

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

C.A. 96 OF 2021

Under Section 242(4) of the Companies Act, 2013 and Rule 11 of the National Company Law Tribunal Rules, 2016

India Infrastructure Finance Company Limited,

5th Floor, Block-2, Plate A&B, NBCC Tower, East Kidwai Nagar, New Delhi 0110023

...Applicant

Vs.

Claims Management Advisor of IL&FS Limited

The IL&FS Financial Centre, Plot C-22, G Block, Bandra Kurla Complex, Bandra East, Mumbai – 400 051

...Respondent

In the matter of

C.P. No. 3638/MB/2018

Union of India

Petitioner

Vs.

Infrastructure Leasing & Financial Services Ltd & Ors.

Respondents

Order delivered on: 29.04.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice V.G. Bisht (Retd.)
Hon'ble Member (Judicial)

Appearances:

For the Applicant : Adv. Prakash Shinde
a/w Niyati Merchant i/b
MDP & Partners, Advocate

For the Respondent : Mr. Shwetank Nigam,
Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. The present Interlocutory Application is filed by the above-named Applicant seeking the following reliefs
 - a) That this Hon'ble Tribunal be pleased to hear the present Application ungently;
 - b) That this Hon'ble Tribunal be pleased to quash and set aside the decisions of the Respondent dt. 17.01.2020, whereby the Applicant's Proof of Claim dt. 20.06.2019 was partly rejected;
 - c) That this Hon'ble Tribunal be pleased to direct the Respondent to admit the Applicant's entire claim of Rs. 775,55,51,592/-;
 - d) For Costs;

2. Applicant herein is a Financial Creditor and has filed Application against one of the Group Companies of Infrastructure Leasing & Financial Services Limited namely IL&FS Transportation Networks Limited. Respondent herein is the Claims Management Advisor of IL&FS Limited.

2.1. It is submitted that *vide* a public announcement dt. 22.05.2019, the Respondent invited claims from the Creditors *inter alia* ITNL. In pursuance thereof, the Applicant submitted its proof of claim (Form C) on 20.06.2019, before the Respondent, when the Hon'ble National Company Law Appellate Tribunal appointed the Hon'ble Justice (Retd.) D.K. Jain, to supervise the operation of the 'Resolution Process' of the IL&FS and therefore, the Respondent invited the Creditors of the IL&FS to submit their claims and thus, above proof of claim **(in Form C to the tune of Rs. 775,55,51,592/-)** came to have been filed on 20.06.2019.

2.2. It is submitted that the Applicant had provided Financial Assistance to Four Special Purpose Vehicles of IL&FS namely (i) East Hyderabad Expressways Ltd.; (ii) Kiratpur Ner Chowk Expressways Ltd.; (iii) Khed Sinnar Expressways Ltd; and (iv) Barwa Adda Expressways Ltd. At the time of providing Financial Assistance to the abovementioned SPVs, ITNL executed Sponsor Undertaking/Promoter Support Agreement dt. 17.10.2007, 29.09.2014, 12.03.2016, 27.12.2016, respectively for each SPV and the total exposure of the

Applicant in the above SPV's was about Rs. 775,55,51,592/- (as on 15.10.2018).

- 2.3. It is further submitted that the provisions of the Sponsor Undertakings/Promoter Support Agreements clearly provide that in the event the above mentioned SPVs fail to meet their debt obligation(s), ITNL will be obligated to make payment towards such default; and since, all the Four SPVs have been defaulting in re-paying the Financial Assistance extended by the Applicant, the accounts of all the SPVs have been classified a Non-Performing Assets in the books of the Applicant.
- 2.4. Applicant states that the Sponsor Undertakings were delivered to the Applicant as Security for securing the loans and basis of which loans were sanctioned to the SPVs. It has been further averred that the undertakings given by ITNL are *akin* to a Contract of Guarantee and as the SPVs have been defaulting in repaying their dues, the Sponsor (i.e. ITNL), is obligated to repay the dues of the SPVs to the Applicant.
- 2.5. Applicant, however, states that *vide* an E-mail dt. 24.07.2019, the Respondent acknowledged the receipt of the Applicant's Proof of Claim; however, rejected the same on the grounds that the undertakings provided in the sponsor documents are with respect to funding of the project or the project company and that the undertakings are not the undertakings of ITNL to pay the lender in lieu of obligations of the borrower. Applicant herein once again requested the Respondent *vide* its letter dt. 26.07.2019, to admit their claim, contending that ITNL was the Sponsor to the four SPVs and therefore, legally obligated to re-

pay the debt obligations of the SPVs to the Applicant. However, Respondent its letter dt. 04.11.2019, once again reject the claim contending that the obligation of ITNL under the Sponsor Undertakings is towards the project and the borrower and not a direct obligation towards the lender i.e., the Applicant for repayment of the loans sanctioned to the SPVs.

2.6. Applicant further requested the Respondent to accept their claim against ITNL, stating that the contentions of the Respondent for rejecting the claims were not legally tenable in support of their claim, they have provided the relevant clauses in the Sponsor Undertakings a/w instances of defaults by ITNL in all the Four SPVs; however, Respondent vide E-mail dt. 17.01.2020, reiterated their stand that the obligations of ITNL under the Sponsor Undertakings are towards the projects and the borrower and not a direct obligation towards that Applicant in respect to (i) East Hyderabad Expressways Ltd.; (ii) Kiratpur Ner Chowk Expressways Ltd.; and (iii) Barwa Adda Expressways Ltd. However, in respect of dues pertaining to Khed Sinnar Expressways Ltd, Respondent accepted that the obligation to create Debt Service Reserve Account was upon ITNL; hence, the Respondent partially admitted the claim of the Applicant to the extent of Rs. 81.28 Crores as on 15.10.2019.

2.7. Applicant lastly states that the decision of the Respondent is incorrect, arbitrary and liable to be recalled as the same is unilaterally nullifying the valid and binding contracts executed between the Applicant and ITNL thereby rendering the

Appellant remediless to enforce its legal rights to recover the outstanding amounts due against concerned SPVs. Applicant also submits that Applicant being the Government of India Undertaking; rejection of their legitimate claims shall also cause loss to public money.

3. The Respondent has filed Affidavit in Reply stating that the Sponsor Undertaking/Promotor Support Agreement is not *akin* to the Contract Guarantee. Further, the stamp duty paid for such documents is merely for an undertaking and not for the Guarantee. The sponsor undertaking/promoter support agreement clearly stipulates that ITNL has not undertaken to pay the Applicant directly.

4. Heard the learned counsel for the both sides and perused the records.

4.1. We find from E-mail dt. 17.01.2020 from the Claim Management Advisor of ILFS addressed to the Applicant, the Claim Management Advisor had drawn attention to certain clauses under the Sponsor Undertakings in relation to BAEL, EHEL, KNECL, which reads as under:

(a) For BAEL –

Clause 7 – ITNL shall “arrange to provide all necessary support including funds, if required, to the Borrower, to meet its Financial Covenants”

Clause 8 – “any overrun in the project cost including IDC cost, over and above the Project Cost as per the base case business plan, shall be

arranged by the Sponsor Group in a manner acceptable to the Senior Lenders”.

(b) For EHEL –

Clause 5- ITNL undertakes to make suitable arrangements for Major Maintenance Requirements for the project, as required by the Concession Agreement.

(c) For KNCEL –

Clause f – in the event of any overrun in the Project Cost including interest during construction period, over and above the cost as per the base case business plan, such cost overrun shall be arranged by the Sponsors in a manner acceptable to the Senior Lenders.

Clause i – ITNL undertakes to provide/arrange all necessary support including funds, if required, to the Borrower to meet its Financial Covenants.

5. Further in case of Promotor support agreement dt. 12.02.2016 for KNCEL, the Applicant invited our attention to clause 3.6 and 12.3, which reads as under:

3.6 Shortfall Support: In the event of deficit in cash flows of the Borrower arising from non-collection / under-collection of toll (as per the Business Plan) from the Project during the tenure of the Loan and resulting in deficit for servicing the Debt Service Obligations (or any part thereof), the Promoter shall bring in additional funds by ways of subscription to the Equity Shares, subscription to the Preference Shares and/or in the form of Subordinated instruments for meeting Debt Service in terms of the Financing Documents to fund such shortfall (“Shortfall Support”).

12.3 The Promoter's liabilities and obligations under or pursuant to this Undertaking shall remain in force until the Final Settlement Date notwithstanding any act, omission, event, or circumstance whatsoever. Without prejudice to the generality of the foregoing, the Promoter's liability and the obligations contained in this Undertaking are absolute, unconditional, irrevocable and shall not be discharged, impaired or otherwise affected by:

(i) the winding up, insolvency, dissolution, administration or reorganization or any incapacity, disability or limitation of the Promoter or any other Person or any change in status, function, control or ownership of the Promoter”.

5.1. Clauses in all these Agreements makes ITNL to contribute additional funds to the respective projects in case of cost overrun or in case of failure respective SPVs to meet its financial obligations. The clauses in the agreement nowhere indicates that ITNL had any obligation to pay to the Applicant any sum of Money in default by the Project SPV in its obligation towards the Applicant. In the absence of any such obligation casted upon ITNL in favour of the Applicant, it cannot be said that these clauses in any manner can be constitute as contract of Guarantee extended by ITNL in favour of the Applicant. The claim has been defined in Section 3 (6) to mean

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or

not such right is reduced to judgment, fixed matured, unmatured, disputed, undisputed, secured or unsecured.

5.2. In the present case, it cannot be said that the Applicant had either any right to receive any payment from ITNL or right to remedy for breach of contract. Undisputedly, ITNL was obligated to contribute additional resources to project SPVs in case of cost of overrun or failure to meet obligations; but, there was no obligation to pay to the Applicant in case ITNL fails to honour its obligations Under the Agreement except to create Debt Service Reserve Account in respect of dues pertaining to KSEL. The Respondent has already accepted this obligation and partially admitted the claim of the Applicant to the extent of Rs. 81.28 Crores as on 15.10.2019.

5.3. In view of the above, we have no hesitation to say that there is no other obligation of ITNL towards the Applicant in relation to Financial Assistance to Four Special Purpose Vehicles of IL&FS namely (i) East Hyderabad Expressways Ltd.; (ii) Kiratpur Ner Chowk Expressways Ltd.; (iii) Khed Sinnar Expressways Ltd (except in relation to obligation towards creation of debt service reserve account which has already been dealt with); and (iv) Barwa Adda Expressways Ltd. Hence, no claim, other than claim in relation to creation of debt service reserve account in case of KSEL SPV is admissible and Claims Management Advisor has rightly admitted the claim in Part and rejected their remaining claim.

6. In view of the forgoing, Company Application bearing CA No. 96 of 2021, is disposed of as dismissed. No costs.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)