

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**COURT NO. 5, MUMBAI BENCH**

**CP (IB) - 1171/MB/2021**

Under Section 7 of the I&B Code, 2016

*In the matter of*

ICICI Bank Limited,  
ICICI Bank Towers, Bandra-Kurla Complex,  
Mumbai-400051.

....Petitioner

vs.

Rajesh Business and Leisure Hotels Private  
Limited,

139, Seksaria Chambers, 2<sup>nd</sup> Floor, N.M. Road,  
Fort, Mumbai-400023

.... Corporate Debtor

**Order Reserved on: 21.03.2022**

**Order Pronounced on: 20.04.2022**

Coram:

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

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

For the Applicant/Financial Creditor: Ms. Bhavika Deora a/w Mr. Aashdin  
Chivalwala, Advocates

For the Corporate Debtor: Mr. Yash Momaya, Advocate

*Per: Suchitra Kanuparthi, Member (Judicial)*

ORDER

1. ICICI Bank Limited (hereinafter called 'Petitioner') has sought the Corporate Insolvency Resolution Process of Rajesh Business and Leisure Hotels Private Limited (hereinafter called the 'Corporate Debtor') on the

ground, that the Corporate Debtor committed default to the extent of Rs. 245 Crores including applicable interest as provided under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereinafter called the ‘Code’) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

**Brief Facts:**

2. The Petitioner sanctioned an amount of Rs. 245 Crores under two facilities namely one External Commercial Borrowing Facility, vide terms and conditions annexed to the Credit Arrangement Letter dated 20<sup>th</sup> June, 2011, appendix to Credit Arrangement dated 14<sup>th</sup> July, 2011 and a Bank Guarantee Facility vide Bank Guarantee Facility Agreement dated 8<sup>th</sup> May, 2015. The breakup of the same is as below:

<b>Facility</b>	<b>Principal Amounts Sanctioned by the Financial Creditor to the Corporate Debtor (in INR in Crores)</b>
ECB Facility (“ECB Facility”)	240.0 at the conversion rate of 1 USD=Rs. 45.0
Bank Guarantee Facility (“BG Facility”)	5.0
<b>TOTAL</b>	245.0

3. Out of the sanctioned amount of ECB, an amount of USD 38,300,000 (United States Dollars Thirty-Eight Million Three-Hundred thousand) was disbursed by the Petitioner on the following dates:

<b>Disbursement Date</b>	<b>Amount (USD) (million)</b>
December 26, 2013	32.3
October 30, 2014	2.6
March 5, 2015	2.9
March 26, 2015	0.4

<b>Total</b>	<b>38.3</b>
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4. Out of the total amount sanctioned for BG Facility, an amount of Rs. 48,752,578/- (Rupees Four Crores Eighty-Seven Lakhs Fifty-Two Thousand Five Hundred and Seventy-Eight Only) was disbursed by the Petitioner.
5. The date of default as captured in Form-1 is 10<sup>th</sup> August, 2021 and the total amount in default is Rs. 3,118,468,910.64/- (Rupees Three Hundred and Eleven Crores Eighty-Four Lakhs Sixty-Eight Thousand Nine Hundred and Ten Only) which includes the Principal Amount, Accrued Interest, Additional Interest and Commission as applicable. The total outstanding amounts in both the facilities is as follows:

<b>Facility</b>	<b>Amount Outstanding</b>
ECB	USD 41,252,473.54
Bank Guarantee	Rs. 3,068,771,506.64

6. The Petitioner furnished the details of Securities in Part-5, which includes Movable Properties, Immovable Properties, Guarantees. The Petitioner has also enclosed the documents along with the Petition which are as follows:
- i. ECB Facility Agreement.
  - ii. Credit Arrangement Letter dated June 20, 2011.
  - iii. BG CAL.
  - iv. BG Facility Agreement.
  - v. Renewal Credit Arrangement Letter dated June 18, 2018.
  - vi. Appendix to Credit Arrangement Letter dated July 14, 2011.
  - vii. Security Trustee Agreement dated February 05, 2015.
  - viii. Share Pledge Agreements dated October 17, 2011.
  - ix. Agreement to pledge additional shares dated October 18, 2018.
  - x. Share pledge amendment agreement dated February 19, 2015.
  - xi. Deed of Hypothecation dated March 1, 2012.

- xii. Amendment of Deed of Hypothecation dated February 19, 2015.
  - xiii. Indenture of Mortgage dated July 11, 2014.
  - xiv. Indenture of Mortgage dated October 28, 2014.
  - xv. Deed of Guarantee dated October 17, 2011.
  - xvi. Deed of Guarantee dated November 24, 2011.
  - xvii. Deed of Guarantee dated October 28, 2014.
  - xviii. Non-disposal agreements dated October 17, 2011.
  - xix. Agency agreement dated October 17, 2011
  - xx. Amendment to agency agreement dated February 28, 2015
  - xxi. POA dated February 19, 2015 executed by Rajesh Construction Company Private Limited in favor of IDBI Trusteeship Services Limited
  - xxii. Designated Account Agreement dated October 17, 2011.
  - xxiii. Amendatory Credit Arrangement Letter dated January 15, 2014
  - xxiv. Terms and conditions for BG Facility.
7. The Petitioner has attached list of other documents to the Petition to prove the existence of debt, which are as follows:
- (i) Disbursement Memos dated December 26, 2013, April 30, 2014, October 30, 2014, March 05, 2015 and March 26, 2015
  - (ii) Utilization Request Letter dated August 11, 2011, December 20, 2011, January 13, 2012, February 15, 2012, May 20, 2012, December 7, 2012, February 24, 2015 and March 18, 2015
  - (iii) Recall notice dated October 9, 2019 and September 10, 2020
  - (iv) Guarantee Invocation Notices dated October 24, 2019
  - (v) Balance Sheet of Corporate Debtor for the year ended on March 31, 2019
  - (vi) Record of default submitted by the Security Trustee/ Financial Creditor to the Central Repository of Information on Large Credits (CRILC) dated July 14, 2021
  - (vii) Copies of entries in the Bankers' Book in accordance with Bankers' Book Evidence Act, 1891
  - (viii) Correspondences with the Corporate Debtor.

8. The Petitioner vide Recall Notice dated 09<sup>th</sup> October, 2019 have classified the loan account of the Corporate Debtor as NPA with effect from 31<sup>st</sup> March, 2019. Further, it was clarified that ICICI Bank Ltd., Singapore Branch, had originally granted loan to the Borrower, at the request of the Borrower, External Commercial Borrowing Facility (ECB) aggregating to USD 53.3 Millions (Original Facility), vide the terms and conditions annexed to the Credit Arrangement (CAL) dated 20<sup>th</sup> June, 2011. The original facility to the tune of USD 50 Millions was transferred to Union Bank of India (acting to Hongkong Branch) in August, 2012. Subsequently, the remaining Original Facility to the tune of USD 38.3 Million was transferred to ICICI Bank Ltd., Bahrain Branch, as mentioned in the Amendatory Credit Arrangement dated 15<sup>th</sup> January, 2014. The current principal outstanding under the facility is USD 34.67 Million.
9. The Petitioner also issued Recall Notice towards the Bank Guarantee Facility on September 10<sup>th</sup>, 2020. It was pointed out that the Borrower had defaulted in his payment obligation towards Bank Guarantee.
10. The Corporate Debtor vide letter dated 27<sup>th</sup> August, 2018 addressed to the Petitioner herein, have acknowledged/ confirmed the debt towards Bank Guarantees to a tune of Rs. 4,96,98,104/- .

**Reply of the Corporate Debtor:**

11. At the outset, the Corporate Debtor pointed out that the Petition, in its present form, as framed and filed, is not maintainable in facts and/or in law, for the reasons more particularly set out hereinafter and the same is liable to be dismissed *in limine* for the reasons and preliminary objections as are more particularly set-out hereinafter.
12. The Petition is filed in respect of 2 (Two) distinct transactions between the Petitioner and the Corporate Debtor, viz. an External Commercial Borrowing Facility and a Bank Guarantee Facility. As such, each of these

transactions would, if at all and without prejudice, form a distinct and independent cause of action, “financial debt” and “default”. The Petitioner has filed a composite Petition encompassing within its scope 2 (two) distinct transactions, which is impermissible in law, beyond the scope of the Code, and beyond the power and jurisdiction of this Hon’ble Tribunal to determine.

13. Assuming for the sake of argument, whilst denying, the Petitioner’s formulation of it’s own case, the Petition is directly barred and prohibited by Section 10A of the Code. Section 10A expressly bars the filing of any Petition *inter alia* under Section 7 of the Code for any default arising on or after March 25, 2020 and for a period of one year thereafter, i.e. until March 24, 2021.

14. In addition, following reasons were cited by the Corporate Debtor for not admitting the Petition:

**A. INSUFFICIENTLY STAMPED DOCUMENTS:**

15. The Petition is filed on the basis of claimed default under an External Commercial Borrowing facility, a Bank Guarantee Facility, and a Credit Arrangement Letter. The Corporate Debtor claimed that these documents are not valid and legally enforceable for reason of them being insufficiently stamped under applicable law. All these documents were executed outside India, and certainly outside the State of Maharashtra.

**B. THE PETITION IS FILED WITHOUT AUTHORITY**

16. The Petition is purportedly filed by one Ms. Anupama Ranade, the Head of Strategic Solution Group of the Petitioner. Ms. Ranade claims to derive her authority on behalf of Petitioner from a purported authority letter dated August 26, 2021 annexed to the Petition.

**C. THE PETITION IS NOT FILED BY A LEGAL PERSON**

17. As set out above, the purported authority letter is addressed by “ICICI Bank Limited, Bahrain Branch”. It is respectfully submitted that ICICI Bank, Bahrain Branch is not a legal person or entity that can either file a legal proceeding, sue, or be sued, and has no rights, or obligations.

**D. JURISDICTION OF THIS HON’BLE TRIBUNAL IS OUSTED**

18. A perusal of Annexures – 6, 7, and 9 to the Petition, on the basis of which the “financial debt” is said to exist and “default” is said to have occurred, all clearly bar and exclude the jurisdiction of this Hon’ble Tribunal, by the consent and agreement of the parties.

**E. THE PETITIONER’S CONDUCT**

19. The Petitioner’s conduct has been *mala fide*, high-handed, and illegal.
20. The Petitioner has purported to exercise rights under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as “**SARFAESI Act**”) by issuance of a Possession Notice and thereafter taking possession of the Corporate Debtor’s hotel. This is not only illegal, void and bad in law but also frivolous and underhanded. Looked at from any angle, such Possession Notice and possession taken thereunder cannot stand legal scrutiny. It is a settled position of law that, by reason of the fact that the ECB Lenders are foreign branches of Indian banks, they neither could be considered “*bank*” or “*financial institution*” under the SARFAESI Act.

**F. FORCE MAJEURE EVENT:**

21. The Petitioner funded the Corporate Debtor’s hotel Project in August 2011 through its Singapore Branch, by way of External Commercial Borrowings. Whilst the hotel was under development, it had an interim

upgradation of the brand as the specifications being developed for the hotel were superior to the earlier allotted brand, viz. Radisson. As a result, the pace of the development slowed down.

22. Around the same time, there was a change in the Development Control Regulations for Greater Mumbai, and an additional Incentive Floor Space Index (hereinafter referred to as “**FSI**”) available for the hotel. The permissions in this regard were to be availed from Urban Development Department which was directly under the control of Hon’ble Chief Minister of Maharashtra. The approval of this Incentive FSI took almost 3 (three) years to be cleared which substantially delayed the completion of the hotel.
23. As there was increase in the scope of the project, the Corporate Debtor needed to avail additional funding, sanctioning of which was also delayed by 10 (ten) months. In the meantime, Indian Rupee depreciation resulted in far higher repayment and borrowing costs.
24. Despite this, in a short span of time, the Corporate Debtor tried its level best to finish and operationalize the hotel - but it did not happen then. On account of differences with the earlier Brand (Radisson), the Corporate Debtor had to discontinue their Management & License Agreement. Instead, the Corporate Debtor joined hands with GHM Group for having their premium brand “THE CHEDI” for the hotel. As the new brand association happened, GHM Group suggested modifications to certain Specification of the hotel to meet their brand image. This involved a certain capex, but the sanctioned limits availed by the Corporate Debtor were exhausted.
25. The Corporate Debtor was also burdened to service its debts rather than infusing money in the hotel development, in spite of no visibility of cashflows from Hotel Project. Approximately Rs. 100 Crore of cashflow was utilized to service debt, rather than develop the hotel.

26. The Promotor Group of the Corporate Debtor is pre-dominantly engaged in Real Estate development. All the excess cashflows of the Promoter Group's Real Estate projects was being infused in the hotel, but since the Real Estate industry itself went through a severe slow down due many macro-economic factors, the promoters could not infuse fresh funds in the hotel. The Real Estate sector was hit by many factors namely demonetization, implementation of Real Estate Regulation Authority (hereinafter referred to as "**RERA**"), implementation of Goods and Service Tax Act, 2017 (hereinafter referred to as "**GST**"), Non-Banking Financial Companies (hereinafter referred to as "**NBFC**") crisis, regulatory changes, high interest rates etc. All these reasons consistently created pressure on the Real Estate sector in one way or the other. Due to these factors, the promoters could not utilize the excess cashflows from the Real Estate projects towards the hotel.
27. In these trying times, where the hotel was starving of cashflows, promoters requested the existing lenders to top up their facility and complete the hotel, but the existing lenders did not show keenness to infuse fresh funds despite the fact that the valuation of the hotel was sufficient to cover the additional capex and the existing lenders also had additional collateral (in the form of a near ready commercial property) of Rs.1,50,00,00,000/- (Rupees One Hundred and Fifty Crore Only).
28. To bring a permanent solution for the hotel, the promoters have been exploring various avenues like, additional funding, strategic partnerships, monetizing the asset amongst others, but none have materialized yet. Proposals were considered by Deutsche Bank & S C Lowy, however the same have not yet fructified.
29. The promoters were in discussions with the Taj – GIC Platform to infuse the funds in the hotel and run the hotel under the Taj Brand. The deal was almost finalized, and it was on the verge of a final sign off before the COVID-19 outbreak in 2020.

**Findings:**

30. Heard the Counsel for the Petitioner and the Respondents and perused the records. The only issue which arises for consideration is whether there is a debt in terms of the External Commercial Borrowing, Bank Guarantee Facility as sanctioned by the Petitioner to the Corporate Debtor and whether the Corporate Debtor has defaulted in payment of monies.
31. The date of default as captured in Form 1 is as on August 10<sup>th</sup>, 2021 and the amount in default is Rs. 3,118,468,910.64/- (Rupees Three Hundred and Eleven Crores Eighty-Four Lakhs Sixty-Eight Thousand Nine Hundred and Ten Only) which includes the Principal Amount, Accrued Interest, Additional Interest and Commission as applicable. The total outstanding amounts in both the facilities is as follows:

<b>Facility</b>	<b>Amount Outstanding</b>
ECB	USD 41,252,473.54
Bank Guarantee	Rs. 3,068,771,506.64

32. The Corporate Debtor vide letter dated 27<sup>th</sup> August, 2018 addressed to the Petitioner herein, have acknowledged/ confirmed the debt towards Bank Guarantees to a tune of Rs. 4,96,98,104/- .
33. Further, the Petitioner had classified the debt of the Corporate Debtor as Non-Performing Asset as on 31<sup>st</sup> March, 2019. The Petitioner issued Recall Notice dated 19<sup>th</sup> October, 2019 and September 10<sup>th</sup>, 2019 with regard to the External Commercial Borrowing Facility and Bank Guarantee Facility. The Petitioner also invoked the Personal Guarantee vide letter 24<sup>th</sup> October, 2019.
34. The Corporate Debtor further acknowledged the liability of Petitioner in its audited balance sheet for the year ended 31<sup>st</sup> March, 2019. The details of Secured Long Term Borrowing as captured in the Financial Statement for

the 31<sup>st</sup> March, 2019 is as follows:

Particulars	Terms of repayment and security	31.03.2019	31.03.2018
		Rs.	Rs.
<u>Term Loans from Banks:</u>			
ICICI Bank	Secured by Mortgage of Land and Building thereon	3,38,26,66,791	3,31,08,42,256
BOB Bank	Secured by Mortgage of Land and Building thereon	1,18,36,16,054	1,15,84,84,204
<u>Terms of Debentures:</u>			
Unsecured Compulsory Convertible Debentures	The Debentures are compulsory convertible into Equity Shares on or before 60 months from the date of allotment	50,00,00,000	50,00,00,000
<b>Total</b>		<b>5,06,62,82,845</b>	<b>4,96,93,26,460</b>

35. The Corporate Debtor objected the maintainability of the present petition as it is prohibited by Section 10A of the Code. Section 10A of the Code is as follows:

*"10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf: Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period."*

36. The Petitioner had pointed out that the Corporate Debtor defaulted in making payments under ECB facility from February 2018, accordingly the Petitioner had reported the said default to CRISIL. The Corporate Debtor further defaulted in making payment in February 2019 and the account was declared NPA as on 31<sup>st</sup> March 2019, therefore, the objection with

regard to prohibition/ bar under Section 10A is untenable.

37. This Bench is of the opinion that the adjudicating authority while admitting claim under Section 7 of the Code is bound by the principles enunciated in the judgment of *M/s. Innoventive Industries Limited vs. ICICI Bank & Anr.* by the Hon'ble Supreme Court and has to adjudicate the dispute basing on the factual matrix of every case with specific reference to the documents of debts which establish the debt granted by the Petitioner to the Corporate Debtor and the default by the Corporate Debtor which is evidenced by way of acknowledgement of debt in the form of balance sheets / acknowledgment letter. In the instance case there has been a debt which was sanctioned by the Petitioner under two facilities namely External Commercial Borrowing and the Bank Guarantee Facility amounting to Rs. 3,068,771,506.64/- and a clear default of non-payment of monies by the Corporate debtor herein as on date of default. Hence, the Petition deserves admission.
38. The Petitioner also has pointed out that vide power of attorney dated October 2014, Mr. Vikas Sharma was appointed as power of attorney holder of the Petitioner and vide letter of authority dated 26<sup>th</sup> August, 2021, Mr. Vikas Sharma authorized Mr. Devesh Sharma and Ms. Anupama Ranade to act on behalf of the Petitioner. Hence, the contention that the Petition filed without authority is untenable.
39. With respect to the objection that this Tribunal has no jurisdiction to deal with the present dispute and that the courts in England, United Kingdom, will have jurisdiction over the present dispute is untenable in view of the fact that the Corporate Debtor has registered office within the jurisdiction of this Tribunal and further, the Petitioner is exercising its right to initiate CIRP against the Corporate Debtor in view of non-payment of debt under the I&B Code.
40. It is a settled position of law that while admitting the petition under Section 7 of the Code, the Adjudicating Authority has to look at the debt

and default.

41. On going through the submissions made by the Learned Counsel for the Petitioner and on perusing the documents produced on record, it is understood that the Corporate Debtor has defaulted in repayment of debt. Hence, owing to the inability of the Corporate Debtor to pay its dues, this is a fit case to be moved u/s 7 of the I&B Code.
42. Considering the above facts, we come to conclusion that the nature of Debt is a “Financial Debt” as defined under section 5 (8) of the Code. It has also been established that there is a “Default” as defined under section 3 (12) of the Code on the part of the Debtor. The two essential qualifications, i.e., existence of ‘debt’ and ‘default’, for admission of a petition under section 7 of the I&B Code, have been met in this case. Besides, the Company Petition is well within the period of limitation.
43. As a consequence, keeping the aforesaid facts in mind, it is found that the Petitioner has not received the outstanding Debt from the Corporate Debtor and that the formalities as prescribed under the Code have been completed by the Petitioner, we are of the conscientious view that this Petition deserves ‘Admission’.
44. Further that, we have also perused the Form – 2 i.e., written consent of the proposed Interim Resolution Professional submitted along with this application/petition by the Financial Creditor and there is nothing on record which proves that any disciplinary action is pending against the said proposed Interim Resolution Professional.
45. The Petitioner has proposed the name of Insolvency Professional. The IRP proposed by the Petitioner, Mr. Rohit Mehra, having Email ID- rohit mehra@hotmail.com and having registration No. IBBI/IPA-001/IP/P-00799/2017-18/11374, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.
46. Having admitted the Petition/Application, the provisions of Moratorium

as prescribed under Section 14 of the Code shall be operative henceforth with effect from the date of order, and shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or services to the “Corporate Debtor” shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.

47. That as prescribed under Section 13 of the Code on declaration of Moratorium the next step of Public Announcement of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.
48. That the Interim Resolution Professional shall perform the duties as assigned under Section 15 and Section 18 of the Code and inform the progress of the Resolution Process and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.
49. In view of the above, the Bench “**Allows**” the Company Petition No. 1171 of 2021 u/s. 7 initiating CIRP against the Corporate Debtor i.e. Rajesh Business and Leisure Hotels Private Limited. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order.
50. Ordered Accordingly.

SD/-

ANURADHA SANJAY BHATIA  
Member (Technical)

SD/-

SUCHITRA KANUPARTHI  
Member (Judicial)