismissal of the application.

4. ADDITIONAL COUNTER FILED ON 31-10-2022:

4.1 It is averred that following additional submissions on the maintainability by the Financial Creditor. It is submitted that the Applicant Bank/Financial Creditor has admitted and acknowledged the formation of Consortium of Lenders and the execution of "Inter Creditor Agreement' amongst them in various documents filed before this Honourable Tribunal. The Financial Creditor refers to the following agreements executed inter-se as under:

i) 14.03.2008 Common Loan Agreement - **Page 35-46**

ii) 22.11.2012 Amendment to Common Loan Agreement - **Page 268-292**

iii) 15.03.2017 MMR Facility Consortium Agreement - **Page 370-445**

iv) 15.03.2017 Inter Creditor Agreement - **Page 485-509**

4.2 It is averred that the Corporate Debtor submits that in pursuance of the guidelines in relation to Joint Lenders Forums issued by the RBI on **24.09.2015,** adherence thereto is binding on all the Lenders. It is submitted that in pursuance of Para 5.2 of the said guidelines, in case of disagreement between the Members of the JLF on deciding the CAP for borrower, the dissenting Lender shall have an option to exit their exposure by completely selling their exposure to a new or existing lender. Therefore, the object of the RBI is clearly that the lenders act through the JLF structure and not go beyond the JLF structure. But the financial creditor is wilfully ignoring the requests of the Joint Lenders Forum to withdraw the captioned application.

4.3 It is averred that the application filed by the Financial creditor is incomplete application and liable to be rejected, the reason is that the financial creditor has not enclosed ***the working for computation of amount and days of default, which is mandatory under section 7(3)(a) of the IBC.*** The Financial Creditor is required to furnish the said working computation along with the application and non-furnishing of the same results in the application becoming an incomplete application, which is liable to be rejected.

5. WRITTEN SUBMISSIONS FILED ON 25-10-2023:

5.1 It is averred that as the Financial Creditor has violated of the inter creditor agreement of consortium of banks, of which the Financial Creditor is a member for the Corporate Debtor's loan account, which negatives the right of the Financial Creditor to initiate any proceeding against the Corporate Debtor without prior permission of the consortium of lenders, also known as Joint Lenders Forum (JLF). The Financial Creditor has failed to secure permission from the consortium of lenders and has unilaterally filed the impugned application and hence the application is liable to be dismissed. It is submitted that the Financial Creditor has wilfully ignored the ignored the request of the joint lenders forum in its Minutes of Meeting dated 26-02-2021 *(Page 31 of the Counter at Page 32)*, where in it was recorded as follows:

> *"Members had requested IOB to withdraw the CIRP application from NCLT as the company is paying the December '20 overdue and consortium is exploring the possibility to restructure the account as the company is not able to serve entire repayment (Instalment and interest) from their revenue".*

5.2 It is averred that the financial creditor has not filed any documentary proof despite the binding bar under the inter creditor agreement. The corporate debtor invites the attention to clause 4.31 of the Inter Creditor Agreement dated 15.03.2017 ***(which is at Page 485-509)*** of the Application filed by the Financial Creditor. In support of the above

submissions, the Corporate Debtor relies upon the following decision of the Honourable National Company Law Appellate Tribunal, Principal Bench, (Full Bench) New Delhi in the matter of "***Mr. Rakshit Dhirajlal Doshi Vs. IDBI Bank Ltd & Others***" dated 15-11-2022 paragraph 28, 29, 32 & 33 are referred.

5,3 It is averred that the disputed default and disputed debt arose on account of the Financial Creditor claiming interest at a rate different from that of the uniform rate of interest agreed amongst the consortium of lenders. The following pages of the Counter where in the Minutes of the Consortium Meetings, and the issue of applying uniform rate of interest was raised and discussed: Page 8 - Para-2, Page 11 - Para-3 & last para of Para-4 and Page 15 - Para-5 & Page-16 para II.

6. In the light of the contest the points that emerge for our consideration are:

POINTS:

(1) Whether it is mandatory for the petitioner to follow the procedure set out in Clause 7.4 of Inter-Creditor Agreement dated 15.03.2017 as well as Clause 4 of the Security Trustee Agreement and intimate the security trustee of its intention to declare a default before

initiating the present action? If so, whether non-compliance of the same renders the present application inadmissible under law?

(2) Whether the petitioner had established existence of a financial debt of a sum over Rs.1 crore due and payable by the respondent? If so, whether the respondent has committed default in repayment of the same?

7. We have heard Shri Alluri Krishna Raju and Shri D. A. Suryanarayana Raju, learned counsels for the petitioner/ Financial Creditor and Shri SVS Chowdary, learned counsel for the respondent/ Corporate Debtor; and perused the record and Written Submissions.

POINT (1) :

Whether it is mandatory for the petitioner to follow the procedure set out in Clause 7.4 of Inter-Creditor Agreement dated 15.03.2017 as well as Clause 4 of the Security Trustee Agreement and intimate the security trustee of its intention to declare a default before initiating the present action? If so, whether non-compliance of the same renders the present application inadmissible under law?

A short and interesting question, namely, whether in the absence of complying the procedure set out in Clause 7.2 of Inter-Creditor Agreement dated 15.03.2017, as well as Clause 4 of the Security Trustee Agreement dated 15.07.2017 intimation to the security trustee the intention to declare default by one of the Members of the Joint Lenders' Forum (JLF), would render the present action under section 7 of the I&B Code, 2016, by one of the Members of the Inter-Creditor Agreement renders the petition not maintainable.

8. While it is the firm contention of the learned counsel for the Corporate Debtor that the breach of Clause 7.2 of the Inter-Creditor Agreement dated 15.03.2017 and Clause 4 of the Security Trustee Agreement dated 15.07.2017 being undisputed, the present petition is liable to be dismissed as not maintainable. In support of this plea, the learned counsel placed reliance on the ruling of the Hon'ble NCLAT, Principal Bench, New Delhi, in Rakshi Dhirajlal Doshi Vs. IDBI Bank Ltd., in Company Appeal

(AT) (Insolvency) No.658 of 2022 dated 15.11.2022, wherein it was held that:

> *"28. We note that in the Impugned Order the Adjudicating Authority has relied on clause 7.5 of the Inter-se Agreement to hold that any lender is at liberty to take any decision or action on any other matter and is not required to take any approval from any other lender. We find that clauses 7.1 and 7.2 of the Inter-se Agreement clearly lay down that an 'Event of Default' is covered under the actions for which the provisions are made in the Inter-se Agreement and the modality of taking such action is clearly set out in clause 7.2. [Even for the enforcement of securities, clause 7.3 of the Inter-se Agreement clearly provides that the enforcement of any or all of the securities, shall be done by the Security Trustee as per provisions of the Security Trustee Agreement on behalf of all the lenders and as instructed by the majority lenders. Therefore, clause 7.5 has to be read conjointly with clauses 7.1, 7.2 and 7.3 of the Inter-se Agreement. If that is done, we find that the action taken by the IDBI Bank in declaring 'Event of Default' is not in consonance with the provisions of Inter-se Agreement. We, therefore, conclude that the Adjudicating Authority has committed an error by placing reliance on a faulty interpretation and understanding of clause 7.5 of the Inter-se Agreement.]*
>
> *29. From the above discussion, it is clear that the Respondent IDBI Bank was not entitled to act independently in declaring an 'Event of Default' in respect of its individual loan and recalling the loan advanced by it to the borrower Doshion and seeking repayment of the said loan from the guarantor FIPL. We are, therefore, of the view that the locus standi of the Respondent IDBI Bank in*

taking unilateral action for declaring an 'Event of Default' in the repayment of the loan advanced by it is not established as the IDBI Bank being a participating bank of the Bank of Baroda consortium was bound to act under the clauses/provisions of the Inter-se Agreement and the Security Trustee Agreement.

32. On the basis of detailed discussion in the aforementioned paragraphs, we are of the clear opinion that, in view of the stipulations and provisions in the Inter-se Agreement of which the Respondent IDBI Bank was a signing party, and the provisions of the Security Trustee Agreement entered into between the Bank of Baroda (as a Lead Bank of the consortium) and the guarantor FIPL and IL&FS Trustee Company Limited, the IDBI Bank could not have acted unilaterally in either declaring an 'Event of Default' regarding repayment its loan facilities granted to the borrower Doshion and later seeking repayment of the loan from the guarantor Fivebro International Private Limited.

33. We thus, find the Adjudicating Authority has committed gross error in not examining the provisions in the Inter-se Agreement, Security Trustee Agreement and the Deed of Company Appeal (AT) (Insolvency) No. 658 of 2022 Page 28 of 29 IBC Laws| www.ibclaw.in Case Citation: (2022) ibclaw.in 901 NCLAT Guarantee, by which the four participating banks of the Bank of Baroda consortium have bound themselves while considering their effect in the adjudication of the section 7 application filed against the guarantor FIPL and thereafter admitting it. We, therefore, set aside the Impugned Order and as a consequence the corporate debtor Fivebro International Private Limited is freed from the rigours of CIRP and moratorium and other related provisions of IBC."

9. However, the learned counsel for the petitioner/ Financial Creditor refuted the said contention by placing reliance on the ruling in Innoventive Industries Ltd. Vs. ICICI, (2018) 1 SCC 407 and contended that mere establishment of existence of financial debt of a sum over Rs.1 crore and its default by the respondent/ Corporate Debtor is sufficient to admit the petition. As such in the present case, since the debt exceeding Rs.1 crore due and payable by the respondent and its default being not in dispute, the present petition is liable to be admitted and Corporate Insolvency Resolution Process be ordered against the respondent.

10. In the wake of the contest as aforesaid and for better appreciation of the respective contentions, we feel it necessary to refer to certain important clauses in the Inter-Creditor Agreement dated 15.03.2017, which is below:

> "*4.3 Provisions relating to Enforcement Action by the MMR Lenders:*
>
> *4.3.1: Enforcement Action – Events of default.*

If any event of default shall have occurred, each of the MMR Lenders may exercise any right or remedy it may have in relation thereto, without prejudice to the rights of any other MMR Lenders, subject to such MMR Lenders giving (i) not less than 15 (fifteen) days notice of its intention to exercise any right or remedy, provided the MMR Lenders holding more than 75% (seventy five per cent) of them outstanding Secured Obligations, convey their consent; (ii) in the event no such consent is given at the expiry of the said period of 15 (fifteen) days, not less than 45 (forty five) days notice of its intention to exercise any right or remedy, provided the MMR Lenders holding more than 51% (fifty one per cent) of the then outstanding Secured Obligations, convey their consent, to the Security Trustee and the Facility Agent.

4.3.2 (i) Upon occurrence of an Event of Default and subject to the provisions of Article 4.3.1 above, any of the MMR Lenders may instruct the Facility Agent to commence an Enforcement Action by delivering a notice to the Facility Agent substantially in the form set out in Schedule III of this Agreement (an "Enforcement Action Notice"). Each enforcement action notice shall, except as otherwise provided therein, be effective on the date set forth in such notice (the "Enforcement Effective Date") and shall specify the particular Enforcement Action, which the Enforcing Party proposes to take, or to cause the Security Trustee to take. Facility Agent shall inform all the other MMR Lenders of the issuance of Enforcement Action Notice within 7 (seven) days of receipt by it of such notice."

11. There is no controversy that the applicant herein being one of the members of the Joint Lenders Forum and a party to the Inter-Creditor Agreement.

12. In light of the above facts, we have carefully perused the ruling of the Hon'ble NCLAT, Principal Bench, New Delhi in Rakshi Dhirajlal Doshi (supra) and found that on facts the above ruling is squarely applicable to the case on hand as a bare perusal of Clause 4.3.2 of Inter-Creditor Agreement, which prescribes the enforcement action upon occurring event of default, is akin to Clause 7.5 of the Agreement referred to in the aforesaid ruling. Therefore, we find that the present Company Petition is not sustainable under law. Here we usefully quote the ruling in Innoventive Industries Ltd. Vs. ICICI, (2018) 1 SCC 407, wherein the Hon'ble Supreme Court has held that:

> "*30. .. .. It is no matter that the debt is disputed so long as the debt is "due", i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. .. .."*

Admittedly, Joint Lenders' Forum (JLF), Inter-Creditor Agreement and Security Trustee Agreement were entered into in furtherance of the guidelines issued by Reserve Bank of India dated 24.09.2015, which have statutory force. Therefore, enforcement of debt claimed as due and payable by the respondent and defaulted is interdicted by law. Hence the present application is not maintainable.

13. In the light of our discussion on Point (1), we are not entering into any discussion on Point (2).

14. In the result, CP (IB) No.39/7/ HDB/2021 is hereby dismissed. No costs.

-SD- -SD-

CHARAN SINGH
MEMBER (TECHNICAL)

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA
MEMBER (JUDICIAL)

K bhargavi/ karim