

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH, COURT -III
IB-687/ND/2023**

Order under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

YES BANK LIMITED

Having its registered office at:

Yes Bank House, Off Western Express Highway,
Santacruz East NA, Mumbai City, Maharashtra-400055.

.... Financial Creditor

Versus

M/s. ATS INFRASTRUCTURE LIMITED

Having its registered office at:

711/92, Deepali, Nehru Place,
New Delhi, Delhi-110019.

.... Corporate Debtor

Order Delivered On: 07.03.2024

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For Applicant : Mr. V. Anush Rajan, Mr. Pradyumn Yadav, Advs.

For Respondent : Mr. Divyansh Rai, Mr. Krish Kalra, Advs.

ORDER

PER: ATUL CHATURVEDI, MEMBER (TECHNICAL)

IB-687(ND)/2023

Date of Order: 07.03.2024

1. This Application has been filed by Yes Bank Limited, the Applicant/Financial Creditor before this Adjudicating Authority under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“IBC” or “Code”) r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (“Adjudicating Authority Rules”), for initiating the Corporate Insolvency Resolution Process (“CIRP”), against M/s. ATS Infrastructure Limited, the Respondent/Corporate Debtor on the ground that the Corporate Debtor has defaulted/failed to clear the outstanding amount of Rs. 7,77,48,929.08/- (Rupees Seven Crore Seventy Seven Lakh Forty Eight Thousand Nine Hundred Twenty Nine and Eight Paise Only) along with applicable interest under all the existing facilities.

2. Submissions of the Applicant/Financial Creditor:

- i.** The Applicant/Yes Bank Limited (Financial Creditor) upon the request of M/s. ATS Infrastructure Limited (Corporate Debtor), extended loan facilities aggregating to the sum of Rs. 61,71,19,625/- ("Facilities").
- ii.** The Applicant sanctioned a Term Loan ("TL Facility") for a sum of Rs. 30 Crores vide Sanction Letter dated 31.03.2016 bearing Ref. No. YBL/DEL/FL/1709/2015-16, later revised and amended by Addendum Facility Letter Ref. No. YBL/DEL/FL/1872/2016-17 dated 10.03.2017, Addendum Facility Letter Ref. No. YBL/DEL/FL/1134/2017-18 dated 26.09.2017, Addendum Facility Letter Ref. No. YBL/DEL/FL/0317/2018-19 dated 01.06.2018, Addendum cum renewal Facility Letter Ref. No. YBL/DEL/FL/0512/2019-20 dated 11.07.2019, Addendum Facility Letter Ref. No. YBL/DEL/FL/0866/2018-19 dated 25.08.2018, Addendum Facility Letter Ref. No. YBL/DEL/FL/1283A/2020-21 dated 11.02.2021 and other addendum facility letters thereto, Loan

Agreement dated 25.03.2017, 1st Supplemental Loan Agreement dated 18.03.2019.

iii. The Applicant sanctioned a Dropline Overdraft Facility ("OD Facility") for a sum of Rs. 30 Crores vide Sanction Letter Ref. No. YBL/DEL/FL/1709/2015-16 dated 31.03.2016, later revised and amended by Addendum Facility Letter Ref. No. YBL/DEL/FL/1872/2016-17 dated 10.03.2017, Addendum Facility Letter Ref. No. YBL/DEL/FL/1134/2017-18 dated 26.09.2017, Addendum Facility Letter Ref. No. YBL/DEL/FL/0317/2018-19 dated 01.06.2018, Addendum cum renewal Facility Letter Ref. No. YBL/DEL/FL/0512/2019-20 dated 11.07.2019, Addendum Facility Letter Ref. No. YBL/DEL/FL/1283A/2020-21 dated 11.02.2021, and Master Facility Agreement dated 02.04.2016, Amended and Restated Master Facility Agreement dated 18.03.2019.

iv. It is the case of the Applicant that upon noticing stress faced by the Corporate Debtor in servicing the interest on a timely basis sanctioned a Funded Interest Term Loan ("FITL Facility") for a total sum of Rs. 1,71,19,625/- to fund the accrued interest obligation under the TL Facility and the OD Facility by way of Funded Interest Term Loan Agreement dated 08.09.2021 for each of the respective two facilities. The FITL Facility for each of the existing facilities was sanctioned in the following manner:

a) FITL Facility - 1:

The Applicant by way of a FITL Agreement dated 08.09.2021 bearing E-Stamp No. 4429T sanctioned a sum of Rs. 78,75,173.15/- to provide additional time to the Corporate Debtor for the repayment of the accrued interest.

b) FITL Facility - 2:

The Applicant by way of another FITL Agreement dated 08.09.2021 bearing E- Stamp No. 1077T sanctioned a sum of Rs.

92,44,451.81/- to provide additional time to the Corporate Debtor for the repayment of the accrued interest.

- v. It is submitted by the Applicant that the Corporate Debtor committed several defaults in regularly servicing the interest and also defaulted in making periodical principal repayment as per the agreed terms of the Facilities. In terms of the Sanction Letter Ref. No. Ref. YBL/DEL/FL/1709/2015-16 dated 31.03.2016, the default for the first time occurred on 05.07.2022. As of 31.07.2023, the outstanding principal and interest due and payable by the Corporate Debtor under the TL Facility is Rs. 3,77,13,500.63/-. In terms of the Sanction Letter Ref. No. Ref. YBL/DEL/FL/1709/2015-16 dated 31.03.2016, the default for the first time occurred on 01.10.2021. As of 31.07.2023, the outstanding principal and interest due and payable by the Corporate Debtor under the OD Facility is Rs. 3,78,88,162.75/-. In terms of the FITL Facility 1, the default for the first time occurred on 05.07.2022. As of 31.07.2023, the outstanding principal and interest due and payable by the Corporate Debtor under the FITL Facility 1 is Rs. 21,31,609.64/-. In terms of the FITL Facility 2, the default for the first time occurred on 05.07.2022. As of 31.07.2023, the outstanding principal and interest due and payable by the Corporate Debtor under the FITL Facility 2 is Rs. 15,656.05/-.

3. Submissions of the Respondent/Corporate Debtor:

- i. The Respondent has filed a reply affidavit denying the allegations made by the Applicant and stated that the alleged sum is not a financial debt and was merely a financial facility. It is trite law that an application for initiation of CIRP can be instituted under the provisions of Section 7 of the Code only by a Financial Creditor, who is a person to whom a financial debt is owed, and for a default of payment of financial debt and not otherwise.

- ii.** The Respondent further submitted that Section 5(7) of the Code mandates that for a person to claim the status of a 'Financial Creditor', a financial debt should be owed to him and in order to establish an existence of 'financial debt', the alleged debt must have been disbursed against the consideration for the time value of money within the meaning of Section 5(8) of the Code. For a debt to be classified as financial debt in terms of Section 5(8) of the Code, the Applicants have to inter alia satisfy disbursement of debt against the consideration of time value of money. The Applicant has failed to disclose the proof of disbursement of the alleged financial debt to the Respondent. Further, disbursement is a sine qua non for any debt to fall within the ambit of the definition of financial debt.
- iii.** It is stated by the Respondent that the Applicant is not coming to this Adjudicating Authority with clean hands. The same is also evident from the fact that the Applicant vide a publication in the newspaper dated 11.12.2023, invited tenders for the sale of the said facility entered into by the parties to various Asset Reconstruction Companies. In this regard, the Respondent was surprised to see such a publication, especially considering that the Respondent is financially stable and capable of honoring the agreement signed between the parties. Without prejudice to the aforesaid, it is also submitted that the Respondent also approached the Applicant with a proposal to resolve the issue, if any (though denied), but the same was not accepted by the Applicant.
- iv.** The Respondent is part of the well-known ATS Group of Companies and has numerous projects in the real estate market and continues to enjoy unblemished goodwill and reputation amongst the buyers. The Respondent currently has assets that are much more than the alleged sums claimed by the Applicants and are sufficient to satisfy the alleged claim of the alleged Financial Creditors. This Adjudicating Authority will appreciate that the Respondent is a going concern

facing no financial difficulties, therefore, the present application deserves no interference from this Adjudicating Authority.

- v. It is submitted that the ongoing Covid-19 crisis was extraordinary and unprecedented and was beyond the control of the parties. The crisis has been aggravated by manifolds due to the curtailed economic activity and the already existing financial vulnerabilities in the economy. The Government of India issued an order no. F18/4/2020-PPD dated 19 February 2020 and clarified in February 2020 itself that the disruption of supply chains due to the outbreak of the Covid-19 pandemic would constitute a force majeure event. Further, the time was not of the essence in any of the agreements between the Parties. Moreover, the Parties had always considered that the alleged time stipulated under the Agreement could not be set in stone and was extendable.
- vi. It is submitted that Section 10A of the Code prohibits the filing of an application for initiation of CIRP for any default arising after 25.03.2020, till the end of the Specified Period without an inquiry into the cause of default. In the present case, since the default has occurred after 25.03.2020 and before the end of the specified period, the present application is barred by the force of Section 10A and deserves to be rejected outrightly by this Adjudicating Authority.

4. **Analysis and Findings:**

- i. We have heard the submissions of Ld. Counsel appearing for the Applicant as well as Ld. Counsel appearing for the Respondent. We have also perused the records.
- ii. We have to consider the following issues:
 - (a) Whether the Applicant falls in the category of Financial Creditor as per Section 5(7) of the Code or not?

- (b) Whether the amount claimed by the Applicant as per Part IV of the Application is a Financial Debt under Section 5(8)(f) of the Code or not?
- iii. Admittedly, the Financial Creditor has crystalized that the account of the Corporate Debtor was declared as NPA i.e. 02.10.2022.
- iv. It is an admitted fact that the Applicant/Financial Creditor sanctioned various facilities such as Term Loan ("TL Facility"), Dropline Overdraft Facility ("OD Facility") and Funded Interest Term Loan ("FITL Facility") including addendum facility letters and Master Facility Agreement. From the perusal of the clauses of the various facilities such as Term Loan ("TL Facility"), Dropline Overdraft Facility ("OD Facility") and Funded Interest Term Loan ("FITL Facility") including addendum facility letters and Master Facility Agreement, we find that the agreement between the parties is a financial facility and is not a 'financial debt' as defined under the Code. The said sum was not disbursed against the time value of money, the aforesaid facilities were not disbursed against the time value of money.
- v. At this stage, it is pertinent to refer to the definition of the expression "Financial Creditor" in sub-section 7 of Section 5 of the Code. Section 5 of sub-section 7 reads as follows:
"Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;"
- vi. From the perusal of various facilities such as Term Loan ("TL Facility"), Dropline Overdraft Facility ("OD Facility") and Funded Interest Term Loan ("FITL Facility") including addendum facility letters and Master Facility Agreement, we do not find any clause which would show that any "Financial Debt" is owed to the present Applicant and therefore by no means the present Applicants can be called as a "Financial Creditor".

- vii.** At this stage, it is also pertinent to refer to the definition of the expression “Financial Debt” in sub-section 8 of Section 5 of the Code. Section 5 of sub-section 8 “Financial Debt” reads as follows: -
- “Financial Debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*
- (a) money borrowed against the payment of interest;*
 - (b) ******
 - (c) ******
 - (d) ******
 - (e) ******
 - (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*
 - (g) ******
 - (h) ******
 - (i) *****”*

viii. We have perused the various facilities such as Term Loan ("TL Facility"), Dropline Overdraft Facility ("OD Facility") and Funded Interest Term Loan ("FITL Facility") including addendum facility letters and Master Facility Agreement very carefully. We have not come across any clause which shows that the money in question was borrowed against payment of interest and that the amount involved in the transaction is having the commercial effect of borrowing.

ix. While determining Issue (a) and (b), we are of the considered view that the amount involved in the present case cannot be considered as a Financial Debt within the definition of sub-section 8 of Section 5 of the Code. We are also of the opinion that the Applicants are not Financial Creditor holding any financial debt which is in default of payment by the Corporate Debtor.

- x.** On perusal of the record of default of the Corporate Debtor maintained by the Information Utility namely National E-Governance Services Limited (NeSL) dated 21.07.2023, we find that this is the record w.r.t. the status of authentication by the debtor is shown as “Disputed” with an outstanding amount of Rs. 3,62,98,468.00/- along with the date of default as 02.10.2022. Therefore, we are satisfied that there exists no debt and default and the same is corroborated by the IU certificate filed along with the application.
- xi.** It is a settled law, the pre-requisites for an application under Section 7 of the Code are the existence of 'financial debt' and a 'default', and as evident from the facts in the preceding paragraphs, it cannot be said that there is any financial debt, much less any default and therefore the present application is not maintainable.

5. **Order**

In light of the above facts and circumstances, it is hereby ordered as follows: -

- i.** The Application bearing **(IB)-687(ND)/2023** filed by the Applicant under section 7 of the Code read with Rule 4 of the Adjudicating Authority Rules for initiating CIRP against the Respondent, is **dismissed**.
- ii.** The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India (“IBBI”) for their record.
- iii.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.
- No order as to costs.

Sd/-
(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

Sd/-
(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)