

FIT FOR INDEXING.

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-1151(PB)/2018

IN THE MATTER OF:

ICICI Bank

.....Applicant/
Financial Creditor

v.

Era Infrastructure (India) Limited

.....Corporate Debtor

**SECTION: UNDER SECTION 7 OF THE INSOLVENCY AND
BANKRUPTCY CODE, 2016**

Judgment delivered on 07.05.2019

CORAM:

**CHIEF JUSTICE (RTD.) M.M.KUMAR
HON'BLE PRESIDENT**

**DR. DEEPTI MUKESH
HON'BLE MEMBER (J)**

PRESENT:

For the Financial Creditor: Mr. Arun Kathpalia, Sr. Advocate with
Ms. Padmaja Kaul, Mr. Yugank Goel, Mr.
Aishwarya Chaudhary, Advocates

For the Respondent: Mr. Vijay Kr. Singh, Mr. Anand P. Singh,
Advocates for Corporate Debtor
Mr. U.K. Chaudhary, Sr. Advocate with
Mr. Himanshu Handa & Mr. Raunak
Singh, Advocates for RP/Intervenor

M.M.KUMAR, PRESIDENT

JUDGMENT

The ICICI Bank Limited (for brevity 'Financial Creditor') has filed the instant application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a prayer for triggering the Corporate Insolvency Resolution Process in the matter

C.P. No. (IB)-1151(PB)/2018

ICICI Bank v. Era Infrastructure (India) Ltd.



of Era Infrastructure (India) Limited (for brevity 'the Corporate Debtor').

2. The Corporate Debtor- Era Infrastructure (India) Limited is a company registered under the provisions of the Companies Act, 1956 and was incorporated on 19.10.2007. The identification number of the Corporate Debtor is U45200DL2007PLC169191 and its registered office is situated at B-292, Chandra Kanta Complex, Shop No. 2 and 3, Near Metro Pillar No. 161, New Ashok Nagar, New Delhi-110096.

3. As per the averments, the Financial Creditor through various credit facilities has granted a loan for a sum of INR 200 crores to certain group/related parties of the Parent Company-M/s. Era Infra Engineering Private Limited namely Hyderabad Ring Road Project Private Limited (for brevity 'HRRPPL'), Apex Buildsys Limited (for brevity 'ABL'), Dehradun Highways Project Limited (for brevity 'DHPL'), Gwalior Bypass Project Limited (for brevity 'GBPL') apart from the Corporate Debtor-Era Infrastructure India Limited (for brevity 'EIIL'). For the aforesaid facilities granted by the Financial Creditor, the Parent Company-M/s. Era Infra Engineering Private Limited had furnished various securities and contractual comforts



to the Financial Creditor. The detail of such facilities granted by the Financial Creditor along with the security and contractual comforts provided by the Parent Company-M/s. Era Infra Engineering Private Limited to secure such facilities is detailed below:-

Era Infrastructure (India) Limited (EIIL)

Pre-restructuring: RTL Facility

1. The applicant sanctioned a rupee term loan facility amounting to INR 300 crores in favour of EIIL, vide credit arrangement letter (for brevity 'CAL') dated 30.09.2010. Subsequently vide CAL dated 20.01.2011 aforesaid sanctioned facility reduced to INR 200 crores. Further on 05.03.2011, the applicant through a rupee facility agreement extended a loan of INR 200 crores. The aforesaid RTL facility was amended through a mandatory CAL dated 31.03.2011, modifying the terms of security created by way of mortgage as specified in the EIIL Sanction Letter which would mean to include EIIL RTL facility read with EIIL RTL Facility Amendment. Copies of the CAL dated 31.03.2011 and EIIL RTL Facility Amendment have been placed on record [Annexure A-1 (Colly) A-3 (Colly)].
2. The payment made through the aforesaid RTL Facility was to be secured by the following guarantees/securities:



(a) **Loan purchase agreement**—The applicant and the Parent Company-M/s. Era Infra Engineering Private Limited entered into a loan purchase agreement on 05.03.2011 wherein the Parent Company-M/s. Era Infra Engineering Private Limited guaranteed payment under the EIL RTL Facility in the event of a default by EIL, by purchase of the entire outstanding amount of the EIL RTL Facility. As per clause 4.2 (a) on the occurrence of any loan purchase event, the applicant has the right but not the obligation to sell the whole or part of the outstanding EIL RTL Facility to the Parent Company-M/s. Era Infra Engineering Private Limited at the loan purchase exercise price and the Parent Company-M/s. Era Infra Engineering Private Limited is under an obligation to purchase the outstanding EIL RTL Facility from the applicant. Accordingly, the Parent Company-M/s. Era Infra Engineering Private Limited guaranteed the payments to be made by EIL to the applicant.

(b) **Non-disposal arrangement** – The applicant, the Parent Company-M/s. Era Infra Engineering Private Limited and IDBI Trusteeship Service Limited (EIL Security Trustee) entered into a non-disposal arrangement dated 16.06.2011. According to the terms incorporated in the non-disposal arrangement the Parent Company-M/s. Era Infra Engineering Private Limited agreed not



to deal with or divest 30% equity share capital of EIIL held by it (NDU Shares), and deposit such number of shares in a designated trust and retention account (NDU). In addition to that, the Parent Company-M/s. Era Infra Engineering Private Limited executed an irrevocable power of attorney in favour of the EIIL Security Trustee, authorizing it to, *inter alia*, sell, transfer, assign, dispose of or encumber the NDU Shares on the terms and conditions specified in the NDU (POA). Afterwards the applicant, the Parent Company-M/s. Era Infra Engineering Private Limited and the EIIL Security Trustee entered into a designated account agreement dated 16.06.2011. The Parent Company-M/s. Era Infra Engineering Private Limited through said designated account agreement agreed to open a trust and retention account with the applicant as required under the NDU for deposit of NDU shares.

3. Restructuring of EIIL RTL Facility: Restructured RTL Facility and FITL Facility

1. EIIL started defaulting in making payment towards the interest and principal amounts of the EIIL RTL Facility. As a consequence, and in light of the RBI guidelines, a Joint Lenders Forum was formed on 30.04.2014, comprising of the applicant and Yes Bank Limited. Accordingly, the applicant



pursuant to the CAL dated 26.06.2015, restructured the EIL RTL Facility to a rupee term loan facility amounting to INR 150 crores through a restructuring agreement dated 26.06.2015. The interest payable by the Parent Company-M/s. Era Infra Engineering Private Limited on the Restructured RTL Facility for 24 months, i.e. from 1 January 2015 (cut-off date) till 31 December, 2016 was funded to EIL as a funded interest term loan. Accordingly, the funded interest term loan facility of INR 42 crores was extended to EIL.

2. Clause 8 of the Restructuring Agreement provides for continuation of existing securities/contractual comforts provided by EIL or third party in favour of the applicant and/or the Security Trustee, post restructuring. In this way the Parent Company-M/s. Era Infra Engineering Private Limited vide letters dated 26.06.2015 & 27.06.2015, confirmed that all rights under the Loan Purchase Agreement and Non-Disposal Arrangement, respectively, shall continue to secure the Restructured facilities.

Breach of Restructured Agreement

1. Pursuant to the Non-Disposal Agreement, the Parent Company-M/s. Era Infra Engineering Private Limited was required to provide

C.P. No. (IB)-1151(PB)/2018

ICICI Bank v. Era Infrastructure (India) Ltd.



a minimum of 30% of equity share capital of EIL for securing the EIL RTL Facility and the Restructured Facilities. However, the Parent Company-M/s. Era Infra Engineering Private Limited failed to fulfil the aforesaid terms and had only deposited 15,242,070 shares in the trust and retention account. The shares deposited in the trust and retention account constituted only 12.70% of the equity share capital of EIL. Accordingly, the applicant vide letters dated 08.07.2016, 30.06.2017 & 24.08.2017, requested the Parent Company-M/s. Era Infra Engineering Private Limited, along with EIL, to arrange for the balance shares (20,759,116 shares). However, the Parent Company-M/s. Era Infra Engineering Private Limited did not pay any heed to the aforesaid request.

2. Due to consecutive defaults on its payment obligations under the Restructured Facilities particularly in payment of interest, demand notices dated 20.03.2017 and 13.04.2017 were issued by the applicant to *inter alia* EIL and the Parent Company-M/s. Era Infra Engineering Private Limited demanding payment under the EIL RTI Facility and Restructured Facilities. Despite receipt of aforesaid demand notices, EIL and/or the Parent Company-M/s. Era Infra Engineering Private Limited failed to repay the outstanding amounts to the applicant. On account of persistent defaults, the

A handwritten signature in black ink, consisting of a stylized 'M' followed by a long horizontal stroke that curves upwards at the end.



account of EIIL was classified as an NPA on 28.09.2017 w.e.f. 30.06.2015 by the applicant.

3. Subsequently the applicant exercised its option/right under the Loan Purchase Agreement to sell the Restructured Facilities at a purchase price of INR 199.5 crores to the Parent Company-M/s. Era Infra Engineering Private Limited, vide a loan purchase notice dated 15.11.2017 on the diverse grounds firstly not to maintain the debt service reserve requirements of INR 6.43 crores by the EIIL including others; secondly not to provide 30% of the equity share capital of EIIL, as security by the Parent Company-M/s. Era Infra Engineering Private Limited and lastly not to adhere to the payment schedule under the Restructured facilities. In view of the above, the applicant called upon the Parent Company-M/s. Era Infra Engineering Private Limited to purchase the Restructured facilities and pay the loan purchase exercise price within 10 days from the date of the Loan Purchase Notice.
4. Upon failure of the Parent Company-M/s. Era Infra Engineering Private Limited to purchase the Restructured facilities and pay the aforementioned amounts, the applicant was compelled to issue a recall cum invocation of guarantee notice dated 27.11.2017 to *inter alia* EIIL and the Parent Company-M/s. Era Infra Engineering Private Limited whereby called upon them to pay the entire

C.P. No. (IB)-1151(PB)/2018

ICICI Bank v. Era Infrastructure (India) Ltd.



outstanding amount under the Restructured facilities as on 31.10.2017 totalling to INR 198.8 crores together with further interest and other charges thereon until payment. Response from the Parent Company-M/s. Era Infra Engineering Private Limited vide letter dated 04.12.2017 was received requesting the applicant for providing statement of accounts and to not initiate any adverse action against it.

5. Despite the aforesaid Recall cum Invocation Notice, EIL and/or the Parent Company-M/s. Era Infra Engineering Private Limited failed to repay the outstanding dues under the Restructured facilities to the applicant. In view of that, applicant issue a letter dated 24.05.2018 to *inter alia* EIL and the Parent Company-M/s. Era Infra Engineering Private Limited, revoking the Restructuring Agreement with immediate effect, thereby restored the liability of EIL and the Parent Company-M/s. Era Infra Engineering Private Limited under the EIL RTL Facility (Revocation Letter). It is stated that in terms of clause 5 (11) read with clause 12 of the Restructuring Agreement, the original facility agreement i.e., the EIL RTL Facility existing prior to restructuring stands re-instated. Therefore, it is highlighted that the payment obligations and the securities against the same would be as per the terms of the EIL RTL Facility. Pursuant to the Revocation letter, the applicant



directed EIL and the Parent Company-M/s. Era Infra Engineering Private Limited to pay the reinstated liabilities to the applicant. However, no amount has been paid to the applicant towards the aforesaid facilities granted to EIL.

4. A perusal of the column-1 'General Definitions' which envisaged in terms and conditions attached with the Credit Arrangement Letter ('CAL') dated 30.09.2010 (at pg. 97) which is a initial document in respect of granting aforesaid loan facilities, the abovesaid parties had been depicted by using two different expressions namely the Corporate Debtor as 'Borrower' and Era Infra Engineering Limited as 'Parent'. At this stage it would be profitable to read the compatible terms and conditions agreed into by the parties which are as under:

I. GENERAL DEFINITIONS	
Borrower	Era Infrastructure (India) Limited (EIL), a company incorporated in India, which is a wholly owned subsidiary of the Parent.
Companies	<ul style="list-style-type: none">• Company 1- Haridwar Highways Projects Limited, India• Company 2 – Dehradun Highways Projects Limited, India• Company 3 – Bareilly Highways Projects Limited, India



	Each of the above company individually shall be referred to as a 'Company'
Parent	Era Infra Engineering Limited ("EIEL"), a company incorporated under the laws of India
-----	-----
Guarantor (s)	Mr. H.S. Bharana ("Personal Guarantor") or any other entity that is required to provide a guarantee for the purpose of creating/perfecting the security/contractual comfort as mentioned below in the 'Security'/Contractual Comfort' clause.
Shortfall Undertaking Providers	Any person/company under than the Parent and Guarantor(s) providing contractual comfort as mentioned in below in the 'Contractual Comfort' clause.
Obligors	The Borrower and the Parent.
----	-----

5. It is pertinent to mention that the Corporate Insolvency Resolution Process was initiated in respect of the Parent Company namely M/s. Era Infra Engineering Private Limited on 08.05.2018 and Mr. Rajiv Chakraborty was appointed as an Interim Resolution Professional. He invited claims and the Financial Creditor lodged its claim (which is further claimed in the present application) placing reliance on the securities and contractual comforts (those are the part and parcel of the present application as well) provided by the Parent Company-M/s. Era Infra Engineering Limited towards the



facilities disbursed by the Financial Creditor to the entities/group related to the Parent Company-M/s. Era Infra Engineering Limited including the Corporate Debtor along with proof claiming that the applicant is a Financial Creditor. The claim of the applicant was rejected vide order dated 13.09.2018 by the Resolution Professional. The aforesaid rejection was recorded on various folds.

6. Feeling aggrieved against the aforesaid rejection, an application being C.A. No. 997(PB)/2018 was filed by the applicant-the ICICI Bank before this Tribunal. After issuance of notice and considering the reply of the Resolution Professional, we accepted the application of the applicant-the ICICI Bank on 06.12.2018. The relevant observations, made, at paragraph 18, by us, reads thus:

“18. In order to determine whether the agreements, arrangements, undertaking etc. involved in this matter would qualify to be called ‘Contract of Guarantee’ we must dwell on Section 126 of the Contract Act, 1872 which reads as under:

“Section 126. ‘Contract of guarantee’, ‘surety’, ‘principal debtor’ and ‘creditor’—A ‘contract of guarantee’ is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the ‘surety’;

the person in respect of whose default the guarantee is given is



called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written."

A bare perusal of Section 126 of the Contract Act makes it patent that it demystify a contract of guarantee to mean a contract to perform the promise, or discharge the liability of a third person in case of his default. The parties involved are known as 'surety'; 'principal debtor' and the 'creditor'. A contract of guarantee involves three parties: creditor, surety, and principal-debtor. A contract of guarantee must, therefore, involve a contract to which all those parties are privy. A guarantee is an undertaking to indemnify, if some other person does not fulfil his promise. The liability under a contract of guarantee is conditional on the default of the principal-debtor, and hence does not amount to a 'promise to pay'.

It is evident from the facts of this case that Principal Debtor are EIL and DHPL. The Corporate Debtor is the 'Surety' and the applicant is 'Creditor'. The essential ingredients of contract of guarantee are also fulfilled as is patent from the preceding paras. As per various clauses surety has stood guarantee for the facilities given in case of default by the Principal Debtor. The default has occurred and the amount is recoverable from the Corporate Debtor. If that be so then the Resolution Professional was not justified to decline the claim made by the applicant."

A handwritten signature in black ink is located at the bottom left of the page.

C.P. No. (IB)-1151(PB)/2018

ICICI Bank v. Era Infrastructure (India) Ltd.



7. Allowing the applicant's-the ICICI Bank's application, we had passed the following directions:

- “1. The Corporate Debtor is liable to repay the amount granted by the ICICI Bank Limited to Era Infrastructure (India) Limited and Dehradun Highways Project Limited, as a Financial Debt as per the provisions of the Code.
2. Once it is an amount repayable then the Resolution Professional must admit the claim of the ICICI Bank as Financial Debt, in respect of the obligations undertaken by the Corporate Debtor under the credit facilities availed by Era Infrastructure (India) Limited and Dehradun Highways Project Limited to the extent of INR 240.17 crores and INR 460.58 crores respectively. Accordingly, we issue directions to Resolution Professional to do so.
3. As a consequential relief a direction is issued to the Resolution Professional to revise the list of financial creditors of the Corporate Debtor by including the claims of the applicant-ICICI Bank with respect to the facilities granted to Era Infrastructure (India) Limited and Dehradun Highways Project Limited amounting to INR 700.75 crores and credit the applicant-ICICI Bank in the CoC by adding the aforesaid

C.P. No. (IB)-1151(PB)/2018
ICICI Bank v. Era Infrastructure (India) Ltd.



claims. It shall also grant the applicant its voting share in the CoC in proportion to such claims with all consequential benefits arising therefrom.”

8. Therefore, the question arises whether the same claim could be made the basis for filing an application under Section 7 of the Code or it is prohibited. The question is no longer *res integra*. In, **Dr. Vishnu Kumar Agarwal v. M/s. Piramal Enterprises Ltd., Company Appeal (AT) (Insolvency) No. 346 of 2018 decided on 08.01.2019**, the Learned Appellate Tribunal held that:

“.....However, once for same set of claim application under Section 7 filed by the ‘Financial Creditor’ is admitted against one of the ‘Corporate Debtor’ (‘Principal Borrower’ or ‘Corporate Guarantor(s)’), second application by the same ‘Financial Creditor’ for same set of claim and default cannot be admitted against the other ‘Corporate Debtor’ (the ‘Corporate Guarantor(s) or the ‘Principal Borrower’)......”

9. In light of the aforesaid facts and circumstances of the case, the question further is as to whether the claim lodged by the applicant-the ICICI Bank which was based on the same set of facts and documents in the parent company namely Era Infra Engineering Limited which after rejection by the Resolution



Professional of that company we had allowed vide order 06.12.2018. A direction stand issued to the RP to admit the said claim as Financial Debt. This is again raised for admission in the present proceeding. Such a course obviously is not permissible in law as laid down in Dr. Vishnu Kumar Agarwal case (supra). Therefore, on account of duplicacy of the claims the petition cannot be entertained.

10. As a sequel to the above discussion this petition fails and the same is dismissed.

Sd/-

**(M.M. KUMAR)
PRESIDENT**

Sd/-

**(DR. DEEPTI MUKESH)
MEMBER (JUDICIAL)**

07.05.2019
Vineet