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

TP/MP/ 102 of 2019 [CP(IB) 319 of 2019]

Coram: MADAN B. GOSAVI, MEMBER (JUDICIAL)
VIRENDRA KUMAR GUPTA, MEMBER (TECHNICAL)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING THROUGH VIDEO CONFERENCING BEFORE THE INDORE BENCH AT AHMEDABAD OF THE NATIONAL COMPANY LAW TRIBUNAL ON 01.01.2021

Name of the Company: Oriental Bank of Commerce & Anr
V/s
Prakash Asphaltings & Toll Highways (India) Ltd

Section: 7 of the Insolvency and Bankruptcy Code, 2016

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open court vide separate sheet.

(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)

(MADAN B GOSAVI)
MEMBER (JUDICIAL)

Dated this the 1st day of January, 2021.

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
INDORE BEHCH ATAHMEDABAD
COURT 1

TP/MP/102 of 2019 [CP (IB) No.319/7/NCLT/AHM/2019]

[An application under Section 7 r.w. Rule 4 of Insolvency and Bankruptcy Code, 2016].

In the matter between:

1. Oriental Bank of Commerce
(now Punjab National Bank).
Head Office at:
Plot No. 5, Institutional Area,
Section-32, Guragaon-122001,
Haryana

And Branch Office amongst others
At: Large Corporate Branch, 6th Floor,
Om Tower, 32, Jawaharlal Nehru Road,
Kolkata-700071.

2. India Infrastructure Finance Company Ltd.
Registered Office at: 5th Floor,
Block-2, Tower-2, Plate-A&B,
NBCC Tower, East Kidwai Nagar,
New Delhi-110023

.....Petitioners/
Financial Creditors

Versus

M/s Prakash Asphaltings and Toll
Highways (India) Limited
Registered office at:
76, Mall Road, Mhow, Indore-453441,
Madhya Pradesh

..... Respondent/
Corporate Debtor

Order Reserved on: 17th December, 2020
Order Pronounced on: 1st January, 2021

Coram: MADAN B. GOSAVI, MEMBER (J)
VIRENDRA KUMAR GUPTA, MEMBER (T)

Appearance:

Learned senior counsel Mr. Mihir Thakore a.w. learned counsel Mr. Akshat Khare appeared for the Financial Creditor.
Learned counsel Mr. Manoj Munshi, learned counsel Mr. Tarak Damani and learned counsel Mr. Dharmik Barot appeared for the Corporate Debtor.

ORDER

[Per: VIRENDRA KUMAR GUPTA, MEMBER (T)]

1. This application has been filed by Financial Creditors, namely, Oriental Bank of Commerce (now Punjab National Bank) and India Infrastructure Finance Company Ltd. under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **"IBC, 2016"**) for initiation of Corporate Insolvency Resolution Process (hereinafter referred to as **"CIRP"**) against the Corporate Debtor, namely, M/s Prakash Asphaltings and Toll Highways (India) Limited.

2. The facts, in brief, are that the Financial Creditors are claiming default in the payment of outstanding loan of Rs. 138.44 crores as on 31.01.2019. There are two applicants, namely, Oriental Bank of Commerce and India Infrastructure Finance Company Limited. Applicant

No.1 i.e, Oriental Bank of Commerce sanctioned loan on 22.12.2012 and Applicant No 2 i.e, India Infrastructure Finance Company Limited sanctioned loan on 15.4.2013. Out of total outstanding amount, Applicant No. 1 is having outstanding of Rs. 83.19 crores whereas outstanding amount of Applicant No. 2 stands at Rs. 55.25 crores.

3. Learned counsel appeared on behalf of the Financial Creditors and submitted that one company, namely, M/s Concast Path Bameetha Satna Road Projects Private Limited was formed as "SPV" wherein the Corporate Debtor held 51% of equity holding which was pledged by the Corporate Debtor as security against the loan facilities granted by the applicants to said SPV. It was pointed out that the said SPV had been formed for undertaking and completing the infrastructure project awarded by Madhya Pradesh Road Development Corporation Limited. However, due to termination of the contract, loan given by the lender to borrower could not be repaid; hence, Financial Creditors initiated action under DRT for recovery of outstanding sum against the main borrower which was pending.

4. It was also submitted that the Madhya Pradesh Road Development Corporation Limited had executed the concession agreement wherein total cost of the project was Rs. 244.39 crores and arrangement was made for part financing of such project. Thereafter, it was pleaded that the Corporate Debtor was a sponsor and irrevocably and unconditionally had undertaken certain financial obligations. In this regard, our attention was drawn to following clauses of Sponsor Support Agreement entered into on 11.05.2013 between financial creditors, borrower and two sponsors.

2. *Sponsor Support*

2.1 Undertaking towards Project Equity Capital:

The Sponsors irrevocably and unconditionally undertake to make Equity Contributions to the aggregate extent of Rs. 57.58 Crores (Rupees Fifty Seven Crores and Fifty Eight Lacs Only) towards the Project Equity Capital as per the Financing Plan and the Financing Documents to enable the Borrower to meet all costs associated with completion of the construction of the Project Road.

2.2 Shortfall Undertaking:

(i) The Sponsors do hereby unconditionally and irrevocably, assure, confirm and undertake to forthwith fund the Borrower on demand by the Borrower and/or the Lenders' Agent, without recourse to the Borrower's Assets/Project Assets, in a manner and to the satisfaction of the Lenders any Lenders shortfall in the resources of the Borrower for completing the Project and overrun in the Project Cost due to any circumstances, by way of:

a. Infusion of fresh equity capital or preference capital, and/or,

b. *granting of unsecured interest free loans or subordinated debt to the Borrower on terms and conditions acceptable to Lenders and without recourse to the Project Assets.*

(ii) *Any shortfall in the resources of the Borrower for meeting major maintenance requirements due to any circumstances, shall be met by the Sponsors by way of*

a. *Infusion of funds in a manner acceptable to Lenders, and/or,*

b. *granting of unsecured interest free loans or subordinated debt to the Borrower on terms and conditions acceptable to Lenders and without recourse to the Project Assets.*

2.3. *Undertaking for Termination Shortfall:*

(i) *In the event that the Termination, Payments received by the Borrower pursuant to the Concession Agreement are insufficient to meet Debt Service Payments, the Sponsors unconditionally, absolutely and irrevocably confirm and undertake to forthwith pay to/deposit with the Lenders' Agent, the Shortfall Amounts in the form and content satisfactory to the Lenders.*

For the purpose of this sub-section, the term 'Shortfall Amounts' shall mean all the amounts outstanding and payable to the Lenders as Debt Service Payments under the Financing Documents ***less the amounts*** *demanded from the payable by the Authority as Termination Payments.*

(ii) *The Sponsors shall forthwith on demand and without any contest, dispute or demur, pay to the Lenders' Agent, the whole of the Shortfall Amounts.*

Clause 3 and 4.1 were also referred which are reproduced as under:

3. *Indemnify by the Sponsors:*

Until the Final Settlement Date, the Sponsors shall, as a separate, Independent and additional stipulation, on demand and without demur, protest or any inquiry, indemnify all the ***Secured Parties against****:*

(i) all losses, expenses, claims and liabilities incurred or suffered by the Secured Parties in relation to the breach of any obligations by the Sponsors ***under this Agreement*** *or any obligation with respect to any claim or liability, which is liable to be discharged/expressed to be payable by them* ***hereunder or as a result of any of their obligations being*** *or becoming void, voidable or unenforceable for any reason, whether or not new existing and whether or not now known* ***or becoming known to any party to this Agreement ;and***

(ii) any funding or other cost, loss, expense or liability (including loss of margin) sustained or incurred by the Secured Parties ***as a result of the Secured Parties being*** *required for any reason (including any bankruptcy, insolvency, winding-up or similar law of any jurisdiction) to refund any amount received recovered by the Secured Parties in respect of any sum payable, in relation to the* ***obligations undertaken hereunder, by the Sponsors****.*

4. *Obligations of the Sponsors*

4.1 *Lenders' Agent's Determination to be binding and conclusive:*

The Sponsors and the Borrower agree that determination by the Lenders' Agent as to the existence of the conditions requiring the Sponsors to provide funds towards Sponsors Support and the amounts payable towards the Sponsors Support or as to any of the matters set out in Clauses 2

and 3 shall be conclusive and binding on the Sponsors and the Borrower.

4.2 The Sponsors shall not pledge its equity interests in the Borrower without prior written consent from the Lenders.

4.3 Sponsors to hold amounts in trust:

Until the Final Settlement Date, any amount whether in cash or securities, received or recovered by the Sponsors in respect of the Project, in contravention of the terms of this Agreement and the other Financing Documents:

(a) as a result of any exercise of any right against the Borrower; or

(b) in the winding-up of the Borrower;

shall be held by the Sponsors in trust for the Lenders and be immediately paid to the Lenders' Agent. Any action taken by the Sponsors pursuant to this Clause shall be without prejudice to any rights that the Lenders may have under the Financing Documents.

4. Based upon these clauses, it was argued that as per Clause 2.2(i), the Corporate Debtor had unconditionally and irrevocably assured and undertook to fund the borrower company on demand either by the borrower company or by the lender's agent. It was contended that as per Clause 2.3 in case of termination of payment received by the borrower company under the concession agreement were insufficient to repay the debt service payment then the sponsors were required to deposit the shortfall amount. It was also argued that as per Clause 3,

sponsors had indemnified the lenders for all losses, expenses, claims and liabilities of the secured parties. Our attention was also drawn to Clause 4.1 and it was contended that liability and demand towards Sponsors Support Agreement as per Clause 2 was conclusive and binding on the borrower and sponsor. It was also pleaded that as per Clause 8.2 any failure by the sponsor to honour their obligation under the Sponsors Support Agreement would be event of default under Loan Agreement and other financing documents. It was also pleaded that this amount was a financial debt within the meaning of Clause (i) of Section 5(8) of IBC, 2016; hence, respondent was a Corporate Debtor and this petition was liable to be maintained. To further buttress this argument, it was also pleaded that the Corporate Debtor by way of Board Resolution dated 17.05.2013 as promoter of the SPV company (borrower) had acknowledged the financing of borrower company by providing security and pledge of shares; hence, Corporate Debtor being the promoter of borrower company had accepted the terms of finance and liability to repay both as promoters and indemnifier. It was also pleaded that

the decision of Principle Bench of NCLT in the case of *Union Bank of India vs. Era Infra Engineering Ltd. in CA No. 997 (PB)/2018 in CP No. IB-190 (PB)/2017 order dated 06.12.2018* also supported the claim of the Financial Creditor. It was also pleaded that decision of the Hon'ble Supreme Court in the case of *Anup Jain vs. Axis Bank Ltd.* was not applicable as facts of the present case were different from the facts of that case.

5. Learned senior counsel appeared on behalf of Corporate Debtor. Firstly, he pointed out that the application filed on behalf of the applicant no. 2 was without proper authority of the Board Resolution; hence, for this reason, the application was not liable to be admitted. However, on this point, on a query that independently the applicant no. 1 was competent to file this application, hence, this technical ground had no relevance in the present case. The learned senior counsel could not controvert this view. Thereafter, the learned senior counsel initiated his arguments on merits of the case. First argument taken by the learned senior counsel was that the respondent was not a Corporate Debtor as the respondent was neither a borrower nor guarantor to the financial assistance

provided to the borrower by the Financial Creditors. It was also pleaded that the Sponsors Support Agreement executed by the respondent was neither a financing document nor it dealt with the debt. In this regard, reliance was placed on the definition of a Corporate Debtor as given in Section 3(8) of IBC, 2016 along with definition of debt given in Section 3(11) of IBC, 2016. It was specifically pointed out that as per Section 3(11) debt meant a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. Based upon this definition, it was submitted that there was no claim which was due and payable by the respondent to the financial creditors. Accordingly, it was claimed that in the absence of respondent either being the borrower or the corporate guarantor, the said application was not maintainable.

6. The second line of argument was that respondent was a sponsor under the Sponsors Support Agreement dated 11.05.2013 and such arrangement was not known to IBC nor there was any reference of any such document in the Code; hence, the petition was not maintainable as reliance on the provisions of such agreement was not

legally tenable. It was further argued that even if it was assumed that such agreement could cast an obligation upon the respondent but that was also limited to the extent of liability as per Clause 2 and 3 of such agreement. Thereafter, it was contended that Clause 2.1 had already been compiled by the respondent as promoters by infusing entire share capital as committed and even otherwise any default in such infusion could not empower the financial creditors to invoke Section 7 of IBC, 2016 as there was no default in repayment of financial debt. It was further argued that both Clauses 2.2(i) and 2.2(ii) were not applicable. As regard to Clause 2.3(i), the learned senior counsel vehemently argued that this clause both in fact and in law supported the case of the respondent as the sponsor was liable to pay only the shortfall between outstanding dues under the financial arrangement payable by the borrower and the amount received from Madhya Pradesh Road Development Corporation Limited as termination payment whereas in the present case, financial creditors had not demanded the shortfall but the entire outstanding which was not payable by the respondent under any circumstances. It

was also pleaded that Clause 2.3.2 of Sponsors Support Agreement was not applicable as the amount of shortfall had neither been determined nor crystallised and consequently there could not be any demand as of now; hence, this application was not maintainable as being premature and there being no debt due as on date.

7. As regard to Clause 3 of Sponsors Support Agreement, it was pleaded that respondent had not breached any terms of such agreement, therefore, this clause was not maintainable. It was vehemently argued that shortfall as defined in Clause 2.3.1 of Sponsorship Support Agreement did not fall under any of the sub clauses (a) to (i) of Section 5(8) of IBC, 2016 which defined the term "financial debt" and, therefore, in the absence of any financial debt the present application under Section 7 was not maintainable. It was emphasised that even sub-clause (h) was not applicable because under that clause only those counter indemnify would fall which were given by Corporate Debtor in relation to any guarantee or Bound of indemnity issued by the Bank or financial institutions. Our attention was again drawn to Clause 3 of Sponsorship Support Agreement to emphasize on the

fact that respondent had agreed to indemnify the losses, expenses, claims and liabilities in relation to breach of any obligation by respondent as specified under such clause and the respondent had never undertaken to indemnify or to provide counter indemnity in respect of any instrument described under sub-clause (h) of Section 5(8) of IBC, 2016; hence, sub-clause (h) was not attracted at all. It was also argued that even sub-clause (i) of Section 5(8) was not applicable as respondent had never agreed or undertaken to indemnify the Financial Creditor for any liability described in sub clauses (a) to (h) of Section 5(8) of IBC, 2016 but had undertaken only to meet the shortfall between the outstanding dues of Financial Creditors less termination payment received from Madhya Pradesh Road Development Corporation Limited.

8. It was argued that shortfall under Clause 2.3(i) of such agreement had yet not crystallized due and payable by the respondent as the amount of termination payment was yet to be determined and adjudicated upon by the competent authority in terms of provision of concession agreement dated 20.01.2012. Our attention was also

drawn to the fact that borrower vide letter dated 30.10.2019 had claimed termination payment of Rs. 291 crores and also damages of Rs. 188 crores due to arbitrary termination and non provisions of site and other reasons causing delay in completion of the project. Thus, the borrower had demanded termination payment of Rs. 479 crores from the Madhya Pradesh Road Development Corporation Limited which was much more than the amount of liability of both the Financial Creditors and there could not be any shortfall and, therefore, respondent shall not be liable to meet any shortfall; hence, for this reason also this application liable to be dismissed.

9. Thereafter, the learned senior counsel submitted that reliance placed by the financial creditor on Clause 2.2.1 was in different context as it was a related to payment of any shortfall in the resources of the borrower for completing project and, therefore, it was an attempt to draw support by way of relying on the wrong clause. It was further argued that reliance on the Clause 3 was also misplaced as applicant had failed to point out any breach of any obligation under Sponsorship Support Agreement

by the respondent and, therefore, such reliance was of no benefit to the applicant. The argument of the applicant that Financial Creditors were not a party to concession agreement, therefore, terms of that agreement were not applicable to Financial Creditors in fact supported the case of the respondent in as much as that if the same analogy was applied to the fact that the respondent was not a party to financing documents, loan agreement, therefore, any liability accruing or arising under these agreement could not be fastened upon the respondent. As regard to the reliance placed by the applicant on the Board Resolution dated 17.05.2013 it was claimed that such resolution had been passed to meet the requirements of Section 293(1)(a) of Companies Act, 1956; hence, it did not mean that the respondent had accepted the terms of finance and liability to repay the same both as promoter and indemnifier. It was further argued that such resolution was limited only to execute Sponsorship Support Agreement and pledge of the shares as security and did not make the respondent liable to all or any other financial document to which the respondent was not a party. It was concluded that the entire

argument was misconceived on the basis of facts misunderstood by the applicant.

10. It was argued that the decision of the Principal Bench of NCLT in the case of Union Bank of India vs. Era Infra Engineering Ltd.(supra) was altogether different from the facts of the present case as there was no conditions/terms similar to Clause 2 and 3 of Sponsorship Support Agreement in that case and, therefore, that case is not applicable in the facts and circumstances of present case. It was further argued that the decision of Hon'ble Supreme Court in the case of *Anup Kumar vs. Axis Bank Ltd* was squarely applicable to the present case. Finally, it was contended that the applicant had failed to show that which clause of Section 5(8) was applicable.

11. We have considered the submissions made by both sides and material on record. In this case, we have been called upon to interpret the provisions of Sponsorship Support Agreement and consequent liability of the respondent. The relevant facts are that SPV company was formed which undertook road construction project awarded by Madhya Pradesh Road Development Corporation Limited

vide concession agreement dated 20.01.2012. The respondent was one of the promoters of the said SPV Company. The loan was granted by the Financial Creditors to said SPV Company to part finance the funds required for completion of the said project. The documents in regard to such loans were executed between SPV Company and corporate guarantors and lenders. The respondent is not a party to such documents. In addition to such arrangement, Sponsorship Support Agreement has been entered into between two Sponsors companies, SPV Company and applicants. The claim of applicant no. 2 is not maintainable for lack of proper authority as claimed by the respondent; hence, rejected. Having said so, the other crucial fact is that the concession agreement was terminated. It is claimed by the respondent corporate debtor that such termination was due to delay in completion of the project for which no fault had occurred on the part of the SPV Company as the requisite land could not be provided by the concessioner. This fact has not been disputed though it has got no apparent bearing on the issue before us even otherwise. The application

has been fled under Section 7 which pre supposes an existence of debt due and payable in law and a default has occurred. The term "default" has been defined in Section 3(12) of the Code which reads as under:

> 3. Definitions.
> *3(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;*

The perusal of the above definition makes it amply clear that default could be said to have occurred on non-payment of debt when whole or any part or an instalment thereof which has become due and payable is not paid. Thus, it the pre-requisite is that there should be a debt which has become due and payable and is not paid.

12. This takes us to the definition of "debt" which is given in Section 3(11) of the Code and reads as under:

> *3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;*

From the perusal of this definition, it is noted that it speaks of a liability or an obligation in respect of a claim which is

due from any person and includes a financial debt and operational debt.

13. This definition takes us to firstly to the definition of the "claim" which is defined in Section 3(6) of the Code in the following manner:

> *3(6) "claim" means—*
>
> *(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*
>
> *(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;*

From the perusal of this definition read with word "due" used in Section 3(11) it is clear that claim could be a right to payment or right to remedy for the breach of contract. In the present case, the next question would arise whether any claim is due from the alleged Corporate Debtor or not or whether there is any breach of contract i.e. Sponsorship Support Agreement by this person? This aspect we will cover later on.

14. Now, next question arises whether such obligation fails in the definition of "financial debt". The term "financial debt"

has been defined in Section 5(8) of IBC, 2016 which is reproduced as under:

> *5(8) "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) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
>
> *(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
>
> *(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
>
> *(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;*
>
> *(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*
>
> *23[Explanation. -For the purposes of this sub-clause,-*
>
> *(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*
>
> *(ii) the expressions, "allottee" and "real estate project" shall have the meanings24 respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]*

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

15. From the perusal of above definition, it is noted that various types of transactions have been covered under this definition. This definition is expansive in nature. The pre-requisite is that there should be a debt which may carry interest if it is so agreed by the parties and some time value of money involved should be involved. Sub-clauses (a) to (i) include various types of transactions which could be construed as of the nature of financial debt. As per respondent sub-clause (h) is not applicable and we are in agreement with such contention as it is not related to any instrument of indemnity issued by a Bank or financial institution. The question which needs to be deliberated is that whether sub-clause (i) is applicable or not? It is not in dispute that Sponsorship Support Agreement is not of the nature of contract of guarantee and it is limited in scope in a sense that it provides for indemnification of shortfall in the liability of the

Financial Creditors difference between amount received as compensation including damages from Madhya Pradesh Road Development Corporation Limited and the amount of outstanding liability. It has been claimed on behalf of Corporate Debtor that such sub-clause (i) is applicable in respect of sub clauses (a) to (h) of Section 5(8) and such shortfall does not fall in any of such sub-clauses; hence, sub-clause (i) is not attractive. On the face of it, such argument appears to attractive but Clause (i) uses the word "the amount of any liability" in respect indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause. Thus, the use of words "amount of any liability" is of significance. It is not in dispute that in this case, SPV Company is principal borrower who has borrowed money against payment of interest from the financial creditors; hence, sub-clause (a) is clearly attracted. Now, the question to be seen whether shortfall would fall in the definition of Clause (i) because the amount of shortfall; hence, difference between outstanding debt and termination payment, in our considered opinion, part takes the character of any liability when it is due and payable both in law or in fact. The shortfall becomes part of debt payable by the indemnifier if

all other conditions for payment such liability are satisfied. Thus, we humbly reject this contention raised on behalf of the Corporate Debtor.

16. Now, the question arises whether debt has become due or payable? In this regard, we find that Clause 2.1 and 2.2 have got no relevance and only Clause 2.3(i) and (ii) are relevant. Clause 2.3.1 has got two conditions that there should be a termination and consequence to that termination payment must be received by the borrower and such payment should be less than the amount outstanding/due from the borrower then only such clause would become operative. It would not be over emphasis even if we again state that unless the termination payment is received by the borrower, the Clause 2.3.1 cannot come into operation and, therefore, we do not hesitate in holding that the present application filed by the financial creditors is premature and, thus, not maintainable in law as the debt is not due and payable at the moment; hence, there is no event of default which can trigger the filling of application under Section 7 of the Code. We are further of the view that if the Clause 3 is not applicable in the manner as canvassed

by the Financial Creditors as there is no breach by the respondent of any condition of such Sponsorship Support Agreement. Further, the liability of sponsor is limited to the extent as defined in Clause 2.3.1 and, therefore, the amount of total outstanding liability claimed by the Financial Creditors is not legally tenable for this reason also. We are further of the view that the liability of indemnifier commences only when the indemnified has actually suffered losses in such kind of situations. To put it differently, the right of indemnity exists where one party is obliged to make good certain losses **suffered** by the other party and the losses which the indemnifying party must make good depends upon the wordings of the indemnity. Further, mere possibility of loss occurring does not make the indemnifier liable. In the present case, even at the cost of repetition, we state that the trigger event would happen only when the amount of termination award is accrued, ascertained and determined at the first instance and the right of indemnity would come into play only if amount so determined falls short of the amount outstanding and due to Financial Creditors. Thus, at the moment, in the absence of such situation, this application is not maintainable.

17. We are further of the view that the liability of indemnifier matures or can be invoked only when the principal borrowers or its guarantors whose liability is co-extensive with that of the principal borrower fail to repay the loan; hence, before that stage is crossed, in our considered view, any legal action cannot be taken against the indemnifier i.e. the respondent in the present case. We are further of the view that apart from this, there should be a situation of termination shortfall at the first stage itself and if that is not the case then the indemnifier cannot be put into service at all in the present case because as claimed by the Corporate Debtor that the amount of compensation for termination including damages is around Rs. 488 crores and as against that the liability of both the lenders is significantly lower and even if one third of amounts so claimed by the SPV company are received that would be sufficient to cover outstanding amount against the principal borrower; hence, for this reason also the application is not maintainable. Further, when the liability itself cannot be quantified at the time of filing of application then such application becomes not maintainable as it cannot be given effect to in the absence of such situation. This view is supported by the

legal principle that when machinery provision of statute or agreement cannot be given effect, no substantive liability can be imposed.

18. We also find that there are two corporate guarantors also and who have executed corporate guarantee and, therefore, in our considered view, the liability as a consequence of Sponsorship Agreement can be invoked only when the principal borrower and such corporate guarantors having a co-extensive liability with the principal borrower, fail to pay the outstanding amount to the lenders. It is also noted that proceedings under IBC have already been initiated against such corporate guarantors. Thus, for this reason also, the present application is premature and not maintainable.

19. We also find that in the case of Union Bank of India (supra) relied on by the Financial Creditors there is a clear cut finding in para 18 of the said order that in that case the agreement was of the nature of contract of guarantee whereas in the present case, it is not so; hence, this case does not help the cause of the Financial Creditors.

20. We do not find any merit in the contention of the Financial Creditors that the respondent being the promoter was liable to

pay the debt as no material has been brought on record to show that liability to repay such loan in the capacity of the promoter of SPV Company had been undertaken by the respondent. Further, reliance placed on the resolution passed by on 17.05.2013 is also misplaced as it relates only to authorization for the purposes of execution of Sponsorship Support Agreement and pledge of shares. We are further of the view that if the plea of the Financial Creditors is accepted then the every shareholder would become liable to pay the debt merely because he is a shareholder though there may not be any legal/contractual obligation to repay such loan. This is not a valid proposition as shareholders and company are separate legal entities; hence, we reject the same.

21. Last but not the least, from page no. 235 of paper book filed by the Financial Creditors, it is noted that account of principal borrower i.e. SPV Company has been classified as NPA as on 31.07.2017 as mentioned in the recall notice dated 27.04.2018. Thus, as transpired during the course of hearing of this application that no proceedings under Section 7 of IBC, 2016 have been initiated against the principal borrower. Now, the petition under Section 7 cannot be filed against the Corporate Debtor as the same has become barred by limitation as on this date. Thus, in this situation, we are of the view that what cannot

be done directly, cannot be done indirectly i.e. if one cannot take an action under Section 7 against the principal borrower on account of debt being barred by limitation; hence, how action can be taken for the recovery of shortfall against such debt from such sponsor. In our view, for this reason also, this application is liable to be dismissed.

22. Accordingly, application filed under Section 7 stands dismissed and disposed of.

23. Urgent certified copy of this order, if applied for, to be issued to all concerned parties upon compliance with all requisite formalities.

(Virendra Kumar Gupta)
Member (Technical)

(Madan B. Gosavi)
Member (Judicial)

Signed on this, the 1st day of January, 2021.

Rajeev Sen/Steno