IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.303

IA/656(AHM)2022 in CP(IB) 141 of 2019

Order under Section 60(5) IBC,2016 r.w rule 11 of NCLT,2016

IN THE MATTER OF:

J.C Flowers Asset Reconstruction Pvt Ltd ....**Applicant**
V/s
Srikanth Dwarkanath IRP For Avantha Power and Infrastructure Ltd & Anr ....**Respondents**

Order delivered on: 25/10/2023

Coram:

Mr.Shammi Khan, Hon'ble Member(J)
Mr.Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-Sd-	-Sd-
SAMEER KAKAR	**SHAMMI KHAN**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-1

I.A. No. 656 of 2022
IN
CP (IB) No. 141 of 2019

(An application filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 11 of the NCLT Rules, 2016)

In the matter of:
M/s. J. C. Flower Asset Reconstruction Pvt. Ltd.
Acting in its capacity as trustee of the
JCF YES Trust 2022-23/6,
Registered as an Asset Reconstruction Company
Under Section 3 of the Securitisation and Reconstruction
of Financial Assets and Enforcement of
Security Interest Act, 2002.

Registered office:
12th Floor, Crompton Greaves House,
Dr. Annie Besant Road,
Worli, Mumbai,
Maharashtra – 400030.

……. Applicant

VERSUS

1. **Mr. Shrikanth Dwarkanath, I.R.P.**
For M/s. Avantha Power and Infrastructure Ltd.
105, Power Plaza, Lane-7,
Koregaon Park, Pune,
Maharashtra – 411001.

……. Respondent No.1

2. **M/s. Avantha Power and Infrastructure**
Thapar House,
124, Janpath,
New Delhi – 110001.

……. Respondent No.2

Order reserved on 10.10.2023
Order delivered on 25.10.2023

Coram: **Shammi Khan, Member (Judicial)**
Sameer Kakar, Member (Technical)

Appearance:

For the Applicant : Ms. Garishma Malhotra, Adv.
For the Respondent : Ms. Simran Grover, Adv.

O R D E R

1. This Interlocutory Application No.656 of 2022 is filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, read with Rule 11 of the National Company Law Tribunal Rules, 2016 in the matter of CP(IB) No.141 of 2019 against the rejection of claim of the Applicant dated 24.02.2022 by IRP for Rs.917,64,76,353.28/- filed by the Applicant **(**Erstwhile Yes Bank**)** via FORM C as a "Financial Creditor" on account of securities provided by the "Corporate Debtor" to secure the repayment of loan granted under the name of M/s. Avantha Holdings Limited and M/s. Oyster Buildwell Private Limited.

2. Brief facts of the case which have led to the filing of the present application are as under:

3. It is submitted that in the Year 2015, 2016 and 2017, the Applicant **(**Erstwhile Yes Bank**)** extended Term Loans to M/s

Avantha Holdings Limited and M/s Oyster Buildwell Private Limited.

4. It is submitted that a term loan of INR 500 Crores was granted to M/s Avantha Holdings Limited vide facility letter Ref. No. YBL/DEL/FL/832/2015-16 dated 20.10.2015 and Facility Agreement dated 28.10.2015 was executed thereof ("Facility 1"). Copy of the facility letter dated 20.10.2015 issued to M/s Avantha Holdings Ltd. is annexed and marked as ANNEXURE A-1. Copy of the Facility Agreement dated 28.10.2015 executed with M/s Avantha Holdings Ltdis annexed with the present application as Anenxure A-2.

5. It is submitted that the term loan of INR 230 Crores was granted to M/s Avantha Holdings Limited vide facility letter Ref. No.YBL/DEL/FL/0410/2016- 17 dated 13.07.2016 and Facility Agreement dated 17.08.2016 issued to M/s Avantha Holdings Ltd is annexed herewith and marked as ANNEXURE A-3. Copy of the Facility Agreement dated 17.08.2016 executed with M/s Avantha Holdings Ltd. is annexed with the present application and marked as ANNEXURE A-4.

6. It is submitted that a Term Loan of INR 515 Crores to one M/s Oyster Buildwell Private Limited vide facility letter ref. no. YBL/DEL/FL/1802/2017-18 dated 29.12.2017, copy of which is annexed herewith as ANNEXURE-A-5 and Facility Agreement dated 05.01.2018. Copy of the Facility Agreement executed with M/s Oyster Buildwell Private

Limited dated 05.01.2018 is annexed with the present application and marked as Annexure-A-6.

7. As submitted, for the above-mentioned facilities granted by the Applicant (Erstwhile Yes Bank), the Corporate Debtor, M/s. Avantha Power and Infrastructure Private Limited provided certain securities as per the following details:

Security Provider	**Security**	**Facility**
Corporate Debtor – M/s. Avantha Power and Infrastructure Ltd.	Pledge over 126,350,146 shares of M/s. Jhabua Power Limited.	Facility-1, Facility-2 & Facility-3 (liability under Facility-1 & Facility-2 restrictred to INR 400 Cr.)
Corporate Debtor – M/s. Avantha Power and Infrastructure Ltd.	First pari-pasu charge over all the current assets (both present and future) of the Corporate Debtor restricted to INR 100 Cr.	Facility-3

8. As per the above table, a Deed of Pledge dated 01.02.2018 was executed in favour of the Applicant (Erstwhile Yes Bank) by the Corporate Debtor comprising 126,350,146 shares of M/s. Jhabua Power Limited held by the corporate debtor. A deed of hypothecation dated 01.09.2017 was also executed by the Corporate Debtor in favour of the Applicant (Erstwhile Yes Bank). Copies of the same are annexed with

the present application as Annexures A-7 and Annexure A-8.

9. It is stated in the application that due to non-repayment of the term loans; the account of Borrower No.1 was classified as Non-Performing Asset (NPA) on 07.08.2019 and the account of Borrower No.2 was classified as NPA on 29.10.2019.

10. The Applicant **(**Erstwhile Yes Bank**)** then issued a loan recall notice to Borrower No.1 on 06.11.2019 and to Borrower No.2 on 03.02.2020. A loan recall notice dated 03.02.2020 was issued to the corporate debtor in its capacity as the Security Provider/ pledger. The Applicant (Erstwhile Yes Bank) annexed the copies of such loan recall notice issued to the Corporate Debtor dated 03.02.2020 is annexed as Annexure A-9 to the present application.

11. As submitted, the Applicant (Erstwhile Yes Bank) also sent a Pledge Invocation Notice to the Corporate Debtor on 18.02.2020 in accordance with the Deed of Pledge dated 01.02.2018 and the pledged shares were transferred to the Applicant (Erstwhile Yes Bank) on 26.06.2020. Copy of Pledge Invocation Notice issued to the Corporate Debtor dated 18.02.2020 is annexed with the application as Annexure A-10. The proof of transfer of pledged shares to the Applicant (Erstwhile Yes Bank) is also placed as **Annexure A-11**.

12. As submitted, an amount of Rs.688,50,90,102.70/- is due to the Applicant (Erstwhile Yes Bank) as per the Deed of Pledge and Deed of Hypothecation, from the facility-1 and facility-2 granted by the Applicant as on 16.08.2021.

13. Further, an amount of Rs.517,64,76,353,38/- is due to the Applicant (Erstwhile Yes Bank) as per the Deed of Pledge and Deed of Hypothecation, from the facility-3 granted by the Applicant as on 16.08.2021.

14. Therefore, the total amount of Rs.917,64,76,353.38/- is claimed by the Applicant (Erstwhile Yes Bank) against the Corporate Debtor as on 16.08.2021, the insolvency commencement date.

15. As claimed by the Applicant (Erstwhile Yes Bank), it filed its claim vide Form F as a Secured Creditor on 12.10.2021 and produced the copy of which as Annexure A-12. It is also mentioned that the Applicant (Erstwhile Yes Bank) had provided all the necessary documents for claim to the RP and mentioned certain email communications. However, the RP, vide its email dated 28.10.2021 had rejected the claim of the Applicant (Erstwhile Yes Bank) on the ground of "Uncrystallized Claim". **Annexure A-14** contains the copy of email communication.

16. The Applicant (Erstwhile Yes Bank), thereafter getting rejection of the claim by the RP, filed a representation on 24.11.2021 before the RP clarifying the liability of claim against the Corporate Debtor. Copy of such communication

addressed to Mr. Srikhanth Dwarakanath, IRP, is annexed as Annexure A-15 at page 240 of the paper book.

17. As claimed in the pleadings, the Applicant (Erstwhile Yes Bank) also had oral discussion with the IRP on 03.12.2021. However, the IRP, vide its email dated 07.12.2021 informed the Applicant (Erstwhile Yes Bank) that the claim cannot be accepted and cannot be verified from the books of accounts of the Corporate Debtor.

18. The Applicant (Erstwhile Yes Bank) had extended loan facilities to the Borrowers. Against such, the Corporate Debtor extended securities to the Applicant (Erstwhile Yes Bank) as mentioned under the Deed of Pledge and Deed of Hypothecation. Based on such, the Applicant (Erstwhile Yes Bank) has filed its claim as a Financial Creditor through Form-C which was rejected by the IRP.

19. The Applicant (Erstwhile Yes Bank) has prayed to this Bench the following prayer(s):

(A) "To allow this application and direct the Respondent No.1 admit the claim of the Applicant (Erstwhile Yes Bank) against the Corporate Debtor as a "Financial Creditor" to the tune of INR 9,176,476,353.38/- (Rupees Nine Hundred Seventeen Crore Sixty-Four Lakhs Seventy-Six Thousand Three Hundred Fifty-Three and Thirty-Eight Paisa Only);

(B) Pass any other and further orders that may be deemed fit and proper by the Hon'ble Tribunal in the interest of justice."

20. This Bench, vide its order dated 16.05.2023 in I.A. No.395 of 2023 allowed the replacement of original applicant, M/s. Yes Bank. Accordingly the necessary amendment was made and the title was changed in the main pleadings.

21. As per the I.A. No. 656 filed on 26.09.2023, an additional Affidavit was submitted on behalf of the Applicant being Authorised Signatory of M/s. J.C. Flowers Asset Reconstruction Pvt. Ltd. acting in the capacity of trustee of JCF YES Trust 2022-23/6.

22. It is submitted that one time settlement dated 28.08.2023 has been executed between the applicant, M/s. J.C. Flowers Asset Reconstruction Private Limited with the Borrower M/s Avantha Holdings Limited, M/s Avanta Reality Ltd. and M/s Oyster Buildwell Private Limited to pay the upfront payment in three tranches before March 31, 2024.

23. We perused the materials. We heard the learned counsels.

24. In the instant case, we perused the "Deed of Pledge at Page no. 166 of the present application. As referred in Para No. 10.2 (l), it is mentioned that:

> ***"****be jointly and severally liable as principal debtors without exclusion/ preference to the other or others of them for the payment of the Borrower's dues to the Pledgee and the Pledgee shall be entitled to recover at its option the amounts due in respect thereof from the*

Pledgor(s) without exercising or exhausting any other remedy/right it has against the other Pledgor(s) and /or Borrower:"

25. Pledge agreement by third party does not amount to guarantee. The liability is limited up-to shares pledged. The pledge of security should be absolute, unqualified and without any conditions. It is settled position that the pledge is given to secure any loan not account on personal guarantee. Hence, the Corporate Debtor is liable to pay only the amount he is holding accountable to the extent of pledge of shares which are admittedly already transferred to the Applicant. The case is covered with judgment of Hon'ble the Supreme Court rendered in Civil Appeal No.5146 of 2019 ***Phoenix ARC Pvt. LTD. V/s Ketulbhai Ramubhai Patel*** *on 03.02.2021***.**

26. Further, there is one time settlement dated 28.08.2023 executed between the applicant, M/s. J.C. Flowers Asset Reconstruction Private Limited with the Borrower M/s Avantha Holdings Limited, M/s Avanta Reality Ltd. and M/s Oyster Buildwell Private Limited to pay the upfront payment in three tranches before March 31, 2024. However, Respondent No.1- M/s. Avantha Power and Infrastructure Ltd. is not a party to the aforesaid settlement.

27. The Section 62 of the Indian Contract Act, 1872, covers the concept of novation.

Section 62: Effect of novation, rescission, and alteration of contract.

"Section 62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed."

28. When the parties to the contract decide that they want to discharge the contract through novation, it means that they want to substitute the existing contract with a new one.

29. Even otherwise, in the present case there is Novation of Contract qua Para No. 10.2 (l) at Page no. 166 of the Pledge Agreement, between the current Applicant, M/s. J.C. Flower Asset Reconstruction Private Limited and the Respondent No.1-M/s. Avantha Power & Infrastructure Ltd.

30. Accordingly, I.A. No.656 of 2022 is hereby dismissed and disposed of. No order to costs.

-Sd-	-Sd-
(SAMEER KAKAR)	**(SHAMMI KHAN)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

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