IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

In C.P. No.(IB)1519(MB)/2017

Under section 7 of the IBC, 2016

In the matter of

Indiabulls Housing Finance Limited ....Petitioner

Vs

Shree Ram Urban Infrastructure .... Respondent

Order delivered on 18.05.2018

Coram: Hon'ble Shri B. S. V. Prakash Kumar, Member (Judicial)

Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For the Petitioner : Mr. Ravi Kadam, Sr. Counsel, Chirag Kamdar a/w Denzil Arambhan, Nanki Growal i/b Wadia Ghandy & Co.

For the Respondent: Mr. Zal Andhyarijuna, Counsel, a/w Mr. Rohan Rajadhyaksha, Mr. Harsh Meghani, Mr. Pulkit Sukhramani, Ms. Vidhi Jhawar, Mr. Renjith Nair, i/b The Law Point.

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

It's a Company Petition filed u/s 7 of Insolvency & Bankruptcy Code, 2016 filed by the Petitioner namely, Indiabulls Housing Finance Limited, against the Corporate Debtor namely, Shree Ram Urban Infrastructure stating that for the Corporate Debtor having defaulted in making repayment of ₹708,70,57,851 as of 31.10.2017, this Petitioner moved this Petition for initiation of Corporate Insolvency Resolution Process under Insolvency & Bankruptcy Code, 2016 against this Corporate Debtor.

2. On perusal of this Petition, it appears that this Petitioner sanctioned an aggregate loan of ₹915 crores through multiple loan agreements, on such sanction, it has disbursed loan aggregating to ₹855,36,36,000 through different loan accounts, which are as follows:

1. Loan I - Loan A/c No. S000237819

The Corporate Debtor executed a Loan Agreement on 16.11.2013 for an amount of ₹200 crores, in pursuance of which the Petitioner disbursed ₹64 crores on 31.12.2013,₹12 crores on 24.2.2014, ₹13.25 crores on 12.3.2014, ₹13.75 crores on 2.4.2014, ₹13.90 crores on 2.5.2014, ₹14.25 crores on 2.6.2014 and ₹68.85 crores on 2.7.2014, aggregating to ₹200 crores

2. Loan II – Loan A/c No. S000237985

   The Corporate Debtor executed a Loan Agreement on 30.6.2014 for an amount of ₹130 crores, in pursuance of which the Petitioner disbursed ₹55 Crores on 2.7.2014, ₹14.50 crores on 1.8.2014, ₹14.70 crores on 1.9.2014, ₹15.10 crores on 7.10.2014, ₹15.10 crores on 31.10.2014, ₹14.88 crores on 4.12.2014, aggregating to ₹129.28 crores

3. Loan III – Loan A/c No. S000238983

   The Corporate Debtor executed a Loan Agreement on 28.9.2015 for an amount of ₹200 crores, in pursuance of which the Petitioner disbursed ₹57.15 crores, on 30.9.2015, ₹13.81 crores on 9.11.2015, ₹15.15 crores on 16.12.2015, ₹14.02 crores on 21.1.2016, ₹24.50 crores on 31.3.2016, ₹37.80 crores on 31.3.2016, ₹50.00 lakhs on 4.5.2016, ₹1.00 crores on 9.6.2016, ₹36.00 crores on 29.6.2016 aggregating to ₹199.93 crores.

4. Loan IV – Loan A/c No. S000239532

   The Corporate Debtor executed a Loan Agreement on 14.9.2016 for an amount of ₹75 crores, in pursuance of which the Petitioner disbursed ₹11.5150 crores on 19.9.2016, ₹37.83 crores on 29.9.2016, ₹20.0380 crores on 30.9.2016, aggregating to ₹69.3830 crores.

5. Loan V – Loan A/c No. S000239621

   The Corporate Debtor executed a Loan Agreement on 20.10.2016 for an amount of ₹110 crores, in pursuance of which the Petitioner disbursed ₹75.24 crores on 1.11.2016, ₹22 crores on 3.11.2016, ₹11 crores on 4.11.2016 aggregating to ₹108.24 crores.

6. Loan VI – Loan A/c No. S000239623

   The Corporate Debtor executed a Loan Agreement on 20.10.2016 for an amount of ₹90 crores, in pursuance of which the Petitioner disbursed ₹27.82 crores on 3.11.2016, ₹40.59 crores on 4.11.2016, ₹11.58 crores on 15.12.2016, ₹10 crores on 10.3.2017, aggregating to ₹89.99 crores.

7. Loan VII – Loan A/c No. S000240128

   The Corporate Debtor executed a Loan Agreement on 28.6.2017 for an amount of ₹110 crores, in pursuance of which the Petitioner disbursed ₹58.54 crores on 30.6.2017.

All these loans are collectively called as "Loan Facilities".

3. The Petitioner submits that this Corporate Debtor, as to Loan I, created mortgage over various parcels of land through Mortgage Deed dated 18.1.2014, apart from this mortgage, it has created First and exclusive charge over all the receivables/cash flows arising from the sale of the aforesaid projects of the developed areas as well as sold in favour of the Petitioner vide Deed of Mortgage dated 18.1.2014. As to Loan II, like in Loan I, created another mortgage over the Mortgaged properties on 15.7.2014 and also further created first and exclusive charge on the receivables vide Deed of Mortgage dated 15.7.2014. As to Loan III, like in Loan I, created a mortgage over the Mortgaged property vide Deed of Mortgage dated 15.1.2016 and also further created first and exclusive charge on the receivables vide Deed of Mortgage dated 15.1.2016. As to Loan IV, like in Loan I created a mortgage over the Mortgaged property vide Deed of Mortgage dated 22.12.2016 and also further created first and exclusive charge on the receivables vide Deed of Mortgage dated 22.12.2016. As to Loan V, like in Loan I created a mortgage over the Mortgaged property vide Deed of Mortgage dated 22.12.2016 and also further created first and exclusive charge on the receivables vide Deed of Mortgage dated 22.12.2016. As to Loan VI, like in Loan I created a mortgage over the Mortgaged property vide Deed of Mortgage dated 22.12.2016 and also further created first and exclusive charge on the receivables vide Deed of Mortgage dated 22.12.2016. As to Loan VII, like in Loan I created a mortgage over the Mortgaged property vide Deed of Mortgage dated 1.9.2017 and also further created first and exclusive charge on the receivables vide Deed of Mortgage dated 1.9.2017.

4. When the Corporate Debtor loan Account became irregular for the Corporate Debtor having committed breach in making payment towards the EMIs with respect to Loan I, Loan II, Loan III and Loan IV and when no EMI was paid after 30.6.2017, these loans were declared as Non-Performing Assets by the Petitioner, on failure of making payment by this Corporate Debtor towards EMIs in respect of Loan I to Loan IV, it became breach of terms and conditions under the Loan Agreement for Loan V, Loan VI and Loan VII, accordingly, Loan V, Loan VI and Loan VII were also declared as Non-Performing Assets by the Petitioner. For these loans not being regularised, the Petitioner issued Legal Notices dated 23.10.2017, 24.10.2017 and 25.10.2017 to the Corporate Debtor recalling the said loan facilities by making demand for repayment of the loans outstanding. The Petitioner under the cover of its

emails dated 25.10.2017, forwarded the said notices to the Corporate Debtor, despite after receipt of notices, the Corporate Debtor having failed to make repayment, not even provided any explanation, an amount of ₹708,70,57,851 being due and payable by the Corporate Debtor to the Petitioner, this petitioner has filed this Company Petition making a claim of ₹708,70,57,851 in default as on 31.10.2017.

5. In reply to this Company Petition, the Corporate Debtor Counsel raised maintainability issue stating that CIRP cannot be initiated against this Corporate Debtor because provisional liquidator has already been appointed by Hon'ble High Court of Bombay in CP 1066/2015 filed against the Corporate Debtor.

6. In support of this contention, the Debtor Counsel relied upon *Superways Enterprises Pvt Ltd vs. Topworth Steel & Power Pvt Ltd (CP No.1305/I&BP/2017, NCLT Order dated 3.1.2018) and Innoventive Industries Limited Vs. Kumar Motors Pvt Ltd. (Company Appeal (AT) (Insolvency) No.181 of 2017 , NCLAT Order dated 9.2.2018 upholding order dated 27.7.2017 passed by NCLT, Mumbai)*, saying that on admission and appointment of Provisional Liquidator in winding up proceedings pending before High Court against the same Corporate Debtor will not be hit by non obstante clause envisaged under Section 238 of Insolvency & Bankruptcy Code, 2016 because winding up proceedings pending before High Court are being saved under Section 255 of this Code r/w 11th Schedule of this Code, in view of the same, the Counsel says that this Company Petition is not maintainable because in the winding up proceedings pending before the Hon'ble High Court, Provisional Liquidator has already been appointed, therefore, this Company Petition is liable to be dismissed without going into the merits of this case.

7. When the Corporate Debtor Counsel raised the contention above mentioned, the Sr. Counsel appearing on behalf of the Petitioner has relied upon *Jotun India Pvt. Ltd. Vs. PSL Limited (CA No.572 of 2017 in CP 434 of 2015)* stating that since an appeal has been filed against the aforesaid order and stay has been granted, the Counsel submits to this Bench to record the ratio decided in Jotun supra as the submissions of the Petitioner Counsel.

8. The Petitioner Counsel submits that by notification dated 7.12.2016 issued under the Provisions of Sub-Section 1 and 2 of Section 434 of the Companies Act, 2013 r/w Section 239 (1) (Power to make rules) of the Code and another notification, i.e. the Companies (Removal of Difficulties) fourth order, 2016 issued u/s 470 (1) of the Companies Act, 2013, only the

proceedings of winding up pending before High Courts are saved but not the company in relation to which such proceedings are saved, meaning thereby such company is still subject to the provisions of IBC, and only the post notice of winding up proceedings which are retained by the High Court are saved, therefore according to the Petitioner Counsel basing on Jotun case supra, IBC is applicable to the company against which winding up petition already pending before the respective High Court.

9. The Petitioner Counsel further submits that jurisdiction of the company in relation to proceedings under IBC is expressly barred by virtue of Section 63 read with Section 64 (2) of Insolvency & Bankruptcy Code, 2016, therefore the Company Court is prohibited from restraining NCLT from exercising its jurisdiction under IBC. He further says by virtue of Section 238 of IBC (Non obstante clause), it has overriding effect over the provisions of the Companies Act, 1956, in view of the same, the Counsel says that Section 446 of the Companies Act, 1956 is not saved, therefore this Petitioner will not have any remedy to initiate its proceedings before Hon'ble High Court, if this Bench forecloses the right of the Petitioner to avail remedy under IBC, in view of this reason, for this Petitioner will remain remediless, if this company petition is not admitted, this Bench is required to admit this Company petition for having the petitioner successfully established that debt and default are in existence as on the date of filing this Company Petition.

10. On hearing the submissions of either side, it need not be reiterated again that NCLT has been following that in respect to the cases which have been filed before NCLT against the company against which winding up petition has already been admitted and provisional liquidator has been appointed by Hon'ble High Court, NCLT is dismissing petitions with a direction to the petitioner/creditor to place its claim before the liquidator appointed by Honourable High Court

11. The reason for saying so is (i) it is true that the proceedings only saved pending before Hon'ble High Court by virtue of Section 255 read with 11^{th} Schedule of IBC, (ii) winding up proceedings or IBC proceedings cannot be equated to regular civil proceedings like simultaneous proceedings pending before different competent Civil Courts.

12. In winding up proceedings or in IBC proceedings, once petition has been admitted, in either case, further action will trigger into for motion conferring right upon the official liquidator to supervise the assets of the company, so is

the case in IBC proceedings, here insolvency resolution professional will administer the functions of the company.

13. In both the cases, the respective authority as enunciated under the respective Act will become the custodian of the assets of the company. That being the situation, these proceedings cannot be treated as proceedings simpliciter pending before two competent forums. Let us assume a hypothetical situation. Official Liquidator has been acting by virtue of an order passed by High Court against the company, if an IRP has been appointed under Insolvency & Bankruptcy Code against the same company, will it be possible for both of them to simultaneously administer the same company as envisaged under different enactments, answer is simple it is not possible. In this dichotomy, the only way out is directing the claimant who subsequently initiated proceedings for admission under IBC to seek remedy in the proceedings already admission has been granted by High Court.

14. The Petitioner Counsel has raised a predicament that in case the Petitioner who obtained admission order in winding up proceeding withdraw his case, in that eventuality, whether this petitioner will be in a position to transpose himself as petitioner because the earlier proceeding initiated by the petitioner in the winding up proceeding has already come to logical conclusion. To which, my answer is, since the petitioner Counsel himself stated that the proceeding pending before Hon'ble High Court in a post notice situation is saved, as long as that proceeding has not been closed, the right to this Petitioner for transposition will also remain open as long as the winding up petition is not closed. When proceeding is not closed, the operating section governing that proceeding will also remain in existence, in that eventuality, section of law cannot be called as repealed.

15. As to primacy of IBC is concerned, it has already been stated that winding up proceeding pending before Hon'ble High Court cannot be construed as hit by Section 238 of IBC because the proceeding or the law applicable to winding up proceeding being saved under Section 255 r/w 11th Schedule of IBC. Once the Section of Law governing post notice winding up proceeding is saved under IBC, especially in the case of admission with an appointment of Provisional Liquidator, that proceeding cannot be treated as proceeding governed by law inconsistent with the provisions of IBC. For Section 238 will come into operations only when other law is inconsistent with IBC, that being settled position of law, it has to be construed that non obstante clause under

Section 238 is not applicable to the winding up proceedings pending before Hon'ble High Court.

16. Here, in the present case, since the company petition filed against this very Corporate debtor has already been admitted and the Provisional Liquidator has been appointed, this Petitioner cannot proceed with this Company Petition.

17. Thus, this Company petition is hereby dismissed as not maintainable with liberty to the petitioner to avail the remedies available to the Petitioner in the Company petition pending before Hon'ble High Court or else to avail other remedies under law available to the Petitioner.

18. Accordingly, this Company petition is hereby dismissed without costs.

Sd/-

RAVIKUMAR DURAISAMY
Member (Technical)

Sd/-

B.S.V. PRAKASH KUMAR
Member (Judicial)