

IN THE NATIONAL COMPANY LAW TRIBUNAL  
COURT NO.1, MUMBAI BENCH

MA 469/2020 in C.P. No. 3638/241-242/2018

(Under Section 241 and 242 of the Companies Act, 2013)

Infrastructure Leasing and Financial  
Services Limited .... Applicant  
Vs  
Union of India ... Respondent

In the matter of

Union of India, Ministry of  
Corporate Affairs .... Petitioner

v/s.

Infrastructure Leasing And Financial  
Services Limited &Ors.  
... Respondents

Delivered on : 25.2.2020

Coram: Hon'ble Member (Judicial) Smt. Suchitra Kanuparthi  
Hon'ble Member (Technical) Shri V. Nallasenapathy

For the Applicant: Mr. Ashish Kamat, a/w Mr. Aditya Sikka and Ms.  
Drishti Das i/b Cyril Amarchand Mangaldas

For the Respondent: Ms. Rupa Sutar

Per: V. Nallasenapathy, Member (Technical)

**ORDER**

The Applicant has filed this Miscellaneous Application for the following  
reliefs:

- A. Approve the sale of the shares of IWPSL held by IEDCL to ORIX,  
free and clear from all encumbrances, liens, security interest  
and third party claims upon receipt of the consideration from  
ORIX, in compliance of the terms of the Final SPA;
- B. Grant the Applicant, IEDCL and ORIX Corporation, Japan the  
liberty to implement and give effect to the terms of the Final  
SPA.
- C. Direct that:
  - (i) *The consideration payable by ORIX in respect of the IWPSL  
be credited into a designated escrow account to be*



*intimated by the Applicant/IEDCL and such funds to be maintained as interest bearing fixed deposits;*

- (ii) Such funds when deposited into the relevant bank/ escrow accounts or maintained as fixed deposits should not be adjusted or set off against any other dues;*
- (iii) From the Consideration, the Applicant/ IEDCL be permitted to withdraw an amount aggregating to INR Rs. 19,19,802/- (Rupees Nineteen Lakhs Nineteen Thousand Eight Hundred and Two) towards Resolution Process Costs incurred in connection with the resolution of IWPSL till date as set out in Annexure 23 hereto; and*
- (iv) The distribution of the remaining consideration or withdrawal of any further amounts of any further amounts for the Resolution Process cost be subject to further orders of this Hon'ble Tribunal.*

2. The applicant submits that IL& FS Wind Power Services Ltd (IWPSL) is the wholly owned subsidiary of IL&FS Energy Development Co Ltd (IEDCL) which in turn is a subsidiary of the applicant in the energy sector (with 91.42% of shares held by the applicant). The applicant seeks approval of this Tribunal to conclude the resolution process for IWPSL.

3. The applicant submits that IWPSL was incorporated in 2013 and is engaged in the business of providing wind power asset management services including technical oversight, commercial and regulatory services and finance and accounts services exclusively to the following companies on a long term, market based, arm's length contract, being support service agreement executed between IWPSL and each of the following companies:

1. Wind Urja India Pvt Ltd
2. Ratedi Wind Power Pvt Ltd



3. Tadas Wind Energy Pvt Ltd
4. Lalpur Wind Energy Pvt Ltd
5. Khandke Wind Energy Pvt Ltd
6. Etesian Urja Ltd
7. Kaze Energy Ltd.

(collectively known as Specified Wind SPVs)

4. The above Specified Wind SPVs were the erstwhile subsidiaries of IL&FS Wind Energy Ltd (IWEL), which held 51% shareholding in each of the Specified Wind SPVs. IWEL is the wholly owned subsidiary of IEDCL and an indirect subsidiary of the applicant. The balance 49% in each of the Specified Wind SPVs was held by ORIX Corporation (ORIX), a company incorporated under the laws of Japan. The shareholding of IWEL in the specified wind SPVs was sold to ORIX and the same was approved by an order of this Tribunal dated 28.8.2019.

5. The applicant submits that on a petition filed against the applicant by the Union of India, under Section 241-242 of the Companies Act, 2013, this Tribunal on 01.10.2018 suspended the then existing directors of the applicant and appointed new directors to the board of the applicant company. The applicant herein to ensure an orderly resolution of the applicant group, filed an appeal before the Hon'ble NCLAT which stayed the coercive action by the creditors in larger public interest against the applicant group.

6. The applicant submits that a report on progress and way forward dt. 30.10.2018 (First Progress Report) was filed with this Tribunal wherein the broad options for resolution of the applicant group were set out.

7. The new board of the applicant commenced the resolution process in respect of the renewable energy assets which include the assets, among others, the specified wind SPVs and IWPSL on



29.11.2018 and an advertisement was issued inviting Expression of Interest (EOI) for acquisition of controlling stake in the applicant group's renewable energy assets.

8. The applicant submitted an initial resolution framework and the first addendum to Union of India and the same has been filed with this Tribunal and Hon'ble NCLAT.

9. Subsequently, a second addendum setting out the revised distribution framework for the Resolution of applicant group was also submitted. The initial framework of the resolution and the first addendum contemplate step by step approach to achieve an asset level resolution of the applicant group through the following steps: -

- A. Inviting Expression of Interest on the basis of such an eligibility criteria for investors of particular business/ class of companies with regard to the nature of the business for which EOIs are invited.
- B. On receipt of EOIs, a request for proposal (RFP) will be issued to eligible applicants pursuant to which binding financial bids will be sought.
- C. Eligible applicants will submit their binding financial offers within specified time prescribed in the (RFP)
- D. New board will evaluate the bids submitted by the bidders and would contemplate categorization of sale of company on the basis of bid received into Category I company (where the bidder is willing to assume all liabilities of the sale company without any compromise of debt) or Category II Company.
- E. The new board will constitute a Creditors Committee depending on the categorization of the company as provided in the First Addendum, to approve or reject the bids.
- F. The decision of the committee of creditors will be placed before the new board for approval and after approval the same will be



placed before Hon'ble Mr. Justice D.K. Jain (Retired) appointed by the Hon'ble NCLAT to supervise the Resolution Process.

G. After the approval of Hon'ble Justice D.K. Jain an application filed before this Tribunal to consummate the transaction/Resolution framework.

10. The new board appointed M/s Alvarez and Marsel India Private Limited (Resolution Consultants) who categorized the entities in the applicant group into three based on "12-month cash flow based solvency test" namely, Green, Amber and Red entities. Green entity tag was given to an entity where there is no payment default and cash flows to be generated by the entities in the testing period from its operation or sufficient to meet all the payment obligations of the entity as and when such an obligation fall due in the testing period and which do not rely on other entities in the applicant group for any financial support to service its debt obligations. The ministry of Corporate Affairs filed a list of green entities with the Hon'ble NCLAT, which permitted the Resolution of those green entities in accordance with the Resolution Framework and subject to the supervision of Hon'ble Justice D.K. Jain appointed to oversee the Resolution process in terms of the resolution framework. IWPSL has been classified as a green entity.

11. Accordingly, the resolution process for IWPSL was started in November 2018 and the applicant commenced the sale/resolution process for the renewable energy assets held by the applicant group's specified wind SPVs and IWPSL.

12. It is submitted that when binding financial bids were received for the specified wind SPVs from the publicly solicited bid process contained in the Resolution Framework, ORIX, the erstwhile 49% shareholder in each of the specified wind SPVs exercised its existing contractual right under a memorandum of understanding dt.



28.11.2018 to match the highest financial bid and acquired 51% shareholding in each of the specified wind SPVs from IWEL and the said sale was approved by Hon'ble Justice Mr. D.K. Jain (Retired) on 15.07.2019 and the subsequently the same was confirmed by this Tribunal vide order dt. 28.08.2019.

13. On 30.03.2018, ORIX, IEDCL & IWPSL had executed an option agreement wherein ORIX had the option to acquire 100% shares capital of IWPSL. On 13.05.2019, ORIX sought to exercise its right under the said option agreement and expressed its willingness to purchase IWPSL. On 28.06.2019, ORIX accepted Rs. 6,05,62,671/- as purchase consideration for acquisition of 100% shareholding of IWPSL held by IEDCL subject to terms and conditions set out therein. In response to the above letter IEDCL and IWEL, on 05.07.2019, wrote to ORIX wherein:

- a. IEDCL agreed that if the sale of shares of IWPSL is not completed within 30 days of completion of the acquisition of the specified wind SPVs by ORIX, the service agreements will be terminable at the option of specified wind SPVs.
- b. It was specified that in case the service agreement terminated by specified wind SPVs, ORIX may, subject to taking over all the liabilities in respect of the employees of the IWPSL post the date of termination of their employment with IWPSL, contact the employees of IWPSL in order to enter into employment agreement with such employees.

14. The timelines for completion of sale of shares of IWPSL was extended by ORIX. On 29.10.2019 ORIX confirmed its willingness to take over all the liabilities of IWPSL recorded in the financial statements of IWPSL till the completion of acquisition of shares of IWPSL.



15. It is submitted that in terms of Resolution Framework two valuers namely, Rakesh Narula & Co.(RNC) and Adroit Technologies Pvt. Ltd.(Adroit) were appointed to determine the fair market value and liquidation value and the valuation is as below:  
(Rs.in Crores)

Sr. No.	Value	RNC	Adroit	Average
1.	Liquidation Value	8.36	5.77	7.06
2.	Fair Market Value	8.69	6.59	7.64

16. In view of the fact that ORIX has agreed to take over all the liabilities of IWPSL, after deducting the liability from the fair market value, the average equity value is shown as below:

(Rs.in Crores)

Sr. No.	Value	RNC	Adroit	Average
1.	Fair Market Value	8.69	6.59	7.64
2.	(Less) liabilities	2.96	2.96	2.96
3.	Average Equity Value	5.72	3.63	4.67

17. It is submitted that the average equity value is Rs. 4.67 crores as shown above, and the consideration accepted by ORIX for purchasing the shares of IWPSL is Rs. 6,05,62,671/- which is more than the average equity value of Rs. 4.67 Crore.

18. In terms of the Initial Resolution Framework, IWPSL is a category I company where the bidder is willing to take over all the liabilities of the company and where a positive equity value will be received by the sale. The first addendum provides that for a Category I company, for approving the sale, creditors committee consisting of all financial creditors has to be constituted and accordingly on 29.08.2019 the Board of Directors of IEDCL formed a creditors



committee comprising the financial creditors (IEDCL CoC) as laid down in the provisions of Insolvency and Bankruptcy Code, 2016. In the IEDCL CoC meeting held on 01.11.2019, 64.8% members by value voted in favor of approving the consideration of Rs. 6,05,62,671/- wherein, the Resolution Framework contemplates that H1 bid will be considered as approved, if 66% or more of the CoC voted in favor. It is further submitted that while 64.8% voted in favor, the rest of the Members of CoC abstained from voting. It is submitted that IEDCL CoC members did not raise any objection to the consideration or valuation of IWPSL or the terms of the ORIX's proposal or feasibility or viability of the plan, but the only objection raised was that IEDCL CoC also comprised of applicant's group entities which had given financial loan to IEDCL.

19. The decision of the CoC of IEDCL was placed before the new Board of Directors to determine the Resolution process for IWPSL, the new board after taking into account the above facts came to a conclusion that the value offered is the best value for IWPSL and approved the sale of IWPSL to ORIX. The said decision of the board was placed before Hon'ble Justice Mr. D.K. Jain (Retired) for approval as required by the Resolution Framework and the proposal was approved by Hon'ble Justice Mr. D.K. Jain (Retired). Subsequent to this approval the applicant issued letter of intent on 29.01.2020 confirming ORIX as the purchaser IEDCLs interest in IWPSL and ORIX on 31.01.2020 accepted the letter of intent and share purchase agreement (SPA) was executed on 31.01.2020 between ORIX, IEDCL and IWPSL.

20. After under going the above process the applicant filed this application for getting the approval of this Tribunal in accordance with the Resolution Framework for "Green Entities". On hearing the counsel for the applicant and on going through the application and





the documents annexed thereto, we are of the considered view that the sale has taken place in a transparent manner in terms of the Resolution Framework. The sale has gone through different stages of scrutiny, first at the level of CoC, second at the level of new board of directors and third at the level of the Hon'ble Justice D.K. Jain (Retired). We found that the sale was undertaken after obtaining valuation reports and is transparent. Further the said sale was supported by 64.8% of the CoC constituting the financial creditors.

21. The counsel for the applicant during the course of argument brought to our notice, which has not been pleaded in the application, that IEDCL have made an application under Section 281 of Income Tax Act, 1961 ("the IT Act"), seeking permission for sale of assets in favor of ORIX corporation, to the Assistant Commissioner of Income-tax, Circle 12 (1), C.R. Building, IP Estate, New Delhi – 110002 and the same has been rejected by the Department on 16.01.2020 vide letter no. ITBA/COM/F/17/2019-20/1023943791(1). The reason for the rejection was that an appeal is pending before CAT(A) against the demand for the Assessment Year 2016-2017 amounting to Rs. 5,00,19,467/- and the assessee have not obtained any stay of demand.

22. Section 281 of the I.T. Act, 1961, provides as below :

*"Where during the pendency of any proceeding under this Act, any assessee creates a charge on or parts with the possession by way of sale, mortgage, exchange or any other mode of transfer whatsoever, of any of his assets in favor of any other person with the intention to defraud the Revenue, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceedings: (Proviso omitted as unnecessary)."*



23. On an ordinary scanning of the above section, it is very clear that the sale, mortgage, exchange or any other mode of transfer by an assessee during the pendency of any proceedings before Income Tax authorities is void if the same is done with an intention to defraud the revenue. The sale proceedings covered in the application is a transparent proceedings which has been executed in terms of the Resolution Framework for the group companies of the applicant. The sale approval has gone through different stages and vetted by authorities as per Resolution Framework, and finally by this Tribunal. Hence there is no question of defrauding the Income tax authorities. Unless otherwise intension to defraud the revenue is established, the applicability of section 281 of the Income tax does not arise at all. In view of this, the rejection of application for permission of sale of assets by the Income tax authorities cannot have a bearing on this sale of shares.

24. The applicant also sought permission of this Bench for payment of the resolution process costs to the extent of Rs. 19,19,802/- incurred in connection with the resolution of IWPSL till date. This Bench is of the view that the same being reasonable ,it has to be approved.

25. In view of the above discussion, this Bench allows this application and doth orders as below:

- A. The sale of shares of IWPSL held by IEDCL to ORIX, free and clear from all encumbrances, liens, security interest and third party claims, upon receipt of consideration from ORIX in compliance of terms of final SPA, is approved.
- B. The applicant, IEDCL and ORIX corporation Japan is permitted to implement and give effect to the terms of final SPA.
- C. The consideration payable by ORIX in respect of IWPSL be credited to the designated escrow account to be intimated by the



applicant/ IEDCL and such funds to be maintained as interest bearing fixed deposits and the same shall not be adjusted or set off against any other dues.

- D. The applicant is permitted to withdraw and pay
- E. Rs. 19,19,802/- towards resolution process cost incurred.
- F. The distribution of the remaining purchase consideration or withdrawal of any further amount towards resolution cost will be subject to further orders of this Tribunal.

Sd/-  
V NALLASENAPATHY  
Member (Technical)

Sd/-  
SUCHITRA KANUPARTHI  
Member (Judicial)



Certified True Copy  
Copy Issued "free of cost"  
On. 27.02.2020  
  
Assistant Registrar  
National Company Law Tribunal Mumbai Bench