

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
COURT - 2

ITEM No.301
CP(IB)/146(AHM)2023

Order under Section 7 IBC

IN THE MATTER OF:

ICICI Bank

.....Applicant

Vs

John Energy Limited

.....Respondent

Order delivered on: 16/05/2024

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)

Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

The petition has been disposed off by necessary orders. It is directed to the Registry, NCLT Ahmedabad to release the FD deposited in terms of Hon'ble NCLAT order by the Investor Alfa Alternatives Structured Credit Opportunities Fund (AASCOF) in favour of the investor AASCOF immediately.

-Sd-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-

CHITRA HANKARE
MEMBER (JUDICIAL)

**IN THE ADJUDICATING AUTHORITY
THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT - 2**

CP (IB) No. 146/ NCLT / AHM / 2023

(Application under Section 7 of the Insolvency & Bankruptcy Code, 2016)

ICICI Bank Limited

... Applicant/Financial Creditor

Versus

John Energy Limited

... Respondent/Corporate Debtor

MEMO OF PARTIES:

ICICI Bank Limited

ICICI Bank Tower, Near Chakli Circle,
Old Padra Road, Vadodara,
Gujarat – 390 007

...Applicant/Financial Creditor

Versus

John Energy Limited

Plot No. 220, GIDC Estate Mehsana,
Gujarat – 384 002

...Respondent/Corporate Debtor

Order pronounced on: 16.05.2024

Coram: Mrs. Chitra Hankare, Member(J)

Dr. Velamur G Venkata Chalapathy, Member(T)

Appearance:

For the Applicant

: Mr. Manish Bhatt, Sr. Adv. a.w Rohit
Gupta, Adv. & Mr. Mustafa Kachwala,
Adv. & Mr. Shantam Mandhyan, adv.

For the Respondent

: Mr. Navin Pahwa, Sr. Adv. a.w Ms.
Pragati Bansal, Adv. and Mr. Ravi

time to time). By creating a first charge by way of hypothecation in favour of the Financial Creditors as a continuing security, of the Rigs and those rigs which are proposed to be owned/acquired in the future, including machinery spares, tools and accessories, more particularly described in Schedule I of the Deed.

4. It is submitted that, according to the terms and conditions of the ECB Facility 1, the Corporate Debtor was to utilize part-proceeds of the ECB Facility 1 to purchase one National-1320 UE AC/SCR, 2000 HP oil rig ("Rig 9") from Dewanchand Ramsaran Industries Private Limited ("DRIPL"). However, since the Defendant failed to purchase the said rig in the year 2011, only USD 27.5 Million out of the ECB Facility 1 was disbursed to the Corporate Debtor and the unutilized portion of the ECB Facility 1 aggregating to USD 12.5 Million was cancelled by the Financial Creditor.
5. Later, the Financial Creditor granted the following Credit Facilities to the Corporate Debtor. These were secured under the individual Deed of Hypothecation executed by the Corporate Debtor in favour of the Financial Creditor:

a. ICICI Rupee Term Loan Facilities - RTL Facility 1 and RTL Facility 2

- Rupee term loan facility aggregating to Rs. 20,00,00,000/- (Rupees Twenty Crores only) ("RTL Facility 1"), granted in pursuance of Credit Arrangement Letter ("CAL 2") dated 10.01.2015 and Facility Agreement dated September February 16, 2015.
- Rupee term loan facility aggregating to Rs. 10,00,00,000/- (Rupees Ten Crores only) ("RTL Facility 2"), granted in pursuance of Credit Arrangement Letter ("CAL 3") dated 02.06.2015 and Facility Agreement dated September June 8, 2015.

b. ICICI External Commercial Borrowing Facilities - ECB Facility 1, ECB Facility 2 and ECB Facility 3

- External commercial borrowing facility aggregating to USD 11.0 million ("ECB Facility 2"), granted in pursuance of Credit Arrangement Letter ("CAL 4") dated 10.09.2015 and Facility Agreement dated 11.09.2015.

- External commercial borrowing facility aggregating to USD 11.0 million ("ECB Facility 3"), granted in pursuance of Credit Arrangement Letter ("CAL 5") dated 14.09.2016 and Facility Agreement dated 19.09.2016.

Since Rig 9 was not purchased in 2011 by the Corporate Debtor, it was later purchased in 2015 out of the proceeds of ECB Facility 2.

6. It is further submitted that, Mr. Mahesh Vyas, the Managing Director of Corporate Debtor, in his personal capacity executed "Shortfall Undertakings" dated 16.02.2015 and 08.06.2015, in favour of Financial Creditor, in order to make arrangements in case there occur any shortcomings in completing the project or working capital due to any circumstances. On the same date he also executed "Management Undertakings" in favour of Financial Creditor, to secure ICICI RTL Facility 1 and ICICI RTL Facility 2. The said undertakings were executed, whereby, it was stated that Mr. Vyas shall not accept any commission from the Corporate Debtor in any year unless the instalments of principal sum and interest and other moneys due to Financial Creditor under ICICI RTL Facilities have been paid or suitable provision for payment thereof has been made to the satisfaction of ICICI Bank.

7. Thereafter, it was noticed that under the ICICI RTL Facilities and ICICI ECB Facilities, the Corporate Debtors have consistently breached the terms and conditions. The Corporate Debtor failed to meet its repayment obligations towards the Financial Creditors with effect from 20.08.2018. As a result, the Corporate Debtor's Account was classified as Non-Performing Asset ("NPA") on 19.11.2018. Till this date, the Corporate Debtor has made a payment of USD 28.0 million towards the ECB Facilities and Rs.25,54,00,000/- (Rupees Twenty-Five Crores Forty Lakhs only) towards RTL Facilities. Further, the Corporate Debtor made payment of Rs. 16,24,00,000/- (Rupees Sixteen Crores Twenty-Four Lakhs only) towards ICICI RTL Facilities. It is submitted that on 31.08.2020, Corporate Debtor addressed a letter to the Financial Creditor acknowledging the principle liability of debt to be paid to the Financial Creditor to the tune of Rs. 232,00,00,000/- (Rupees Two Hundred Thirty-Two Crores).
8. It is submitted that the Corporate Debtor has failed in fulfilling its debt obligations under ICICI RTL Facilities and ICICI ECB Facilities and has defaulted to pay the outstanding dues of Rs. 34,35,16,918/- (Rupees Thirty-Four Crores Thirty-Five Lakhs Sixteen Thousand Nine Hundred Eighteen only) and USD 31.8

million respectively ("Outstanding Amounts") as on 03.09.2020. Accordingly, a recall notice was issued on 22.09.2020, to the Corporate Debtor to clear the Outstanding Amounts within 7 days, however, despite receipt of the said recall notice, the Corporate Debtor has neither replied to the Recall Notice nor cleared the Outstanding Amounts

9. Since the Corporate Debtor's account was declared as NPA, the lenders including Financial Creditor held various meetings to restructure of debt amount. However, the parties could not enter into a Restructuring of Debt and/or Inter Creditor Agreement. The Financial Debtor also observed that the actual revenue and operating profit generated by the Corporate Debtor has not been in line with the projections in the Financial Years 2022 and 2023. It is submitted that the Corporate Debtor also intended to settle the loans by way if a One Time Settlement Offer ("OTS Offer"). However, the Financial Creditor turned down the offer as the same was substantially lower than the realizable value of security available to the Bank as per the asset valuations conducted by GAA Associates and Kakode Associates in March 2023. Therefore, the Corporate debtor has failed and neglected to pay the outstanding amount

10. As per the applicant the date of NPA was Nov 19 2018 and date of acknowledgement of debt was on 31 August 2020 (Rs 232 crores) and issue of recall notice was on Sept 22,2020. There were some OTS offers from the Corporate Debtor on 17 Oct 2022 (Total plan of Rs 250 crores offered to 3 banks namely applicant(127 crores), Axis Bank Rs 82 crores, HDFC Bank Rs 41 crores. The bank made a conditional offer to accept the token offer subject to approval of higher authorities and also stated that inspite of revenue generation, sufficient earnings before interest and tax, the respondent was not remitting the interest and instalments due and payable.

11. Reply and objections of the Respondent:

a) The debt is a time barred debt under Sec 238 A of IBC and is filed to harass the respondent CD who is a solvent company otherwise has certain liquidity constraints but has offered a viable OTS and a new strategic investor(Alpha Alternatives Structured Credit Opportunities Fund (AASCOF) has already given funds as per orders of Hon'ble NCLAT on April 16, 2024 of Rs 253 crores as FD in favour of the Registrar of NCLT Ahmedabad which is kept in a separate account with SBI to pay the OTS amount to the applicant and Axis Bank. Further, the application is filed beyond 3 years of the debt due.

- b) The CD is one of the leading private Oil and Gas service provider catering to various entities in India (including PSU) and overseas and has ISO rating and accredited abroad. He is also the largest company in onshore drilling, work over and completion services, Natural Gas compression and conditioning services contractor in India and executed various projects to ONGC, OIL, GAIL, Cairn Vedanta etc and presently has an order book of Rs 900 crores. There are also various subsisting contracts and has more than 1600 full time employees and 10000 persons dependent on CD.
- c) He has availed various facilities through Joint Lending Forum from 5 financial institutions amounting to Rs.654.42 crores as on 20.1.2024 of which ICICI bank has an exposure of Rs 329.29 crores (50.3%) and Axis Bank has an exposure of Rs 186.89 crores (28.6%) with SBI being the lead bank with Rs 96.74 crores. HDFC bank which had moved an application under Sec 7 has exited after their application was rejected through an OTS. He has also stated that inspite of financial difficulty they have serviced the interest of SBI and Standard Chartered Bank till date. From the submissions those accounts are not NPAs.
- d) The Joint Lenders Forum had deliberated and conducted a Techno Economic Viability Report which opined that 90% of

the revenue of the respondent company is generated by operation of Oil drilling rigs and since there are no other major competitor it has long term viability if supported by appropriate debt restructuring scheme.

- e) Further the forensic audit of the respondent was conducted where no instances of wilful default or fraudulent transactions have been attributed, which was also discussed and recorded in the minutes of meeting of lenders held on July 12, 2023. Further during the recent period it has also settled the dues of Yes Bank, Kotak Mahindra Bank and also paid off the liabilities of HDFC Bank. He states that he has sincere intentions and offered a viable OTS to protect his company as on going concern.
- f) Further the valuation report conducted by lenders on 21 Feb 2022 gave a liquidation value on going concern to be Rs 503 crores and on stand alone basis at Rs 344 crores. The fair value of the CD is assessed at Rs 1104 crores. Due to bringing insolvency if allowed, this will have a material impact on subsisting contracts and erode its value and the interest of all stakeholders.
- g) The respondent has further stated that since the applicant was pressing for payment on an ongoing concern, he had offered an OTS amount of Rs 179 crores vide email dated

19.5.2023 as per the wish of the applicant, meanwhile the applicant without considering the same has preferred the present application for initiation of CIRP.

Observations on the submissions and document:

a) Date of initial loan agreement (External Commercial Borrowing):

Credit Arrangement letter dated June 24, 2011. Copy of ECB agreement Sept 10, 2011. Copy of hypothecation agreement dated Oct 4, 2011, Deed of hypothecation dated Sept 16, 2015.

ECB borrowing agreement (2) dated Sept 11, 2015, (3) dated Sept 19, 2016.

Credit Arrangement letter (2) dated Jan 10, 2015. Rupee Term Loan facility dated Feb 16, 2015, credit arrangement letter dated June 2, 2015 and Rupee Term loan facility dated June 8, 2015. Deed of hypothecated dated June 8, 2015 for ECB. The charges were registered on June 30, 2015 & Oct 18, 2023.

The CD also executed a shortfall & management undertaking dated Feb 16, 2015 through its MD and on June 15 2015.

Further, the CD has also registered mortgage in favour of creditor on Oct 18, 2015

Date of NPA: Nov 19, 2018

Amount of Debt: Rs 34.35 crores (Rupee Term Loan) and USD 31.8 million as on 3 Sept 2020. (No conversion of the USD

exposure given, loan stated to have been issued through Bahrain Branch).

Date of recall notice: Sept 22, 2020

Date of default as per applicant (to the notice) Sept 30, 2020.

Record of Default is filed with CIBIL.

- b) The applicant financial creditor had sanctioned a External Commercial Borrowing facility through its overseas branch (offshore unit) for sanction of USD 40 million initially on June 24, 2011. The CD also created a first charge on the properties. The stated sanction and facilities were subsequently pruned down. The applicant further sanctioned two Term Loans of Rs 20 and Rs 10 crores each in 2015. Further facilities under ECB was granted for USD 11 million each on Sept 10, 2015 and Sept 19, 2016 (enhancement and renewal of earlier facility). There were also certain shortfall undertaking made by the MD of the CD. The applicant states that the CD failed to meet its repayment obligations with effect from August 20, 2018 and was classified as NPA on Nov 19, 2018.
- c) The corporate debtor had made a payment of USD 28 million towards the ECB facilities and Rs 25.54 crores towards Rupee

Term Loan facilities till the account was declared NPA and made further payment of Rs 16.24 crores to the applicant after declaring as NPA till the filing of this application. The CD addressed a letter to the FC acknowledging the principle liability of debt of Rs 232 crores on August 31, 2020.

- d) There were 13 hearings in the matter before it was reserved for orders. The respondent sought time to get the OTS approved by the applicant, which he stated had been delayed due to completion of due diligence process and the new investor had stepped in. Moreover, the respondent also filed an appeal before Hon' ble Hon' ble NCLAT seeking intervention to enable them proceed with the OTS proposal submission. Hon' ble NCLAT in its order dated 18 March 2024 had in its operative part of judgment stated that “however, in the ends of justice, we are of the view that the Appellant and the investors as submitted before the Court may deposit the amount of Rs 167 crores along with interest @ 12% and Rs 87 crores plus 12% interest before the NCLT within 10 days as prayed by way of FDR in favor of Registrar NCLT”. The compliance to this order was made by the applicant.
- (e) In compliance of the order dated 18.3.2024 made by the Hon'ble National Company Law Appellate Tribunal, New

Delhi in Company Appeal (AT) (Ins) No.558-559 of 2024, the investor of Corporate Debtor i.e. Alpha Alternatives deposited a total sum of Rs. 253 Crores in Fixed Deposit Receipt (FDR) in favour of the Registrar, NCLT, Ahmedabad towards full and final settlement of the outstanding dues of the lenders in the following manner:- ii. ICICI Bank Limited: Rs. 167 Crores iii. Axis Bank Limited : Rs. 86 Crores.

In compliance of the order dated 18.3.2024, the Corporate Debtor also deposited an amount of Rs.13,17,76,666/- in FDR in favour of the Registrar, NCLT, Ahmedabad towards interest on delayed payment on the principal amount of the sanctioned OTS Amount. The funds shall be utilized as below:- i. ICICI Bank Limited Delay for 143 days @ 12% = Rs. 7,96,03,333/- ii. Axis Bank Limited Delay for 143 days @ 12% = Rs. 5,21,73,333/-. The act of deposit of above amounts by the investor/ Corporate Debtor makes it clear that the Corporate Debtor does not need resolution under the provisions of the IB Code as the Corporate Debtor is a solvent company.

- f) From the records, filing with the CIBIL it is observed the borrower is not a willful defaulter and is stated to be a

standard asset in other two Financial Creditors books of accounts. Even though there is no documentary evidence produced in this regard, taking in to consideration the quantum of debt, the securities charged available either as first charge or second charge to this lender and it was a multiple lending involving various other banks with various facilities, precipitating an insolvency when the company is solvent would lead to great financial loss to other lenders or operational creditors. From the submissions of the applicant, even though various proposals were put forth by the respondent, who also acknowledged the debt in August 31, 2020, there is no rejection letter from the applicant who had examined the proposal based on the merits of the matter except for stating that the value of charged property is more than the value of OTS offer made. The applicant has not stated the reasons why the offer was not considered by the top management(based on its power and limits) and whether the same was examined at the appropriate level to consider and allow, negotiate a better offer by either offering a scheme or accepting or modifying the scheme. While there is a default which existed as NPA in 2018, various

negotiations failed, but the CD is observed to have remained solvent and there has been no restructuring in case of multiple lender and stressed assets through the Joint Lenders Forum as per prudential norms prescribed (by all lenders) and an independent insolvency filed before this Tribunal, rejecting the OTS.

- g) The date of default mentioned in the application is Sept 20, 2020 (even though it is mentioned that it was NPA on Nov 19, 2018). The bank had not specified which of the accounts (facility) turned NPA on that date or whether the bank reckoned the account as recoverable for default only on Sept 20, 2020 since there were many restructurings offers and considerations. The borrower also extended the limitation of the facility (acknowledgment) for legal purposes on August 31, 2020. NPA date itself may not be the date of default as interest or principal instalment due and payable would have been reckoned for accounting and identified for the purpose of provisioning, but the due date of the debt did not fall for payment during the 10 A period. Date of NPA is confirmed in the filings before NeSL, however, it appears that date of NPA is Nov 19, 2018. The question is

whether the default occurred on that date or on Sept 20, 2020 and as the bank was still nursing the unit for a resolution/reschedulment of debt, the date of default could be reckoned as Sept 20, 2020. However, the law of limitation does not forbid filing of this application as the borrower had acknowledged the Debt on August 31, 2020. But the applicant has not produced any balance sheet of the CD acknowledging the Debt in Rupee and Foreign Currency terms which confirms individual exposure amongst banks. Further the bank's application states that a techno economic study report conducted based on the projections of the CD revealed that 90% of the debt to be viable subject to certain conditions by two independent valuers.

- h) It is observed from the detailed account statements produced by the applicant, the overseas Bahrain Branch which sanctioned the ECB facility does not reflect credit(repaysent transactions) since 2018, while the Rupee loans sanctioned show various credits till 2022-2023 (up to Jan 2023). The bank had not given any details of which are classified as NPA or the reckoned default on the total facility

as there are repayments confirmed also by the applicant and the instalments are due and payable till 2024.

- i) As regards the orders of this Tribunal dated 1 April 2024, in view of the multi finance availed from various banks, Hon'ble NCLAT hearings in the matter and the orders, directed the applicant to conduct a meeting with financial creditors and file a compliance affidavit as the intention was to give an opportunity for considering the views of other creditors and the OTS offer for which new investor offered the payment as per NCLAT order. However the applicant did not conduct any meeting (should have conducted meeting with all financial creditors) based on the order, further denied that the debt fell due on the 10 A period and stated that the account had turned NPA 5 years before. It is also observed that the maturity date is 23 2 2024 (Term Loan of ECB in overseas branch) and there has been default since 2018 on interest or principal and the account would have accordingly been reckoned as NPA which cannot be questioned as it is a provisioning norm as per regulatory prescription.

- j) The bank has not supplied any copies of the valuation reports to verify if its holdings were more than the OTS. However, the documents and title to the assets charged to the bank reveal that they have also ceded charge to other creditors, while having exclusive charge in certain cases. As per the charge created on 18 11 2011, the respondent has created a charge of over Rs 180 crores in favor of the applicant and most of these assets as per the document are fixed assets as the respondent (CD) is involved in various contracts with major PSUs in oil and natural gas and is acknowledged as a going concern, thereby sale of individual assets charged would not be possible unless it is resolved for the debt or taken to composite insolvency by all creditors. The balance sheet of the CD has not been provided on updated basis to ascertain the acknowledgment of debt as the respondent has questioned the maintainability due to delayed filing of this application.
- k) Judgments which are given in this regard by the applicant in support are:

E. S. Krishnamurthy & Ors. v. M/s Bharath Hi Tech Builders Pvt. Ltd., in Civil Appeal No. 3325 of 2020 – Date of Judgment: December 14, 2021, b) M. Suresh Kumar Reddy v. Canara Bank and Ors, in 2023 8 SCC 387 – Date of Judgment: May 11, 2023, c) State Bank of India v. Arvindra Electronics Pvt. Ltd., in 2023 1 SCC 540 – Date of Judgment: November 04, 2022, and d) Bijnor Urban Cooperative Bank Ltd., Bijnor & Ors v. Meenal Agarwal & Ors, in 2023 2 SCC 805 – Date of Judgment: December 15, 2021.

- 1) Further, most of the debt which has been shown as default are those lent from offshore entity of the applicant through ECB facility which becomes a cross border lending and repayment and compliance could be different matter as the exposure is in foreign currency. There are no adverse remarks on the company anywhere including the CIBIL report and there in compliance to certain regulatory standards. The Hon'ble NCLAT vide its order dated 21 March 2024 has permitted the debt ridden firm facing insolvency proceedings to deposit Rs 254 crore before the NCLT which has been complied with interest at 12% by

prospective investor but left it to NCLT to decide the matter further. Even though the company could be debt driven, the possibility of revival through a restructuring package has not been examined.

m) Further the following observations are important in deciding this application:

i) In the orders passed in the CPIB 02/2022 by Court I on 24 January 2023 by the NCLT in the Sec 7 application filed against the respondent CD by one of the creditors HDFC bank, the application was rejected. *When the application was moved, this applicant did not consent to moving an insolvency application.* However, the order mentions few important observations: “ We noted the facts and background of the Corporate Debtor. It is noted that HDFC bank is not the only financial creditor of the Corporate Debtor. Besides HDFC bank, ICICI Bank, Axis Bank, SBI, SCB and Krishkan Bank were also lenders of the Corporate Debtor. HDFC bank placed on record the minutes of JLF meeting dated 14.6.2022 to decide whether the debt can be restructured.....All the lenders showed their willingness to restructure the loans taking in to consideration the

bright prospect of Corporate Debtor of generating revenue in future from its operations”. The application was accordingly due to solvency of the Corporate Debtor dismissed. It underlines the fact that all the lenders agreed in favor of restructuring the advance. *Subsequent to this order, after the application was moved by the HDFC Bank before Hon’ble NCLAT, the OTS settlement was effected and it withdrew and there were two other creditors repaid under OTS by the applicant as per submission.*

ii) While contrasting this with the present application where the applicant had earlier agreed to restructure the advance, it is observed that the exercise was not done. This tribunal had passed an order dated 1 April 2024 on the applications filed by both this applicant and Axis Bank (CP/146/2023) directing the applicant to convene a meeting of financial creditors and accordingly file an affidavit (applicant). The meeting was conducted on 8th April 2024. The bank filed an affidavit in this regard on 16 April 2024. The directions of this tribunal was discussed. The meeting was attended by the applicant(ICICI Bank), Axis Bank (which has a major exposure due to

development of Guarantee and Standby Letter of Credits issued by the bank on default which are contingent liabilities crystallised in to a liability to be paid), SBI and Standard Chartered Bank including the Corporate Debtor. Certain agenda was discussed regarding regularisation of arrears and SBI appropriating all the accruals of the Corporate Debtor against non fund based limits after which the financial performance data of the Corporate Debtor was discussed. It is observed that the Corporate Debtor had good sales of Rs 326 crore during the year and EBITDA of approx Rs 66 crore till Dec 23. The Corporate Debtor had also paid off HDFC and Yes Bank. Further it is observed that SBI and Standard Chartered Bank stated that the account was not NPA at their end. Further on the OTS proposal which had lapsed, both Axis Bank and ICICI Bank sought a fresh proposal for resolution of the debt considering the recent development/growth in business. The Corporate Debtor stated that they do not have any other proposal as on date. From the deliberations in the latest meeting, it is observed that the issue of OTS as a modified proposal is still open for both the lenders. The

meeting did not discuss the orders of Hon'ble NCLAT and the compliance made by the Corporate Debtor.

iii) Further, the ECB liability was raised overseas, the applicant did not confirm if they are crystallised in to rupee debt in parent (applicant) bank balance sheet (normally if it turns as NPA) and if not this cross border exposure is to be repaid in USD on terms of the overseas branch lending norms, there are multiple lending by the banks with the assets raised by the Corporate Debtor under charge of one of the lenders with first charge, or second charge full details of which has not been provided. Guarantees of the other lenders have been invoked and there is yet to be a liability in rupee terms to be crystallised. The applicant has not converted the liability in to Rupee Liability of the debt if had been identified as NPA in parent book for the entire exposure and stated the amount due and payable in rupee terms in its application, even though the debt would be above the threshold limit for filing this application.

iv) While, we may not direct the applicant to accept or reject the OTS proposal, the solvency has been proved, the contracts are existing and from the minutes of the meeting

of financial creditors there is disagreement in proceeding with the default through insolvency process and the debt could have been restructured to ensure prudential norms are followed by all banks and CDs exposure recasted. The bank had ignored the directions of the Hon'ble NCLAT and placed before all lenders that the OTS amount was directed to be deposited with the NCLT Ahmedabad, especially when the lending discipline and proceedings in recovery of financial creditors where there are multiple lenders needs to be synchronised and action in consonance with all be taken to pursue this application. The respondent has also given a formal letter in writing on the proposal and as to whether the same was put up before the appropriate authority of the financial creditor to consider the OTS proposal, if the proposal was not in terms of its policy and in compliance with the directions of Hon'ble NCLAT. The banks statement that the fair value assessed was larger than the OTS proposal is not to be a consideration for accepting / rejecting the proposal. There have been observed delay due to decision in restructuring, coordinating with other creditors and also Covid 19 period

when Sec 10 A period had crept in for recovery. The bank also did not file the correct date of default and if was to fall under Sec 10 A as per the respondent, the bank could have given further reliefs if needed including time to consider the OTS proposal. A proposal from the Corporate Debtor which was considered, subsequently cannot be rejected as it expired within a short period for reason that there was delay in paying the amount as the applicant stated that he had to complete due diligence to find a new investor. Also since there was a Sec 7 application, there was delay in getting the new investor as per the respondent. The bank has to take in to consideration its decision based on the solvency, impact of moratorium on a going concern and solvent entity, where there is observed to be deviation in lending (multiple lenders without coordination) and borrower who has diverted the surplus funds through another two banks.

v) The main question is whether the applicant as a lender having an exposure in its off shore unit (USD liability) and the rupee liability confirm to the lenders discipline and due to multiple lending attempt to restructure the debt through

the Lenders Forum Arrangement to restructure the loans especially when the lead lender(as per reply of respondent SBI) has not preferred or did not agree with filing insolvency in the earlier matter of Sec 7 rejected. Consent has not been asked in filing this application. The applicant has not confirmed during submissions or in his application whether they had convened the meeting of the Joint Lenders Forum to proceed against insolvency, whether any interse agreement was signed in terms of resolution of stressed assets or it individually hold more than 75 % of the value of total outstandings (both fund and non fund limits) of the CD and 60% of the number of lenders, as the merits of the case on regulatory compliance could have ensured that the debt and default is admissible as no resolution was attempted. The applicant has not placed any document wherein its management has affirmed that this multiple banking exposure which has become a default confirms to the regulatory norms in filing insolvency on a if so solvent company. The main submission during arguments of the applicant was that the CD had offered better OTS to other lenders. When banks

function independently deviating from such norms, if any, then they have to examine a proposal if it is to be considered based on its board policy. The applicant also did not confirm if the same was in deviation of its board policy as there was an offer and acceptance but delay in execution of the OTS amount. Without considering the OTS which could have protected the solvency of the CD and or coming through a process where the debt restructuring has failed, the applicant has also not complied with our instructions to convene the meeting of financial creditors and revert back on the proposal, as the meeting was attending by only two of the lenders who had filed independent petitions against the CD.

vi) From the submissions and documents, the ECB exposure continues to be a default on the books of the offshore branch and the payment to be made will still be in USD and has not been confirmed whether has to be in to the domestic applicant's *exposure*, and hence comes under cross border exposure, whether if any regulatory requirements will be needed if goes through an insolvency process as sought. The applicant could have outsourced or

acted as agent, routed through the books overseas and if not should have given a clear rupee amount of debt on the amount lent through ECB as it has got the facility extended from overseas branch. Hence a requirement of a joint lenders approaching insolvency through appropriate regulatory guidelines would have been more appropriate with the affidavit clearly establishing its right to file this application as an individual lender eligible to do so, within the group of lenders. The lender has also not exercised his rights if any for recovery of assets charged to him through other course of law.

vii) Further, the applicant has not specified as to how the ECB exposure which is USD is or not a cross border exposure as it has not shown relevant rupee outstanding in its book issued as demand notice to the CD. This needs to be addressed in the application as to how the insolvency process will enable the debt due in the books of its off shore unit be paid which becomes a cross border exposure. The application is not signed by the overseas branch where the ECB is outstanding.

viii) The OTS proposal offered does seem to be conditional and does not confirm the entire debt. *We have also not been produced the latest balance sheets since serving the last demand notice to the CD.*

- n) The Hon'ble NCLAT in the case of Anita Jindal v. M/s. Jindal Buildtech Private Limited in Company Appeal (AT)(Ins) 512 of 2021

The Hon'ble Supreme Court in the case of Swiss Ribbons Pvt. Ltd. vs. Union of India & Ors., (2019) 4 SCC 17 has held that the primary focus of the legislation is to ensure revival and continuation of the Corporate Debtor and not simply the recovery of debt.

The law laid down by the Hon'ble Apex Court in Vidarbha Industries Power Ltd. (2022) 8 SCC 352 squarely applies to the facts of present case as the company is solvent otherwise, and has to be restructured within the process of regulatory frame work given to the creditors before triggering insolvency or the creditor has to pursue an independent exit route with the borrower.

- o) The CD has produced relevant documents to prove its solvency and two major creditors have not agreed to file

this insolvency petition and are treating the accounts as standard. Further there are adequate securities and valuation satisfactory to the amount of Debt and the OTS amount offered has been complied, reasons for delay clearly explained before this Tribunal.

- p) The Respondent has also raised a question on the limitation as the date of default and date of filing the application are not within the time period. Also the application is to be viewed from the angle of limitation as the documents do not clearly prove the date of default, the interest charge, continuation of documents to keep the debt alive under limitation period for filing a recovery notice including date of submission of this application within the period of limitation under Sec 238 A of IBC 2016. OTS offer by the respondent clearly is conditional *and if the applicant is to be given the comfort of extension of limitation* the entire debt has not been acknowledged as the relevant and continuous balance sheets of the CD has not been provided.

iii) Hence, based on the detailed submissions, appeals and facts observed during the hearings, we pass the following order:

ORDER

The applicaton CP(IB) No.146 of 2023 is rejected.

-Sd-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-

CHITRA HANKARE
MEMBER (JUDICIAL)