

(2019) 07 NCLT CK 0017
In the National Company Law Tribunal
Case No : IBA/138 Of 2019

Oriental Bank Of Commerce

APPELLANT

Vs

L&T Halol-Shamlaji Tollway Limited

RESPONDENT

Date of Decision : 19-07-2019

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 6, 7, 13, 14(1), 31(1), 33

Citation : (2019) 07 NCLT CK 0017

Hon'ble Judges : B.S.V. Prakash Kumar, J

Bench : Single Bench

Advocate : A.R.L. Sundaresan, E. Kumar, K.N. Chinnakrishnan, Thriyambak J. Kannan, Solaiappan

Final Decision : Allowed

Judgement

B.S.V. Prakash Kumar, J

1. It is a Insolvency Bankruptcy Application filed u/s 7 of the Insolvency and Bankruptcy Code, 2016 (the Code) by the Financial Creditor namely Oriental Bank of Commerce for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor on the ground that it has defaulted in repayment of Rs. 76,68,75,126 as on 27.12.2018.

2. Looking at the Company Application, it is evident that this Corporate Debtor availed loan facility by a Common Loan Agreement dated 28.08.2009, Lenders Agent Agreement dated 28.08.2009, Security Trustee Agreement dated 28.08.2009, Inter Creditor Agreement dated 28.08.2009, Escrow Agreement dated 28.08.2009 between Corporate Debtor and Allahabad Bank (as lenders representative and Escrow Bank) including Gujarat State Board Development Corporation (Authority), Supplementary Escrow Account Agreement dated 28.08.2009 between Corporate Debtor and Consortium of Banks including Allahabad Bank (as lenders representative and Escrow Bank), Substitution Agreement dated 28.08.2009 between Gujarat State Board Development

Corporation (Authority) and Corporate Debtor including the Allahabad Bank (as lenders representative) and Deed of Hypothecation dated 28.08.2009 between the Corporate Debtor and Security Trustee, (IDBI) Trusteeship Services Limited). In pursuance thereof, this Financial Creditor on 23.10.2009 disbursed Rs. 155 crores to the Corporate Debtor. Thereafter, since the Corporate Debtor failed to service the debt, this account was declared as NPA by the Bank on 31.07.2016. As the Corporate Debtor, even after declaring the Account as NPA, failed to make it Standard Account, this Financial Creditor along with other lenders entered into Master Re-structuring Agreement dated 14.02.2017 with this Corporate Debtor for conversion of debt of Rs. 405,82,65,250 into equity out of total debt of Rs. 1000 Crores payable to the consortium of the Banks along with constitution of "default clause" and "consequences of event of default", which are as follows:

7.1 In addition to the events of default set out in Article VII of the Common Loan Agreement, the following additional events shall constitute Event(s) of Default on the occurrence of which, the Security Trustee/Lenders' Agent/Lenders shall be entitled to exercise any and all rights hereunder as contained in this Agreement, in the manner contained in Clause 8 (Consequences of Event of Default) below:-
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(a) Payment Default

The Borrower does not pay any amount(s) constituting the outstanding amounts or any portion thereof in relation to the Part-B Debt on the respective Due Date for payment of such amount(s).

(b) Breach or default of the Facility Documents

The Borrower and/or the Promoter commit(s) a breach of or is/are in default of any covenant, condition, representation, warranty, obligation or provision contained in any of the Facility Documents, which is not capable of being remedied or where such breach in the opinion of the Lender, is capable of being remedied, the same is not remedied within a period of 90 (Ninety) calendar days from the date of a notice being received from the Lenders in this regard.

(c) Concessions

In the event that the concessions sought in terms of the letter dated November 8., 2016 addressed by the Lenders' Agent to the GSRDC are provided within 90 (Ninety) calendar days of the Effective Date, in a form and manner acceptable to the Lenders.

8. CONSEQUENCES OF EVENT OF DEFAULT

8.1 Upon occurrence of any Event of Default, (such event being hereinafter referred to as "Enforcement Event"), the Lenders' Agent or Security Trustee (acting on the instructions of any of the Majority Lenders) shall be entitled to exercise all or any of the powers mentioned below:

(a) the Lenders shall have a right to reverse any waivers or concessions that has

been granted as a part of this Agreement and upon such reversal, revert back to the provisions of the Existing Facility Documents;

(b) Accelerate the Facility and declare the obligations of the Borrower in relation to the Facility, immediately due and payable;

(c) Enforce the Security Interests which have been created to secure the obligations of the Borrower in relation to the Facility in the manner stipulated under the Facility Document;

(d) Stipulate any further terms and conditions as the Lenders deem fit with respect to Facility Document;

(e) Upon the occurrence of an Enforcement Event, the Majority Lenders (acting through any of the Lenders or otherwise) shall have a right to appoint a nominee/ whole time director(s) on the Board of Directors of the Borrower and any costs incurred by the Lenders/Lenders' Agent/Security Trustee in relation to such appointment shall be borne by the Borrower and the Borrower shall do all acts, deeds and things necessary in this regard, including but not limited to making necessary alterations to its memorandum of association/articles of association as may be required; and

(f) Exercise any other rights that the Lenders may have under Applicable Law, any other law for the time being in force, the Facility Documents and/or the Project Documents.

3. Besides this, lead Bank of Consortium, Allahabad Bank on 08.11.2016 wrote a letter to the Managing Director of Gujarat State Road Development Corporation Limited(GSRDCL) stating that the revival package will be based on adoption/ implementation of measures proposed by Banks and GSRDCL, which are- conversion of debt to the tune of Rs. 410 crores into equity and GSRDCL to take share of Rs. 210 Crores out of the proposed equity of Rs. 410 crores by 31.12.2017; reduction of interest to 10% and extension of repayment based on proposed cash flow; any measure like Entry restriction or full toll on SH-59 or Monthly annuity equivalent to Rs. 8,00,000 per day with annual growth of 5% annually; deferment of Revenue Share and extension of agreement by 7 years.

4. The Financial Creditor counsel has further stated that since the Corporate Debtor had taken monies from various Scheduled Banks including this Applicant for laying road, as this Corporate Debtor failed to service the loan, GSRDCL was asked to take share of Rs. 210 Crores equity by 31.12.2017 out of proposed conversion of debt of Rs. 410 Crores into equity. On having this Corporate Debtor given an impression to the Banks stating that GSRDCL would take share of Rs. 210 crores of equity out of proposed equity of Rs. 410 crores, the lenders on 14.02.2017 agreed in the Master Restructuring Agreement for clause 7.1 (Event of Default) and 8 (consequences of Event of Default) mentioning that in the event concessions sought in terms of the letter dated 08.11.2016, the Lenders' Agent (Allahabad Bank) addressed to the GSRDCL are not provided within 90

calendar days from the Effective Date (i.e. Strategic Debt Restructuring Agreement dated 14.02.2014) in a format and manner acceptable to the lenders, the lenders can proceed against the Corporate Debtor basing on the original documents executed between the parties. In Clause 8 of consequences of events of default, it has been stated that the lenders have a right to reverse any waivers or offers or concessions that has been granted as part of this Agreement and upon such reversal revert back to the provisions of the Existing Facility Document i.e. the document initially executed by the Corporate Debtor in favor of the Creditor as well as other banks. The Financial Creditor counsel has stated that though this Corporate Debtor servicing part of the debt, as GSRDCL has not taken equity share of Rs. 210 crores out of Rs. 410 crores debt converted into equity by this Restructuring Agreement within 90 days from the effective date, this Financial Creditor has every right to reverse the waivers and concessions that were provided under Master Re-structuring Agreement dated 14.02.2017 and to proceed against this Corporate Debtor basing on the original debt obligations declaring Part A debt and Part B as due and payable.

5. As to this claim, the Financial Creditor counsel has further clarified that in the recall notice given on 12.09.2018, it has been stated that since the Corporate Debtor failed to comply with the concessions mentioned in the Master Restructuring Agreement dated 14.02.2017, this bank has given recall notice demanding repayment of Part-B debt of Rs. 78,27,62,198 within 7 days with effect from the date of service of recall notice. Since the Corporate Debtor failed to repay the loan as demanded by the Financial Creditor, the Bank has initiated this proceeding against the Corporate Debtor.

6. As against the Financial Creditor's case, the Corporate Debtor counsel has stated that there being no default in making payment in respect to Part-B debt, there cannot be any occasion to this Financial Creditor to recall the debt on the ground that GSRDCL has not come forward to take equity out of Part-A debt as mentioned above. To substantiate this argument, this Corporate Debtor counsel has also relied upon the minutes of consortium meeting held at the Office of the L & T Infrastructure Development Projects Limited on 22.06.2018.

7. In respect to the statement recorded in this minutes, the Corporate Debtor says that the Financial Creditor has stated that this Financial Creditor has recalled the account in the past and decided to file application with NCLT as part of their recovery measures which will act as indirect pressure on the ultimate parent. Citing this statement from the Minutes, the Corporate Debtor counsel has also tried to impress upon this Bench that Allahabad having already recorded that the Corporate Debtor's account is regular, it has to be construed that no default is in existence as against Part-B debt payable to this Financial Creditor. This Corporate Debtor counsel has further submitted that even in the event of occurrence of default, this Financial Creditor on its own cannot initiate proceedings against the Corporate Debtor upon consequence of events of default because in the clause 8 of the consequence of events of default, it has been

clearly mentioned that Lender's Agent or Security Trustee (acting on the instructions of the majority lenders) alone can exercise right to proceed against the Corporate Debtor, but not independently by any of the Banks.

8. On hearing the submissions of either side, it is evident that this loan was taken by this Corporate Debtor in 2009 and this Debtor has failed to service the loan in the year 2016 itself, following which the financial creditor declared the account of the Corporate Debtor as NPA on 31.07.2016. Ever since this Corporate Debtor entered into various understandings with the lenders including this Financial Creditor for re-structuring of this loan and the Corporate Debtor succeeded in getting part of the loan converted into equity by saying that GSRDCL would fund Rs. 210 crores as equity out of Rs. 410 Crores debt converted into equity but till date no such conversion or fund has come into the Corporate debtor within 90 days from the effective date i.e., 14.02.2017 or thereafter. We are now in the second half of 2019.

9. In the Master Re-structuring Agreement, though it has been stated that the Lender's Agent is entitled to exercise all or any of the powers mentioned below, for it has not been said anywhere that the lenders cannot independently proceed against this Corporate Debtor and there being a Clause saying that these lenders have a right to reverse any waivers or concessions and revert back to the provisions of the existing facility documents, that additional right given to the lenders agent in clause 8 of the agreement dated 14.02.2017 will not amount to prohibiting the lenders from independently proceeding against the Corporate Debtor on the default occurred in the year on 31.07.2016.

10. If Clause 7.1 in the Restructuring Agreement is closely looked into, the grounds of event of default mentioned in this Agreement are in addition to the events of default mentioned in Article VII of the Common Loan Agreement. On perusal of Clause 7.1 and 8.1 of Master Re-structuring Agreement, it is evident that additional default of Events shall constitute additional events of default, on the occurrence of which, either Security Trustee or Lenders' Agent or Lenders shall be entitled to exercise their rights, including the right to proceed against the debtor.

11. Since it is an admitted fact that fund of Rs. 210 Crores having not come as equity from GSRDCL into the Corporate Debtor within 90 days from the effective date, as per clause 7.1 of the Restructuring Agreement, it has become additional event of default entitling the lenders to proceed against the debtor basing on original loan documents. For there being no dispute with regard to availing loan amount of Rs. 155 Crores from the Applicant and this Account having become NPA in the year 2016 itself, it could be safely concluded that debt and default are in existence as on the date of filing this Application.

12. Since debt and default have already been proved for having the Corporate Debtor not complied with bringing in money from GSRDC, it cannot be understood that since right has been given to lenders agent to proceed against

the Corporate Debtor, the legal right of the lenders to proceed independently against the Corporate Debtor is taken away. If at all any such right is to be curtailed, there must be express prohibition in the agreement saying that lenders shall not independently proceed against the Corporate Debtor, but no such clause is present anywhere either in the Master Restructuring Agreement or in the original facility documents.

13. Whenever any party makes an argument that a legal right to proceed against the debtor in the event of default, such party shall establish that lenders are prohibited from exercising their legal right against the corporate debtor. In the documents referred by the corporate debtor counsel, no such prohibitory language is used anywhere restricting the right of lenders, in the event of default, to proceed against the Corporate Debtor. Since Master Restructuring Agreement being qualified with event of default, it cannot be called as an agreement come into existence superseding the earlier agreements.

14. When debt has come to original situation of default on non-compliance of Master Restructuring Agreement, the classification set out by the shareholders Agreement and other documents converting part of the debt into equity will become ceased to have any effect. Once it comes out of Master Restructuring Agreement, part of debt remaining as equity and part of it as debt will not arise, entire debt is considered to be NPA.

15. Here in this case even after reading the Clauses 7.1 and 8.1 along with Article VII of the Common Loan Agreement, when the Corporate Debtor failed to bring in equity through GSRDC as promised by him then that classification of debt and equity has to be construed as vanished because once any default as mentioned in Section 7 has occurred, then the entire amount as well as Part-A debt and Part-B debt will become one debt payable by the Corporate Debtor.

16. Of course, it is up to the Creditor whether to proceed against the Corporate Debtor for the entire money or part of the money. Since the Creditor knowingly or unknowingly has proceeded against the Corporate Debtor for part of the amount falling under Part-B debt, it cannot be construed that default has not occurred as stated under Article 7 of the Master Restructuring Agreement. This classification of debt Part-A and Part-B was not present in the any of original loan agreements entered with the Corporate Debtor. Therefore, violation of noncompliance of bringing in equity from GSRDC having entitled this Financial Creditor to proceed under Article 7, under Article 7, the Financial Creditor can proceed either for the default of repayment of principal sum or default in repayment of interest or payment defaults under other agreements or default in performance with respect to terms and conditions and supply of misleading information, any of the lenders can proceed against the Corporate Debtor under Insolvency and Bankruptcy Code.

17. In addition to this ground, it has also been mentioned in Clause 7.1 of sub-clause (i) and article 7 of the Common Loan Agreement, if any extraordinary

circumstances have occurred and if that extraordinary circumstance has caused material adverse effect making it improbable for the Project to be carried out as mentioned in the transaction documents, the Financial Creditor can proceed against the Corporate Debtor.

18. To substantiate this point, the Financial Creditor counsel has argued unless equity comes from GSRDC, this Project will become non-viable therefore keeping the debt in the form of equity in the company after such non-compliance will become material adverse effect upon the financial creditor in realisation of debt from this Corporate Debtor. Therefore GSRDC not infusing into the company as stated in Clause 7.1 of sub-clause (c) of the Master Restructuring Agreement will amount to default. It is pertinent to mention that the additional right given to the lenders agent to proceed against the Corporate Debtor on behalf of the other Banks cannot be considered as a restriction upon this lender to independently proceed against this Corporate Debtor. Henceforth, this Bench is of the view that the Financial Creditor has proved existence of debt and default as mentioned in Section 6 and 7 of Insolvency and Bankruptcy Code, whereby this Bench admits this IBA/138/2019 by appointing Mr. Anil Kumar Birla as Interim Resolution Professional with the direction as follows:

I. That Moratorium is hereby declared prohibiting all of the following actions, namely,

a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

II. That Supply of essential goods or services to the corporate debtor if continuing, shall not be terminated or suspended or interrupted during moratorium period.

III. That the provisions of sub-section (1) of Section 14 of IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

IV. That the order of moratorium shall have effect from 17.07.2019 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of IBC or passes

an order for liquidation of corporate debtor under section 33 of IBC, as the case may be.

V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of IBC.

VI. That this Bench hereby appoints Mr. Anil Kumar Birla, having Registration Number [IBBI/IPA-001/IP-P00328/2017-18/10598], Sumedha Management Solutions Private Limited 1st Floor Park Plaza, No. 1 Park Road, (Off Infantry Road), Tasker Town, Bangalore- 560 051, Karnataka, E-Mail: anil birla@sumedhamanagement.com, Mobile No: 9901902545 as Interim Resolution Professional to carry out the functions as mentioned under IBC. Fee payable to IRP/RP shall be in compliance with the IBBI Regulations/Circulars/Directions issued in this regard.

19. Accordingly, this Petition is admitted.