

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**NEW DELHI****COMPANY APPEAL (AT)(INSOLVENCY) NO.270 OF 2019**

(Arising out of Judgement and order dated 26th February, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in C.P.(IB) No.974(PB) of 2018).

In the matter of:

Aditya Kumar Jajodia,
2nd Floor, WZ-K 173/4
Nangal Raya,
New Delhi-110046

Appellant

Versus

1. ICICI Bank UK PLC
One Thomas More Square
London E1W1YN
United Kingdom.

2. Aditya Estates Private Limited,
Through IRP
Alok Kailash Saksena,
1st Floor, Laxmi Building,
Sir P.M. Road,
For, Mumbai-400001.

Respondents

Present:

For Appellant: Mr. Rajeev Mehra and Mr. Rajiv Ranja, Senior Advocates with Mr. Saurabh Kohli and Mr. Harshil Agarwal, Advocates.

For 1st Respondent: Mr. Raju Ramachandran and Mr. Abhinav Vasishat, Senior Advocates with Ms Misha, Mr Shantanu Chaturvedi and Mr. Nikhil Mathur, Advocates.

For 2nd Respondent: Mr. Kunal Vajani, Mr. Paras Anand and Mr Varun Ahuja, Advocates.

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J**

The ICICI Bank UK PLC (hereinafter referred to “ICICI Bank UK”) filed an application under Section 7 of the Insolvency & Bankruptcy Code, 2016 (‘I&B Code’ in short) for initiation of ‘Corporate Insolvency Resolution Process’ against M/s Aditya Estates Private Limited (‘Corporate Debtor’). Claiming it a ‘Financial Creditor’ of M/s Aditya Estates Private Limited (‘Corporate Debtor’) on account of debt of US\$ 63 million granted by ICICI Bank UK (‘Financial Creditor’) to one M/s Assam Oil Company Ltd’, an overseas company. It was pleaded that in terms of ‘Debt Asset Swap Agreement’ dated 20th December, 2014, ‘the Aditya Estates Private Limited’ (‘Corporate Debtor’) defaulted to pay the debt.

2. The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi by impugned order dated 26th February, 2019 admitted the application against which the present appeal has been preferred.

3. Learned counsel appearing on behalf of the appellant (Shareholder of ‘Corporate Debtor’) submitted that ‘ICICI Bank UK PLC’ was claimed to be the ‘Financial Creditor’ has given a loan to M/s Assam Oil Company Limited, which is an overseas company, for which no guarantee has been given by M/s Aditya Estates Pvt Ltd (‘Corporate Debtor’) nor any property has been mortgaged or charge has been

created. Therefore, 'ICICI Bank UK PLC' cannot claim to be the 'Financial Creditor' of M/s Aditya Estates Private Limited ('Corporate Debtor').

4. It was submitted that pursuant to separate agreement 'ICICI Bank Ltd, India' has given loan of Rs.24.95 crores to one 'M/s Duncan Macneill Power India Ltd' for which corporate guarantee has been given by 'M/s Aditya Estates Pvt Ltd' ('Corporate Debtor') and mortgaged property to secure the loan of Rs.24.85 crores. According to Counsel for the appellant the aforesaid issue is not the subject matter of the application under Section 7 of the I&B Code filed by 1st respondent.

5. Learned counsel for the appellant submitted that the Adjudicating Authority failed to notice that Section 7 application can be filed by 'Financial Creditor' either by itself or jointly with other financial creditors. The default must be in respect of a financial debt owed by the 'Financial Creditor' and not any financial creditor. According to the counsel for appellant, in the present case, the application under Section 7 was filed by ICICI Bank UK PLC for the alleged loan granted to 'M/s Assam Oil Company Limited' in which the 'Corporate Debtor' is not the guarantor nor mortgaged any of its asset. Therefore, according to the learned counsel for appellant, ICICI Bank UK PLC is not 'Financial Creditor' qua M/s Aditya Estates Pvt Ltd ('Corporate Debtor') within the meaning of Section 5(7) r/w Section 5(8) of the I&B Code. Reliance has been placed on decision of this Appellate Tribunal in '**Nikhil Mehta & Sons Vs AMR Infrastructure Ltd.**

6. Learned counsel for the appellant submitted that there is no debt payable to 'ICICI Bank UK PLC' from 'Corporate Debtor'. For the purpose of default as defined in Section 3(12) of I&B Code, first there should be debt payable in terms of Section 3(11) of I&B Code. According to him default means non-payment of debt when whole or any part of instalment of amount of debt has become due and payable; in absence of which it cannot be pleaded that there is debt payable and there is default.

7. It was submitted that as per 'Debt Asset Swap Agreement' dated 20th December, 2014 the undertaking will come into picture only upon the sale of the property as contemplated under the 'Indian Facility with ICICI Bank (India)' and not otherwise. Both 'Debt Asset Swap Agreement' and the Undertaking were entered in terms of the 'Indian Facility Agreement' dated 17th November, 2014 of ICICI Bank Ltd (India) and not the ICICI Bank UK Facility. Neither 'ICICI Bank UK Facility' ('Financial Creditor') nor 'M/s Aditya Estates Pvt Ltd' ('Corporate Debtor') is a party to the 'Indian Facility Agreement' dated 17th November, 2014. Though the 'Corporate Debtor' did execute a 'Corporate Guarantee' and mortgaged its property but only limited to the Indian Facility/loan granted by ICICI Bank Ltd (India) to Duncan. Further, under 'Debt Asset Swap Agreement' dated 20th December, 2014, 'lender' has been defined as 'ICICI Bank Ltd (India)' only. The 'Indian Facility Agreement' dated 17th November, 2014 was entered into between ICICI Bank Ltd (India) and Duncan. The only connection which 'M/s Aditya Estates Pvt Ltd' had with the said Indian Facility, as

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a security to the Loan given to Duncan, had mortgaged its property in favour of ICICI Bank (India) under the loan facility. It is further stated that the 'Corporate Debtor' had already discharged its liability under the 'Indian Facility' and redeemed the property in terms of the order dated 23rd July, 2018 passed by the Debt Recovery Tribunal. In view of such discharge of liability under the 'Indian Facility' and redemption of the property of the 'Corporate Debtor', there is no question of the sale of property now.

8. It is brought to our notice that on an appeal filed by ICICI Bank (India), the Debt Recovery Appellate Tribunal vide its order dated 23rd January, 2019 remanded the matter to Debt Recovery Tribunal to calculate the dues of ICICI Bank (India). However, Hon'ble High Court of Delhi in WP(C) No.2960 of 2019 and WP(C)No.2962 of 2019 vide its order dated 26th March, 2019 has stayed the proceedings before the Debt Recovery Tribunal. The aforesaid issue has attained finality.

9. Learned counsel for the appellant placed reliance on Clause 5(2) of 'Debt Asset Swap Agreement' dated 20th December, 2014 which stipulates sale of the property can be made only for a price above the 'Reserve Price'. If the sale price of the Property is less than the 'Reserve Price'. then ICICI Bank UK Facility cannot be repaid and, therefore, according to appellant the 'Debt Asset Swap Agreement' is not and cannot be construed as a guarantee by the 'Corporate Debtor'.

10. Reliance was also placed Clause 2.1(g) of 'Debt Asset Swap Agreement' which provides for the proceeds of any sale, which is to be used for repaying or discharging the obligations of 'M/s Assam Oil

Company Ltd' towards ICICI Bank UK PLC, only after settling all statutory dues, repayment of the dues of others can be made. According to the counsel of the appellant if nothing is left after the payment of statutory dues and the outstanding under the ICICI Bank Indian Facility, ICICI Bank UK Facility will not be paid.

11. Though the aforesaid submission has been made, but from the record it appears that the matter is pending consideration before Debt Recovery Tribunal. Therefore, it cannot be said that total amount has been paid to 'Corporate Debtor' as per 'Indian Facility Agreement'.

12. Learned counsel for the appellant submitted that ICICI Bank UK PLC is treating the 'Corporate Debtor' as a guarantor and right of ICICI Bank (India), if any, to sell the property under 'Debt Asset Swap Agreement' has also expired and stood extinguished on payment and discharge of the claims made in respect of the Indian Facility. But such submission cannot be accepted as the issue is pending consideration before Debt Recovery Tribunal and the Hon'ble High Court as noticed above.

13. An amendment has been made in the 'Articles of Association' of the 'Corporate Debtor' in February, 2015 showing ICICI Bank UK PLC as lender ('Financial Creditor'). Learned counsel for the appellant submitted that ICICI Bank UK PLC cannot place reliance on the Articles of Association of the 'Corporate Debtor' to claim itself as a 'Financial Creditor', but such submission is not supported by any reasoning.

14. Learned counsel for the appellant also submitted that the claim is barred by limitation as ICICI Bank UK PLC had given loan and the

principal borrower 'M/s Assam Oil Company Ltd' has defaulted on 28th December, 2011.

15. Learned counsel appearing on behalf of 1st respondent ICICI Bank UK PLC Ltd submitted that the 1st Respondent granted a loan of US\$ 63 million to 'M/s Assam Oil Company Ltd', a UK based company under a 'Facility Agreement' dated 21st December, 2007. Simultaneously, 'M/s Aditya Estates Pvt Ltd', executed a 'Non-Disposal Agreement' dated 21st December, 2007 in respect of its property situated at 3, Bhagwan Das Road, New Delhi wherein it specifically undertook that the property of 'Corporate Debtor' shall not be disposed off until the ICICI Bank UK PLC is paid its full and final dues to the satisfaction of ICICI Bank UK PLC. Further, by way of an 'Escrow Agreement', the title deeds of the property of 'Corporate Debtor' were deposited by 'Corporate Debtor' with 'IDBI Trusteeship Services Limited'.

16. The 'Facility Agreement' dated 21st December, 2007 as brought on record shows that it has been entered into between 'M/s Assam Oil Company Ltd' and the Financial Creditor, for a total loan facility of US\$ 63 million. It was amended by 'Reinstatement Facility Agreement' dated 15th April, 2011. The relevant portion of the 'Facility Agreement' dated 21st December, 2007, as amended from time to time, and the Clause 25.1 of the said Agreement shows that 'M/s Aditya Estates Pvt Ltd' has been defined as 'Relevant Person'. As per said agreement 'Relevant Person' includes "an obligor, Quicknet, the issuer and 'M/s Aditya Estate Pvt Ltd' ('Corporate Person)". The Clause 25 deals with "Events

of Default” whereas Clause 25.1 relates to non-payment as quoted below:

“25. EVENTS OF DEFAULT

Each of the events or circumstances set out in this Clause 25 is an Event of Default (save for Clause 25.25 (Acceleration)).

25.1 Non-Payment

A Relevant Person does not pay on the due date any amount payable pursuant to a Transaction Document at the place at an in the currency in which it is expressed to be payable.”

Failure by the ‘Relevant Person’ which includes ‘Corporate Debtor’, to pay on the due date any amount payable by it in terms of the said agreement, is defined as a ‘Event of Default’. The aforesaid agreement was reached between ‘M/s Assam Oil Company Ltd’ and ‘ICICI Bank UK PLC’ and in it the ‘Corporate Debtor’ has been shown as ‘Relevant Person’ therein. This shows how the asset of the ‘Corporate Debtor’ has been made as an integral part of the ‘comfort arranged’ by ‘M/s Assam Oil Company Ltd’ for obtaining the loan from ICICI Bank UK PLC and the commercial understanding between the parties show that the Corporate Debtor is a party obliged to make payment of the amount outstanding to the UK Facility.

17. A separate loan facility was granted by 'ICICI Bank (India)' to 'M/s Duncan Macneill Power India Ltd'. Pursuant to which a sum of Rs.335 crores loan was sanctioned to 'M/s Duncan Macneill Power Ltd', a group entity of Corporate Debtor (Indian Facility). The same was secured by a separate and independent mortgage and guarantee executed by the Corporate Debtor to secure the repayment of the Indian Facility.

18. The execution of 'Debt Asset Swap Agreement' and 'Multi Party Undertaking' shows that in order to secure the repayment of both ICICI Bank Indian Facility and ICICI Bank UK Facility the Corporate Debtor executed 'Debt Asset Swap Agreement' dated 20th December, 2014 whereby 'Corporate Debtor' has agreed to repay the ICICI Bank Indian Facility and ICICI Bank UK Facility in terms of Clause 5 of 'Debt Asset Swap Agreement' or to sell the Property at a reserve price of at least the aggregate of the outstanding amounts under the ICICI Bank India and ICICI Bank UK PLC and utilise the proceeds of sale for repayment of the ICICI Bank Indian Facility and ICICI Bank UK Facility.

19. For proper appreciation it is desirable to quote Clause 5.1, 5.2 and 5.4 of 'Debt Asset Swap Agreement' which are as under:-

"5. SALE PROCESS

5.1 Upon the occurrence of an Event of Default under the Facility, the Lender shall issue a notice to all the Obligors to make payment for discharge of their obligations within 7 days of the notice.

5.2 On non-payment of the dues in full to the satisfaction of the Lender within 7 days of the Demand Notice issued under Clause 5.1, the Lender shall provide a notice to the Owner requesting to sell the immovable Property within (45) days of the Demand Notice or to clear(i) the outstanding amounts under the Facility and (ii) the outstanding amounts under the facility provided by ICICI UK Plc to Assam Oil Company Limited, a company incorporated in England (collectively the “Total Dues”). The Owner may sell the immovable Property only for a price above the Reserve Price.

Xxx

5.4 In case the Owner and/or the Attorney fail(s) to sell/auction the Immovable Property and/or deposit the sale proceeds of the Immovable Property for any reason whatsoever or repay the Total Dues within the timelines stipulated hereinabove, the Attorney shall provide a final notice of 7 days to the Owner to pay the Total Dues, failing which the Lender shall proceed to purchase the Immovable Property in accordance with Clause 5.6 herein.”

20. In addition to ICICI Bank India and Corporate Debtor, ICICI Bank UK PLC has been separately included in the ‘Debt Asset Swap

Agreement' as a confirming party. Though ICICI Bank UK PLC has not separately signed the 'Debt Asset Swap Agreement' inspite of that it is stated therein as a party, however, the same is immaterial as the 'Corporate Debtor' has undertaken obligation under the 'Debt Asset Swap Agreement' and ICICI Bank UK PLC being a beneficiary of the obligation undertaken by the Corporate Debtor and other parties under the said Agreement.

21. The subsequent 'Multi-Party Undertaking' dated 14th April, 2015 placed on record shows that it was executed in favour of both ICICI Bank India and ICICI Bank UK PLC by 'Corporate Debtor' re-asserting the rights in favour of ICICI Bank UK PLC to claim its outstanding dues qua 'M/s Assam Oil Company Ltd' from the proceed of the sale of the property owned by the 'Corporate Debtor'.

22. Clause 5.1 of the said Agreement, as quoted above created right in favour of ICICI Bank UK by the 'Corporate Debtor'. Therefore, it is clear that an unequivocal obligation has been undertaken by the 'Corporate Debtor' under the Agreement to repay the loans availed by 'M/s Assam Oil Company Ltd' from ICICI Bank UK PLC. The acknowledgement liability of financial debt by Corporate Debtor towards ICICI Bank UK PLC for 'M/s Assam Oil Company Ltd' is further fortified by the amendments made to its 'Articles of Association' by inserting Article 34(c) whereby it lists of Creditors ICICI Bank UK has been shown as lender, in relation to the debts owned by ICICI Bank UK from 'M/s Assam Oil Company Ltd'.

23. From the aforesaid facts and discussions as made above we find that ICICI Bank U.K. PLC has successfully made out a case that it is the 'Financial Creditor' of the 'Corporate Debtor' and the Adjudicating Authority has rightly admitted the application under Section 7 of I&B Code.

24. We find no merit in this appeal. It is accordingly dismissed. No order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice A.I.S. Cheema)
Member (Judicial)

(Kanthi Narahari)
Member (Technical)

New Delhi

Dated:5th September, 2019

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