

(2023) 01 NCLT CK 0018

National Company Law Tribunal, Mumbai Bench, Court IV

Case No: CP (IB) No.1184 Of MB IV/2020

IL&FS Financial Services Ltd.Vs
M/s. Avance Technologies
Limited

APPELLANT

Vs

RESPONDENT

Date of Decision: Jan. 5, 2023

Acts Referred:

- Insolvency and Bankruptcy Code, 2016 - Section 7, 7(5)(a), 9(2), 9(5)(a)

Hon'ble Judges: Kishore Vemulapalli, Member (J); Shyam Babu Gautam, Member (T)

Bench: Division Bench

Advocate: Mustafa Doctor, Rashid Boatwala, Samiksha Rajput, Amir Arsiwala, Yash Jariwala, Tanushree Sogani, Atishay Jain

Final Decision: Dismissed

Judgement

,

Avance Technologies Limited,31-07-20

Particulars,Total Rs.

Principal (Term Loan),"1,50,00,00,000

S Drs Interest,"37,57,80,823

S Drs Penal Interest,"3,77,26,024

S Drs Delayed Payment Interest,"5,27,48,155

S Drs Penal Interest (Security Shortfall/Documents Deficiency),"5,34,24,652

Total O/s (Principal + Interest + Penal + DPI),"2,01,96,79,654

TDS Certificate o/s,"45,36,986

Net Receivable (Payable) Inclusive of TDS Amt., "2,02,42,16,640

Interest Accrued but not due,

to ITNL vide a Novation Agreement dated 07.09.2018 and thereafter further re-assigning the loan to Srinagar Sonamarg Tunnelway Limited (â€œSSTLâ€) vide,

Novation agreement dated 22.09.2018 and the loan was secured by the current assets and receivable of SSTL. The said charge was also registered with the office of,

Registrar of Companies, Mumbai vide e-form no. CHG â€" 1. ITNL being the guarantor had again issued an awareness letter dated 22.09.2018 to the Corporate Debtor",

wherein it undertakes to repay the loan in case SSTL defaulted in repayment of the loan along with the interests and other costs.,

i. The Corporate Debtor filed its claims against MP Border, SSTL and ITNL (since ITNL being the guarantor and had also issued the Awareness Letter to repay the",

loan in case the MP Border as well as SSTL) and while the claims were sought for the period up to 15.10.2018, however, the Corporate Debtor had filed its claims for",

the period up to May 01, 2019.",

j. The Financial Creditor with devious and deceitful intentions had again issued another demand notice dated 29.05.2019 re-calling upon the Corporate Debtor to,

release the overdue amount along with interest, charges, penalties, etc., and furthermore, on 21.08.2020 the Corporate Debtor was served with a copy of the Petition",

filed by Financial Creditor for seeking initiation of Corporate Insolvency Resolution Process with respect to the Corporate Debtor.,

k. The Corporate Debtor in response to the said demand notice, had sent a letter dated 12.10.2020 stating that there is an interim order dated 15.10.2018 passed by",

Honâ€™ble National Company Law Appellate Tribunal, at New Delhi (â€œNCLATâ€) which restricts actions or proceedings by all creditors against IL&FS group",

companies/entities (including SSTL). It was stated that the Honâ€™ble NCLAT vide its order dated 12.03.2020 has also approved the resolution framework relating to,

the IL&FS group companies and further stated that there has been substantial progress with regard to arriving at a settlement between the parties.,

l. The IL&FS group falsely represented the Corporate Debtor about its overall financial health at the time of entering into the financial arrangement. Shortly after,

entering into the financial arrangement the irregularities in the functioning of IL&FS group companies came to light which proves that the IL&FS group lured the, Corporate Debtor to enter into a financial arrangement with a mala-fide intention to defraud the Corporate Debtor as on the one hand it is itself defaulting on, repayment of loans and on the other hand it is taking steps against the Corporate Debtor.,

m. It is imperative to mention that at the time of entering into the above-mentioned transaction, it was a public news that the Corporate Debtor was a part of the list", released by the Ministry of Corporate Affairs & SEBI of suspected shell companies and this news had also been published on moneycontrol.com (one of the leading, news websites in India). However, being aware of this news, the Financial Creditor transferred an amount of Rs. 150,00,00,000/- to the Corporate Debtor coupled with", the fact that the Respondent was used as a pass-through entity to divert funds to ITNL which clearly demonstrates that the said facility was not genuine and cannot, be considered as a financial debt.,

n. It is clear through the conduct of the Financial Creditor that it is a case of well strategized and calculated method of extorting money from the Corporate Debtor and,

furthermore, the conduct of the Financial Creditor from the beginning has been such that the Financial Creditor has been producing and disclosing the material facts",

that are favourable to its case and sliding the facts, information and documents that would bring in the actual fact of the matter in light. It is pertinent to mention that",

while the Corporate Debtor has to take money from IL&FS group company which is seeking refuge under the moratorium and on the other hand other IL&FS group,

company is seeking money from Financial Creditor, given this situation any invocation of Section 7 of Code would be against the provisions of law.",

6. The Financial Creditor made a response to the defense taken by the Corporate Debtor and submits that it is totally misconceived and is belied by,

the facts and the law for the reasons set out below: -,

a. The Corporate Debtor submits that an identical defence was taken in number of suits filed before the Honâ€™ble Bombay High Court and the same has been, rejected by the following judgments: -,

i. ILFS Financial Services Vs. SKIL Infrastructure Limited & Others,

- ii. Wavell Investments Pvt. Ltd. Vs. IL&FS Financial Services Limited.,
 - iii. IL&FS Financial Services Limited Vs. ARM Telecom Services Limited & Ors.,
7. The Corporate Debtor on the directions of this Bench filed written submissions.,

Findings: -,

8. We have prudently heard the Ld. Counsel for both sides and perused the materials available on records.,

9. Ld. Counsel for the Financial Creditor submits that the Corporate Debtor approached for grant/sanction of Term Loan facility of Rs.150 Crores.,

Vide offer letter dated 27.03.2018, the Financial Creditor sanctioned the Term Loan facility to the tune of Rs.150 Crores. To secure the credit",

facilities, the Corporate Debtor executed various loan and security documents i.e. Loan Agreement, Deed of Hypothecation. The Corporate Debtor",

failed to repay the said Term Loan. The Financial Creditor issued recall letter on 26.10.2018 thereby demanding and recalling for outstanding dues.,

10. The Corporate Debtor submits that this Company Petition is liable be dismissed on following grounds: -,

i. That no financial debt exists;,

ii. That there has been no default;,

iii. That the present case is not a fit case for admission;,

11. The Corporate Debtor submits that a transaction shows that the Corporate Debtor had not availed of any financial facility nor was any amount,

disbursed to it against the time value of money. The real transaction can be summarised as below;,

i. IL&FS has a requirement to fund the operations of IL&FS Group entities; specifically, ITNL and its subsidiaries. However, it could not do so itself.",

ii. Thus, IL&FS Group through IFIN transfers a sum of Rs. 150,00,00,000/- to the Respondent. The amount is stated to be a loan bearing interest @ 12% p.a.",

iii. The Corporate Debtor immediately transfers the amount to ITNL under a loan agreement stipulating interest payable at 13.35% p.a.,

iv. The Corporate Debtor effectively is only transferring the funds received from IFIN to ITNL on a back-to-back basis. The Respondent did not avail of any,

financial facility itself and the disbursement was also effectively from IL&FS Group to its own entities.,

v. The Corporate Debtor may recover the amount from ITNL and thereafter transfer the funds back to IFIN, if demanded.",

vi. The Corporate Debtor only received compensation in the form of 1.35% p.a. interest spread, being the difference in the interest payable by ITNL entities and", that payable to IFIN.,

12. The Corporate Debtor further submits that from the above transactions, it is clear that the Corporate Debtor is actually only a service provider or",

facilitator who agreed to help the IL&FS Group transfer its funds within the group structure, in return for which it was entitled to 1.35% of the amount",

as "œcommission"œ. Notably, 1.35% of the amount of Rs. 150,00,00,000/- amounts to Rs. 2,02,50,000/- which the Corporate Debtor has not been",

able to recover. It is repeated and reiterated that IFIN has not disbursed any amount to the Corporate Debtor against the consideration for the time,

value of money. The documents on record including the Awareness Letter make it clear that the transaction was meant to be within the IL&FS Group,

itself. It was never the intention of any of the parties that the Corporate Debtor would be independently liable to pay any amount to IFIN before,

recovering the amount from ITNL. The transaction is not one which "œhas the commercial effect of a borrowing"œ for the simple reason that the,

Corporate Debtor did not avail of any loan from IFIN for its own purposes but only for the purpose of acting as a facilitator for the funds to be,

advanced to the IL&FS Group entities.,

13. The Corporate Debtor has been defrauded by the IL&FS group by falsely portraying that its financial position was in good standing and lured the,

Corporate Debtor into this transaction. Pertinently, immediately after entering into this arrangement, the IL&FS group companies started defaulting on",

their obligations and the news surfaced of IL&FS group going bankrupt. Under the garb of financial arrangement, the IL&FS group have already",

taken funds from the Corporate Debtor and are now making false and malicious claims against the Corporate Debtor solely with an intention of,

defrauding the Corporate Debtor.,

14. To prove the above contentions, it is imperative for this Hon"œble Tribunal to note that ITNL being the guarantor issued the above-mentioned",

awareness letter to the Respondent wherein it undertakes to repay the loan given to MP Border in case of any default.,

15. The Corporate Debtor further submits that arrangement between the parties was really a transaction between IL&FS Group entities inter se. Until,

the Board of Directors of IL&FS was superseded on 01.10.2018, IFIN had not taken any steps for recovery of the amount claimed by it, while the",

Corporate Debtor had already issue notices to MP Border and SSTL. This is because the arrangement between the parties was always that the,

Corporate Debtor would only make payment to IFIN (after deducting its spread) after it received the payment from the ITNL entities.,

16. The Corporate Debtor further submits that from the documents and material on record make it clear that the Corporate Debtor has made out a,

genuine and more than prima facie case that it has not committed any default of an obligation towards IFIN and that it is actually the IL&FS Group,

which has committed a default by not making payment to the Corporate Debtor. It is also important to note that the IL&FS Group has admitted this,

default as the claims of the Corporate Debtor against MP Border, SSTL and ITNL have all been admitted. In fact, ITNL vide letter dated 07-10-2022",

apprised the Corporate Debtor that its claim has been admitted and updated up to 31-12-2021 by the Claim Management Advisor appointed by the,

board of IL&FS. It was further informed that once ITNL will have requisite approvals, it shall proceed with the drafting of settlement agreement and",

furthermore, the distribution of the proceeds amongst the creditors.",

17. It is established beyond doubt that the lender and the ultimate borrower are the entities belonging to the IL&FS group. Pursuant to the directions,

passed by Hon'ble National Company Law Appellate Tribunal, at New Delhi for restructuring the IL & FS group, all the entities belonging to the",

group are treated as a single entity and not restructured separately. However, in the present matter the Financial Creditor is treating this one leg of",

transaction in isolation as against the complete transaction where the lender and borrower are both IL&FS group. In light of the facts of the case the,

claim of the Petitioner should be set-off between the IL&FS group companies.,

18. The principle set out above applies squarely to the present case. The ability of the Respondent to recover due amounts from ITNL and ITNL,

entities is restricted due to the moratorium imposed by the NCLAT in unconnected proceedings. Since the Respondent cannot receive the amount, from ITNL, MP Border and SSTL, there is no question of it being required to make payment of the amount to IFIN. Therefore, in light of the serious", dispute relating to whether any default has been committed, the present case is not a fit case for initiating CIRP."

19. The Corporate Debtor also relied on the letter dated 07.10.2022. Copy of letter dated 07.10.2022 is extracted hereinbelow: -,

20. The Corporate Debtor further submits that this is a fit case for applying the law laid down by the Honâ€™ble Supreme Court in the case,

Vidharbha Industries Power Limited Vs. Axis Bank Limited (2022) 8 SCC 352,

76. The fact that the legislature used â€œmayâ€ in Section 7(5)(a) IBC but a different word, that is, â€œshallâ€ in the otherwise almost identical provision of",

Section 9(5)(a) shows that â€œmayâ€ and â€œshallâ€ in the two provisions are intended to convey a different meaning. It is apparent that the legislature,

intended Section 9(5)(a) IBC to be mandatory and Section 7(5)(a) IBC to be discretionary. An application of an operational creditor for initiation of CIRP under,

Section 9(2) IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the rules,

and regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice have been delivered to the corporate debtor",

by the operational creditor and no notice of dispute has been received by the operational creditor. The IBC does not countenance dishonesty or deliberate failure, to repay the dues of an operational creditor.,

77. On the other hand, in the case of an application by a financial creditor who might even initiate proceedings in a representative capacity on behalf of all",

financial creditors, the adjudicating authority might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances,"

including the overall financial health and viability of the corporate debtor. The adjudicating authority may in its discretion not admit the application of a,

financial creditor. â€¸,

87. Ordinarily, the adjudicating authority (NCLT) would have to exercise its discretion to admit an application under Section 7 IBC and initiate CIRP on",

satisfaction of the existence of a financial debt and default on the part of the corporate debtor in payment of the debt, unless there are good reasons not to admit",

the petition.,

88. The adjudicating authority (NCLT) has to consider the grounds made out by the corporate debtor against admission, on its own merits. For example, when",

admission is opposed on the ground of existence of an award or a decree in favour of the corporate debtor, and the awarded/decretal amount exceeds the amount",

of the debt, the adjudicating authority would have to exercise its discretion under Section 7(5)(a) IBC to keep the admission of the application of the financial",

creditor in abeyance, unless there is good reason not to do so. The adjudicating authority may, for example, admit the application of the financial creditor,"

notwithstanding any award or decree, if the award/decretal amount is incapable of realisation. The example is only illustrative.",

89. In this case, the adjudicating authority (NCLT) has simply brushed aside the case of the appellant that an amount of Rs 1730 crores was 10 realisable by the",

appellant in terms of the order passed by Aptel in favour of the appellant, with the cursory observation that disputes if any between the appellant and the",

recipient of electricity or between the appellant and the Electricity Regulatory Commission were inconsequential.,

21. The Corporate Debtor further submitted that in the above matter the Honâ€™ble Supreme Court held that this Bench can refuse to admit a,

Petition under Section 7 of IBC if there are good reasons to do so. In the present case, it is clear that the so-called loan extended by IFIN to the",

Corporate Debtor is only a part of a larger transaction which involved other IL&FS Group entities. The amount deposited by IFIN with the Corporate,

Debtor was immediately transferred to ITNL. The understanding between the parties was always that ITNL and its subsidiaries will repay the amount,

with a higher rate of interest after which the Corporate Debtor would transfer the sum to IFIN and complete the transaction. However, the Corporate",

Debtor has been precluded from recovering the amount from ITNL / MP Border / SSTL due to the order of the NCLAT. Thus, on the one hand, the",

Corporate Debtor cannot recover the amount due from ITNL / MP Border / SSTL but on the other hand IFIN (which is a group company) is seeking,

to recover the amount from the Corporate Debtor.,

22. The Corporate Debtor also pleaded that in a similar case in Coordinate Bench, NCLT Court Room No. 3 in C.P (IB) 541/(MB)2020, the Bench",

has taken a view Corporate Debtor has acted as a facilitator to relending the amounts lent by the Financial Creditor.,

23. In the present case, on perusal of the aforesaid letters, this Bench is of the view that the Corporate Debtor in this case also acted as a facilitator",

for relending the amounts lent by the Financial Creditor to their own group Companies for which the Corporate Debtor will be getting the difference,

margin of interest.,

24. After hearing the submissions and upon perusal of records, we are of the considered view that this is a fit case for dismissal of above Company",

Petition by exercising our judicial discretion as per law laid down by the Honâ€™ble Supreme Court in the above mentioned judgment of,

â€™Vidharbha Industries Power Limitedâ€™ Vs. Axis Bank Limited (2022) 8 SCC 35â€™. Hence, there is no merit in the above Company Petition",

and the same is dismissed.,

25. Accordingly, the Company Petition is dismissed with no costs.",