

THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH – I,
MUMBAI

CP 3638/241-242/MB/2018

CORAM : SHRI V.P. SINGH, MEMBER (J)
SHRI RAVIKUMAR DURAISAMY, MEMBER (T)

ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF THE NATIONAL
COMPANY LAW TRIBUNAL ON 03.12.2018

NAME OF THE PARTIES: UNION OF INDIA, MCA

v/s
INFRASTRUCTURE LEASING & FINANCIAL
SERVICES LTD. & ORS.

SECTIONS 241-242 OF THE COMPANIES ACT, 2013

ORDER

32. CP 3638/241-242/MB/2018

Diary No.3711/2018

Petitioner has filed this application for impleadment of Shri Vibhav Kapoor, Shri K. Ramachand, Shri R. C. Bawa, Shri Pradeep Puri, Shri S. Rengarajan and Shri Mukund Sapre as party Respondents in this case. The application has been filed on the basis that proposed Respondents exercised control over the Respondent No.1 and its group companies. All of them were at helm of affairs for more than 20-25 years in different capacities. The brief role and their position are also given in the application which shows that Shri Vaibhav Kapoor was the Chief Investment Officer of IL&FS Ltd, Chairman of IL&FS Employees Welfare Trust, Director and CoD Member of several group companies of IL&FS Limited; Shri K. Ramachand was the Managing Director of IL&FS Transportations Networks Pvt Ltd, Trustee of IL&FS Employees Welfare Trust, Director and CoD Member of several group companies of IL&FS Limited; Shri R. C. Bawa as the

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Managing Director of IL&FS Financial Services Limited and Trustee of IL&FS Employees Welfare Trust, Director and CoD Member of several group companies of IL&FS Limited; Shri Pradee Puri was the Director and CoD Member of ITNL; Shri S. Rengarajan was the Managing Director and Chief Executive Officer and CoD Member of IL&FS Securities Services Limited and Shri Mukund Sapre was the Executive Director of ITNL and Director and CoD Member of several group companies of IL&FS Limited.

It is contended by the Petitioner that the proposed Respondents were the decision makers and the controlling will and mind for most of the other group companies, explicitly at the subsidiary level or companies having substantial operations, and the IL&FS Employees Welfare Trust.

It is further stated that the proposed Respondents are necessary and proper parties to the present Petition. The presence of the proposed Respondents is necessary to render a complete and effective adjudication on the subject matter at hand.

In the circumstances, the Petitioner has requested that the proposed Respondents be impleaded as party Respondents in the case.

Ld. Counsel representing the proposed Respondents requested that time for filing reply. It is not needed to provide time for filing reply and give them opportunity of hearing before being impleaded in the case. The proposed Respondents have no locus at this stage before impleading them as party Respondents in the case.

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We have heard the argument of Shri Sanjay Shorey, Director (Legal & Prosecution) and perused the record. It appears that the proposed Respondents were holding Key Managerial Position for more than 20-25 years at helm of affairs in different capacities in IL&FS and its group companies and their impleadment as respondents in the case is necessary to render a complete and effective adjudication. Thus we at this moment allow the application for impleadment of the proposed Respondents, i.e. Shri Vaibhav Kapoor, Shri K. Ramachand, Shri R. C. Bawa, Shri Pradeep Puri, Shri S. Rengarajan and Shri Mukund Sapre with immediate effect and implead them as party respondents from Sr. No.313 to 318.

Application for impleadment is accordingly disposed of.

By order dated 31.10.2018, Petitioner was directed to implead all 348 group companies of IL&FS as party Respondents in the case. In compliance of our order, affidavit has been filed by the Petitioner wherein request has been made to implead proposed Respondent Nos. 1 to 301 as party Respondents in the case. IL&FS is already Respondent No.1, and the affidavit has been made in compliance of our order dated 31.10.2018.

This application complies with our earlier order DT. 31st Oct 2018, thus we allow the impleadment of the proposed Respondent Nos. 1 to 301 as party Respondents in the case. However, it is made clear that we have ordered for impleadment of 348 group companies of IL&FS, but the prayer has been made for impleading only 301 group companies.

Therefore the Petitioner is further directed to file detailed affidavit as to why remaining group companies of IL&FS have not been impleaded as Respondents, within 15 days from today.

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Application under Diary No.30457/2018 in the matter of
IL&FS

Application under Diary No.30457 of 2018 has been filed in relation to CP No.3638 of 2018 under Section 242(4), 246 read with Section 339 of the Companies Act, 2013 seeking certain relief against Respondent Nos.2, 3, 9 and newly added Respondent Nos.313 to 318, namely Shri Hari Sankaran, Arun K Saha, Ravi Ramaswami Parthasarthy, Vibhav Kapoor, K. Ramachandra, R. C. Bawa, Pradeep Puri, S. Rengarajan and Mukund Sapre.

Interim Relief has been sought relating to the disclosure of certain moveable and immovable properties/assets of the Respondents and restraining them from mortgaging or creating charge or lien on third party interest or in anyway alienating, the movable or immovable properties owned by them, including jointly held properties

Petitioner has sought other relief which are mentioned under Clause (a) to clause (h) of Para 8 of the Application.

Petitioner has stated that interim investigation report of the S.F.I.O. reveals that Respondent No.1, IL&FS and its main subsidiaries had the same set of persons as the controlling officials who have been at the helm of the affairs for a long period. As part of the governance structure, the Board of Directors of all key IL&FS group companies had constituted Committee of Directors (CoD) which was empowered to take decisions about the operations of that respective entity. The Committee of Directors of significant subsidiaries comprised of Managing Director, Joint Managing Director and Executive Directors of the Respondent No.1 to deal with all operational matters, including credits and investments. The Committee was responsible to deal with all on-going ordinary course of business, for the smooth conduct of

the business. It is stated that Shri Ravi Parthasarthy, Shri Hari Sankaran, Shri ArunSaha, ShriVibhav Kapoor, Shri K. Ramachandra, Shri R.C. Bawa, Shri Pradeep Puri, Shri S. Rengarajan and Shri Mukund Sapre were in helm affairs of the company for a long period. The Respondents from the above set of officials of the holding company were the decision makers and 'the controlling will and mind' for most of the other group companies, especially at the direct subsidiary level or companies having substantial operations, and the IL&FS Employees Welfare Trust (EWT). The other group companies of R-1 practically acted as departments of their respective holding companies, rather than functioning as separate legal/business entities. The interest of the holding companies were held supreme, many a times at the cost of their subsidiaries/JVs/Associates. Further Respondent No.1 and its group companies were tightly controlled by Shri Ravi Parthasarathy, who acted as the Chairman/Managing Director/CMD of IL&FS Ltd from 1989 to 2018 and was on the Board of the key group companies – IL&FS Financial Services Limited, IL&FS Transportation Networks Limited, IL&FS Energy Development Company Limited.

It is further contented that the intent was to show profitable financials at the holding company and at immediate subsidiary levels by hiding depleted financial conditions, in order to avoid breach of regulatory ceiling of leverage, obtain high credit ratings to access market funds, and reap personal benefits by way of high managerial remunerations, thereby avoiding falling within the ceiling on remuneration as laid down under the Companies Act, 1956/2013. That the investigation findings reveals had there been proper due diligence by the lenders, creditors, or the independent directors of the Respondent No.1 in the capacity of approving the financial statements in the audit committees, decorated coloured financial statements

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representing pink health and northward profits could have been detected at the infancy stage.

It is further alleged that on investigation, it is evident that Respondent No.1 procured funds from the market through short term instruments and invested in its group companies by way of giving Long Term loans and advances, which was prejudicial to the interest of the Respondent No.1 regarding financial solvency. During these distressed times, Respondent No.1 and its key subsidiaries such as IFIN, ITNL were contained to raise short term market funding through commercial papers/inter corporate deposits based on its bogus and fictitious, but good credit rating and these short term loans were passed to its project SPVs/group companies, for helping them service their debt obligations, management being fully aware, thereby hid and avoided possible defaults resulting into increasing indebtedness on a standalone basis. This was virtually an act of fraud, causing indebtedness of Respondent No.1 to over Rs.91,000 crores. This indebtedness is deliberate, wilful, fraudulent act of directors, who were controlling the affairs of Respondent No.1, with intention to defraud creditors, who too had failed in their due diligence. As increasing level of indebtedness of Respondent No1, year after year was sufficient red flag for the creditors to prevent further loans and advances. Such discriminatory acts of lenders have provided long rope to the respondent directors in control of affairs to put Respondent No.1 into coma.

It is further contended that the Indenture of Trust has been amended six times till date, incorporating several additions and amendments to the initial Indenture to Trust dated 23.8.1990 and for the 4th, 5th and 6th Supplemental Indenture, no Board Resolution was passed. It is alleged that the above mentioned three amendments were carried out without any approval of the Board of Directors of

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Respondent No.1, the settlor of the Trust. This indicates that the intention of the Trustees of EWT, who happened to be the directors of Respondent No.1 and its group companies were to fraudulently benefit themselves.

It is contended that the trustees were duty bound by the decision of the Board of Directors of Respondent No.1 or any committee constituted by the Board in this regard for distribution of the trust investments/ sale proceeds of Trust investments. However, except for profits realised by EWT on sale of Respondent No.1 shares to ADIA, which was referred to compensation committee, no other distribution was referred to Board of Directors of the Respondent No.1 or the Committee of the Board constituted for this purpose. In the interim report, it is stated that it is clear that all the distributions made by the EWT were fraudulent to enrich few employees/managerial personnel. It is clear that the Trustee and directors of the Respondent No.1 Group who happened to be the set of persons acted for their benefit and compromised the business interest of Respondent No.1 Group with intent to defraud creditors and company.

In the interim report of SFIO, it has been found that EWT had distributed approx.. 31 lakhs shares of Respondent No.1 to select employees/managerial personnel under "ESOP Scheme". As per the resolution passed in the AGM of IL&FS, shares were allotted by the company to the Employees Welfare Trust in three tranches for the welfare of the employees. The said resolution had no reference to onward sale to employees under ESOP Scheme. In the interim report, there are several other findings against the then Managing committee who were at the helm of the affairs of IL&FS and its group companies for a long period.

By interim report of the S.F.I.O., the Central Government has moved this application seeking certain interim relief against the persons, who were managing the affairs of the company before the Board of Directors were suspended, and new Board of Directors were substituted.

Ld. Counsel appearing on behalf of R2, R3, and newly added Respondent Nos. 313 and 317, made a request that before passing any order, time be given for filing reply and after giving them opportunity, then only order should be passed. They have also opposed for passing the ad-interim order.

It is further alleged by some of the Respondents that copy of the application was not served to them in advance and only in the morning they were served notice by email and therefore, they need time for filing detailed parawise reply.

Director (Legal and Prosecution) of behalf of Union of India, MCA submitted that if the time is given to the Respondents for making reply, the assets will be alienated and application will become infructuous.

Petitioner has relied upon judgements passed by Hon'ble High Court of Delhi in the case of Padmini Technology Limited vs. Union of India wherein ex parte stay was granted wherein the company and its officers were restrained from encumbering, selling, transferring, alienating, creating any third party rights.

Director (Legal and Prosecution) has further relied on the order passed by the then CLB in Satyam Computer case, wherein ex parte stay was granted.

It is further contended by the Director (L&P) that in case of Gitanjali Gems Ltd, ex parte stay was granted by this Bench. It is further stated that order passed in Gitanjali Gems was challenged before the Hon'ble NCLAT and Hon'ble NCLAT has confirmed that order with certain modifications in the order passed by NCLT, Mumbai Bench. It is further contended that in the case of Ridhi Sidhi Infraprojects Pvt Ltd, NCLT, Jaipur Bench has passed ex parte stay. Director (L&P) has also relied upon the order passed in the case of Chitra Sharma & Ors. Vs. Union of India, wherein Hon'ble Supreme Court of India has passed an order against the independent directors and has restrained the independent directors of the company from alienating their personal properties and assets in any manner. It is further contended that in the above mentioned case, Hon'ble Supreme Court has also restrained transfer of properties of the dependent family members of the Independent directors/promoters of the company.

We have heard the argument of both the parties and perused the record. It is clear that SFIO's interim report was submitted on 30.11.2018 and after that, today is the next working day, when Union of India has filed this application. It has been contended by the Petitioner that notice through email was served on the Respondents today in the morning before moving the application.

It is pertinent to mention that IL&FS and its group companies have defaulted to the tune of about Rs.91,000 crores and on the application of the Central Government, the then Board of Directors was suspended, and the nominee directors were appointed to take over the management of the R1 company. SFIO is also investigating the matter, and only interim report has been filed till date. The Director (L&P) has stated that there are certain investigation reports

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which they are not producing at this stage because they may hamper the investigation.

Keeping in view the submissions and given the circumstances, we are relying upon the interim report of SFIO, and we at this moment pass the interim order and directing the Respondent Nos. 2, 3, 9 and 313 to 318 (namely S/Shri Hari Sankaran, Arun K Saha, Ravi Ramaswami Parthasarthy, Vibhav Kapoor, K. Ramachandra, R. C. Bawa, Pradeep Puri, S. Rengarajan and Mukund Sapre, to disclose their moveable and immovable properties/assets, including bank accounts, lockers owned by them in India or anywhere in the world, including jointly held properties.

Further direction is being issued against the above mentioned Respondent Nos. 2, 3, 9 and 313 to 318 restraining them from mortgaging or creating charge or lien or creating third party interest or in any way alienating, the movable or immovable properties owned by them, including jointly held properties.

The above mentioned Respondents are further restrained from dealing with the securities in any company till the next date of hearing.

The Ld. Counsel appearing on behalf of the R313 and R317 contended that copy of the Main Petition has not been served and Impleadment Application has also not been served on them. It is to be clarified that before impleadment, it is not necessary to serve the copy on the proposed respondents. The person has a right to defend himself, only after impleadment.

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Ld. Counsel appearing on behalf of the above respondents requested that the documents which have been relied upon by the Petitioner, i.e. the amendments in Trust Deed, Resolution passed by the Board of Directors, Committee of Directors should be supplied to them. Prayer is allowed. The above documents may be served by the Petitioner upon Respondents within one week from today.

Reply may be filed within three weeks from today with a copy in advance to the opposite party, after that, rejoinder, if any may be filed within two weeks.

List on 16.1.2019 for hearing.

Sd/-

RAVIKUMAR DURAISAMY
Member (Technical)

Sd/-

V. P. SINGH
Member (Judicial)