

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

CP (IB) No.745/7/HDB/2019

U/s 7 of I&B Code, 2016 read with
Rule 4 of I & B (AAA) Rules, 2016.

In the matter between:

Punjab National Bank

Having its Corporate Office at:
Plot No.4, Sector 10
Dwarka, New Delhi - 110075.

.. **Applicant/
Financial Creditor**

VERSUS

Ind Barath Thermal Power Limited

H. No.8-5-210/43, Plot No.44
Shiva Enclave, Old Bowenpally
Secunderabad, Rangareddy - 500011.

.. **Respondent
Corporate Debtor**

Date of order: 30th December 2021

Coram:

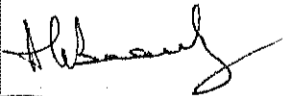
**HON'BLE DR. VENKATA RAMAKRISHNA BADARINATH NANDULA
MEMBER (JUDICIAL)**

and

**HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)**

Counsels present:

For the Petitioner : Shri Sanjay Bajaj, Advocate.







For the Respondent: Shri Yogesh Jagia, Senior Advocate assisted by
Shri Nitish Bandary, Advocate.

PER BENCH

ORDER

The present application is filed by the applicant under Section 7 of Insolvency and Bankruptcy Code, 2016, read with Rule 4 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, seeking admission of the petition, initiation of Corporate Insolvency Resolution Process (CIRP), granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon, contending that the respondent/Corporate Debtor defaulted in payment of the debt of Rs.327,51,72,704/- (Rupees three hundred twenty seven crores fifty one lacs seventy two thousand seven hundred and four only).

2. The gist of the averments in the application are:
That the applicant herein after referred to as Financial Creditor is a body corporate constituted by and under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970.

3. The respondent herein after referred to as the Corporate Debtor is a limited company incorporated under the Companies Act, 1956, bearing Identification No.U40101TG2007PLC052232, having its registered office given in the cause title.

4. It is submitted that the Corporate Debtor had availed and utilised facilities the following credit facilities under the consortium arrangement with other lenders at different times.



| Sanction letter dated | Produced at Annexure | Page number of the petition. | Volume |
|-----------------------|----------------------|------------------------------|--------|
| 13.03.2008 | A-3 | 46-59 | 1 |
| 26.02.2010 | A-5 | 316-328 | 2 |
| 27.09.2012 | A-7 | 514-521 | 3 |
| 06.12.2013 | A-9 | 569-574 | 3 |
| 20.11.2014 | A-12 | 706-740 | 4 |

The above facilities availed by the Corporate Debtor are secured as detailed hereunder:

- (i) The Corporate Debtor created mortgage, through Security Trustee- Vistra ICL (India) Limited, in respect of all that piece and parcel of vacant land measuring 129 acres, 27 gunthas and 21 Anna situated at Honkan Village, Uttara Kannada District, Karnataka.
- (ii) The Corporate Debtor created mortgage of land admeasuring 280.10 acres situate at Ottapidaram and Saminathan Village, District Tuticorin, Tamilnadu. Copies of documents are at ANNEXURES A-20 TO A-24.
- (iii) The Corporate Debtor created hypothecation, through Security Trustee- Vistra ICL (India) Limited, of moveable assets including plant and machinery together with accessories and further created hypothecation of various assets as detailed in clauses (a) to (f) on pages 10-11 of the petition.
- (iv) M/s Ind Barath Power Infra Limited, the Sponsor of the Corporate Debtor created *pledge*, through Security Trustee- Vistra ICL (India) Limited, 51% of shares of the borrower in



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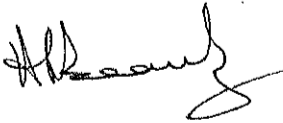
order to secure credit facilities from time to time on the basis of deed of pledge executed from time to time as detailed in clauses (a) and (b), at page 12 of the petition.

- (v) Aarkey Energy (Rameshwaram) Limited also pledged its shareholding of 51% in the Corporate Debtor, of the issued and paid up to secure the outstanding debt and executed the documents as detailed in clauses (a), (b) and (c), at page 12 of the petition. Copies of documents are at ANNEXURE A-26 COLLY.

The estimated value of the aforementioned security has been assessed as Rs.872.63 crores as per Valuation Report (ANNEXURE-28).

5. It is further averred that on account of continuous default on the part of the Corporate Debtor, on 31.03.2018 its account has been classified as a Non-Performing Asset and the Financial Creditor has taken the following steps for realisation of its dues:

- (i) Issued Notice dated 22.05.2018 [ANNEXURE A-17 COLLY.] under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act),
- (ii) Issued Default Notice dated 08.04.2019 [ANNEXURE-A-18] calling upon the Corporate Debtor and its Directors to rectify the defect.
- (iii) The Financial Creditor along with other consortium Members has filed Original Application [ANNEXURE-19] before Debt Recovery Tribunal-II, New Delhi being OA No.623 of 2019 for recovery of Rs.1383,38,07,154.27. As the above debt remained unpaid the financial creditor has moved this

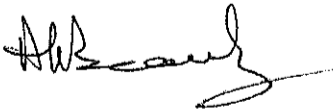




application for initiation of corporate insolvency resolution process against the respondent/corporate debtor.

6. The gist of the averments in the *counter* of the respondent is as under.

- Corporate Debtor relied on orders dated 18.09.2018 and 30.01.2019 (ANNEXURE R-1) passed by the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No.552 of 2018/ 553 of 2018.
- Corporate Debtor relied on yet another order of the Hon'ble NCLAT dated 29.05.2018 (ANNEXURE R-2) passed in Company Appeal (AT) (Insolvency) No.215 of 2017/ 231 of 2017.
- Account of the Corporate Debtor as on 31.03.2017 was in order with all the lenders, except Bank of India, who had not implemented flexi structuring scheme and classified the account as NPA and because of omission of the PNB, this account was forced to be NPA. That led to filing of OA before Debt Recovery Tribunal, New Delhi under section 19 of Recovery of Debt and Bankruptcy Act, 1993. Yet the present petition is filed on 22.10.2019.
- The Corporate Debtor furnished details of its capital structure prior to invocation of pledge by consortium members. PNB, the senior lender invoked the pledge vide letter dated 15.12.2017.
- The petitioner/ Financial Creditor gave approval in principle to sell the Corporate Debtor/ company as a going concern at Rs.440 crores, which amounts to 41% of the total debt outstanding.
- The Financial Creditor did not issue notice before filing petition under section 7 of the I&B Code, 2016. It amounts to non-compliance of directions issued by the Hon'ble NCLAT vide





order dated 30.01.2019 in Company Appeal (AT) No.553 of 2018.

- The Corporate Debtor filed police complaint/ complaint with CVC (ANNEXURE R-14) against T.R. & Chadha Company LLP & Chartered Accountants on 18.03.2020.

7. The gist of the *rejoinder* filed by the Financial Creditor is as under:

- Proceedings before the Hon'ble NCLAT relate to settlement between the parties. Thus the said orders have no applicability to the present petition.
- The averments made with regard to transactions between the Corporate Debtor and TANGEDCO relate to Corporate Debtor and its customer (TANGEDCO), hence it does not have any impact on the present petition.
- The project of the Corporate Debtor was under stress. The Financial Creditor denied that the account of Corporate Debtor was declared NPA due to omission of the petitioner. Because of failure of Corporate Debtor to adhere to RBI guidelines the account of Corporate Debtor was declared NPA. Lenders have rightly filed OA before Debt Recovery Tribunal.

Financial Creditors are within their right to invoke pledge. However, management was always with directors of the Corporate Debtor.

The Financial Creditor pleaded that there is no such in principle approval to sell the Corporate Debtor/ company as a going concern and contended that it goes contrary to the record.

- Notice of the petition was served on the Corporate Debtor prior to filing of this petition, proof of which is filed on record. The Financial Creditor demands a copy of the order of the Hon'ble



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NCLAT. It is submitted that the petitioner is within its right to file proceedings available in law.

- As regards the statement that the Corporate Debtor filed police complaint/ complaint with CVC (ANNEXURE R-14) against T.R. & Chadha Company LLP & Chartered Accountants, the Financial Creditor contends that the same do not pertain to the Financial Creditor.

8. In light of the contest as stated supra, the points that emerge for consideration by this Tribunal are:

- (i) Whether a Financial Creditor, despite being a Member of Consortium can individually maintain an application under section 7 of the I&B Code, 2016, seeking initiation of CIR Process against the corporate debtor?.
- (ii) Whether the applicant herein has made out a case for initiation of Corporate Insolvency Resolution Process (CIRP) against the respondent/Corporate Debtor?

9. We have heard the learned counsels for both the sides. Perused the record and the case law.

POINT No.(i) :

Undoubtedly, the present application has been filed individually by one of the members of the consortium of lenders Viz, Punjab National Bank for initiation of CIRP against the respondent corporate debtor. The Corporate Debtor had raised an objection as regards the maintainability of the application contending that under law there shall be a common application by all the lenders as the I&B Code 2016 has not envisaged filing of application individually by each lender in





cases where there are more than one lender and in that view of the matter the present petition is not maintainable.

In order to answer this objection, we profitably rely on section 7(1) of the I&B Code, 2016, which is as follows:

"7. Initiation of corporate insolvency resolution process by financial creditor.

- (1) *A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*

Provided that for the financial creditors, referred to in clauses (a) and (b) of subsection (6A) of section 21, an application for initiation corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second provisos as the case may be within thirty days of the commencement of the said Act,



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failing which the application shall be deemed to be withdrawn before its admission.

Explanation. - For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor."

10. A bare perusal of the aforesaid provision makes it amply clear that a Financial Creditor either by itself or jointly with other Financial Creditors or any other person on behalf of the Financial Creditor as may be notified by the Central Government may file an application for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor when a default has occurred.

11. Therefore, we do not find any bar for the Financial Creditor to initiate proceedings individually despite being a Member of Consortium of Lenders. Hence the contention of the learned counsel for the Corporate Debtor that the application filed by individual Financial Creditor is not maintainable is devoid of any force or substance. Hence the same is liable to be rejected and accordingly the same is hereby rejected.

Point is answered accordingly.

POINT No. (ii) :

It is needless to say that in an application filed under section 7 of the I&B Code, 2016, this Tribunal is required to find whether or not a debt between the parties exists; and if so whether there is a default in discharge of the said debt by the Corporate Debtor. Here it may be stated that the debt referred supra, must be a debt enforceable by law.



13. Insofar as the case on hand is concerned, a perusal of the pleading discloses that the he Corporate Debtor has not disputed availing credit facilities as referred by the Financial Creditor in this application. In fact, the Corporate Debtor in categorical terms had admitted and acknowledged the liability under several of its letters, more particularly, under letter dated 15.03.2017, addressed to the Corporate Debtor (marked as Annexure-15), wherein it was stated as follows:

"Revival letter

Place: Hyderabad

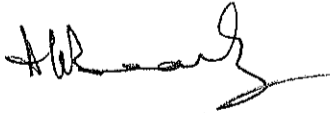
Date: 15th March 2017

To
Punjab National Bank (Lead Bank)
Tolstoy House, Tolstoy Marg
New Delhi.

Dear Sir,

We refer to the Working Capital loan consortium agreement dt.25th April 2014 entered into by us with YOU, as the Lead bank and the member Banks i.r.o. the Working Capital loan facilities granted to us and/ or agreed to be granted to us by YOU and the Member banks, hereinafter referred to as "the Bank Consortium" and the charge by way of hypothecation created by us on our current assets as mentioned therein to secure all sums standing at the foot of the Working Capital Loan account(s) or other account(s) with YOU and the Member Banks i.r.o. such facilities.

We do hereby confirm that all the security documents executed by us in favour of YOU and the Member Banks i.r.o. such facilities are subsisting, valid and effective and are fully enforceable against us.



We do hereby acknowledge for the purposes of section 18 of the Indian Limitation Act, 1963 and in order to preclude any question being raised on limitation regarding our liability to your bank and the Member Banks for the payment of the outstanding amounts i.r.o. the present as well as the future indebtedness and liabilities under the said Working Capital Loan account(s) or other account(s) together with interest, compound interest, additional interest, liquidated damages, costs, charges expenses and other moneys in terms of the said Working Capital Loan consortium agreement our liability shall remain in full force with all relative securities, agreements and obligations as mentioned therein.

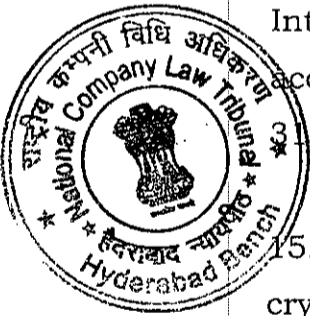
For Ind Barath Thermal Power Ltd.

Sd/-

Authorised Signatories'

14. That apart, the Corporate Debtor has not denied initiation of proceedings against the corporate debtor, both under the provisions of Securitisation and Reconstruction of Financial Assets C and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and also under Recovery of Debt and Bankruptcy Act, 1993 (RDB Act) by the Corporate Debtor for recovery of amounts defaulted by the Corporate Debtor. The undisputed demand notice dated 22.05.2018 [ANNEXURE A-17.] issued under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) by the applicant discloses that the account of the applicant has been duly classified as NPA on 11.03.2018.

15. Therefore, when admission of debt in this case being as clear as crystal and as the applicant by placing the undisputed demand notice dated 22.05.2018 issued under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security



Interest Act, 2002 (SARFAESI Act), has also established default on the part of the Corporate Debtor this application of the financial creditor has fully satisfied the requirements viz, existence of "debt" and "default" in repayment of the said debt on the part of the respondent corporate debtor, as such this application is liable to be admitted and initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor is bound to be ordered. We, therefore, accordingly allow this petition.

Point is answered accordingly.

16. Now we shall refer to the case law relied upon by the corporate debtor in this case.

- (i) State Bank of Travancore Vs. Kingston Computers India Private Limited, (2011) 11 SCC 524.

Suit filed by company – institution of, by unauthorised person – Held. Letter of authority issued by R was nothing but a scrap of paper as no resolution was passed by Board of Directors delegating its powers to R to authorise another person to file suit on behalf of company.

We find that on facts the above ruling is not applicable to the resent case.

- (ii) Uttam Industries Vs. Commissioner of Central Excise, Haryana, (2011) 11 SCC 528/

Held. To get benefit of notification granting exemption, claimant has to show that he satisfies eligibility criteria – appellants failed to bring any such evidence on record.

We find that on facts the above ruling is not applicable to the resent case



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(iii) Debasish Som Vs. Meenakshi Energy Limited & others. Order dated 13.10.2020 rendered by the Hon'ble Supreme Court of India in Civil Appeal No.3307 of 2020.

Since the above ruling focused on issuance of notice, we find that on facts the above ruling is not applicable to the present case.

(iv) India Power Corporation Ltd. Vs. Meenakshi Energy Ltd and others. Judgement dated 10.09.2020 rendered by the Hon'ble NCLAT in Company appeal (AT) (Insolvency) No.1220 of 2019 with Company appeal (AT) (Insolvency) No.1450 of 2019.

Held. The Financial Creditor has not filed the application under section 7 of I&B Code, in pursuance of the RBI Circular dated 12.02.2018 and even after invocation of the pledged shares by SBI CAP Trustee Company Ltd., the Financial Creditor can maintain the application. Learned AA has rightly admitted the application under section 7 of I&B Code. It is undisputed fact that the Corporate Debtor has committed default in repayment of debt and the amount of debt is more than 1 lakh.

Thus, we found no ground to interfere in these appeals. Thus, the appeals are hereby dismissed. No order as to costs.



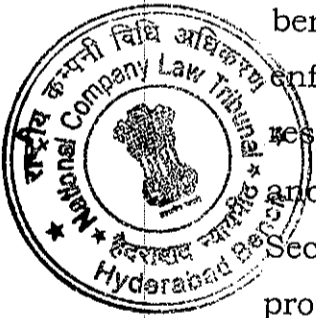
17. It is observed that Original Application [ANNEXURE-19] has been filed by the petitioner/ Financial Creditor along with other Consortium Members on **15.07.2019** before Debt Recovery Tribunal-II, New Delhi being OA No.623 of 2019 for recovery of

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Rs.1383,38,07,154.27, which is pending adjudication. Whereas, the present petition is filed on **23.10.2019**. Thus, there is a pre-existing proceeding pending adjudication.

18. In the light of our discussion as above and on considering the entire material placed before us, we hereby hold that this application is liable to be admitted, hence we accordingly admit this Petition under Section 7 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions:-

- (A) The respondent Corporate Debtor, M/s Ind Barath Thermal Power Ltd, is admitted into Corporate Insolvency Resolution Process under section 7 of the Insolvency & Bankruptcy Code, 2016.
- (B) The Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;
- (C) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.



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- (D) Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.
- (E) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (F) That the order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.
- (G) That the public announcement of the initiation of Corporate Insolvency Resolution Process shall be made immediately as prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.
- (H) That this Bench hereby appoints Shri Sreekakulam Vamsi Krishna having Registration No. IBBI/ IPA-001/ IP-P-02167/ 2020- 2021/ 13360, as Interim Resolution Professional, whose contact details are:

e-mail ID: srevak11@gmail.com



Address: 1-2-170/5, Rajamudhaliar Street
Besides Minerva Grand, Hyderabad – 500003.

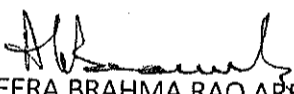
as Interim Resolution Professional to carry the functions as mentioned under the Insolvency & Bankruptcy Code.

19. Shri Sreekakulam Vamsi Krishna shall file Form-2 within three days.

20. Authorisation for Assignment of Shri Sreekakulam Vamsi Krishna is valid upto 14.06.2022. This information is available in IBBI Website. Thus, there is compliance of Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016, as amended. Therefore, the proposed IRP is fit to be appointed as IRP since the relevant provision is complied with.

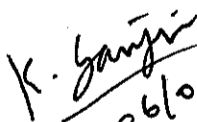
21. Registry of this Tribunal is directed to send a copy of this order to the Registrar of Companies, Hyderabad for marking appropriate remarks against the Corporate Debtor on website of Ministry of Corporate Affairs as being under CIRP.

2. Accordingly, this Petition is admitted.


VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)


DR. N.V. RAMAKRISHNA BADARINATH
MEMBER (JUDICIAL)

karim


06/01/2022

Deputy Registrar / Assistant Registrar / Court Officer
National Company Law Tribunal, Hyderabad Bench

प्रमाणित प्रति
CERTIFIED TRUE COPY
केस संख्या
CASE NUMBER... (P/IB) No. 745/7/HDB/2019.
निर्णय का तारीख
DATE OF JUDGEMENT... 30/12/2019
प्रति तैयार किया गया तारीख
COPY MADE READY ON... 6/1/2022

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OF THE ORIGINAL