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

COMPANY APPLICATION No. 1029 OF 2020
in
COMPANY PETITION No. 3638 OF 2018

IL & FS Transportation Networks Limited
… Applicant
Versus
1. Grant Thornton India LLP
2. Union of India, represented by Secretary, Ministry of Corporate Affairs
3. Hazaribagh Ranchi Expressway Limited
… Respondents

In the matter of:

Union of India … Petitioner
Versus
Infrastructure Leasing & Financial Services Limited & Ors.
… Respondents

Order Dated: 01.12.2020

Coram:
Hon'ble Member (Judicial), Janab Mohammed Ajmal
Hon'ble Member (Technical), Shri V. Nallasenapathy

Appearance (via videoconference):

For the Applicant : Mr Ashish Kamat with Mr Aditya Sikka and Ms Drishti Das, Advocates

For the Respondents : Mr Deep Roy and Ms Nupur Malde, Advocates for R1.
Mr Chiradeep Baloni (Assistant Director, Office of the Regional Director, Western Region, MCA) for R2.

Per: V. Nallasenapathy, Member (Technical)

ORDER

1. The Applicant, perturbed and aggrieved by the action of Respondent No. 1 (R1)/Claims Management Consultant, in reviewing and rejecting its claim made during the resolution of Respondent No. 3 (R3), is before us for the following reliefs:
    a. *Set aside the rejection/adjudication of ITNL Claim of INR 354.73 crores (approximately) in respect of Hazaribagh Ranchi Expressway Limited by the R1 vide their email dated 06.11.2019 (wrongly mentioned as 06.11.2017, actual date is 06.11.2019), their letter dated 21.01.2020 and their letter dated 19.03.2020;*
    b. *Direct R1 to reinstate and admit the claim relating to the loan granted by IL&FS Transport Networks Ltd, aggregating to the sum of INR 354.73 crores (approx.)*

in the list of creditors and/or list claims of Hazaribagh Ranchi Expressway Limited.

c. *Pending hearing and final disposal of the present Application, stay the operation, effect and implementation of the email dated 06.11.2019, their letter dated 21.01.2020 and their letter dated 19.03.2020.*

d. *Pending hearing and final disposal of the present Application, restrain R1 from in any manner communicating the rejection and/or adjudication of the claim relating to the loan granted by IL&FS Transportation Networks Limited, aggregating to the sum of INR 354.73 crores (approx.) pursuant to the R1's email dated 06.11.2019, their letter dated 21.01.2020 and their letter dated 19.03.2020;*

e. *exempt the Applicant from affixing the affidavit annexed to this application on stamp paper and notarizing the present Application.*

2. The factual backdrop that led to the present Application may briefly be stated. The Union of India (UoI) filed CP No. 3638 of 2018 against Infrastructure Leasing and Financial Services Ltd (IL & FS) under Sections 241 and 242 of the Companies Act, 2013 (the Act) *inter alia* alleging mismanagement in the Company.

3. This Tribunal by an order dated 01/10/2018 superseded the Board of Directors of IL & FS and constituted a new Board

with six Directors to take over the affairs of the Company. The new Board was directed to furnish a roadmap for consideration of the Tribunal. This Tribunal by an order dated 12/10/2018 in MA No. 1173 of 2018 declined to order a moratorium in respect of IL & FS group. The UoI and IL & FS carried the matter in Appeal before the Hon'ble National Company Law Appellate Tribunal (NCLAT) respectively in Company Appeal No. 346 of 2018 and Company Appeal No. 347 of 2018. The Hon'ble NCLAT by an order dated 15/10/2018 granted interim stay against any coercive action by the creditors against IL & FS and its group entities.

4. The New Board prepared periodical progress reports in terms of the order dt. 01/10/2018 and submitted them to the Respondent No. 2 (R2, Union of India (UoI)). In the process the Board of Directors submitted the 3rd Progress Report dated 17/12/2018 and in terms of the order dated 01/10/2018 proposed the Resolution Framework. It made certain recommendations for various Resolution Processes of the IL & FS and its group Companies and requested the R2 to approach the relevant forum for approval of the Resolution Process.

5. The Hon'ble NCLAT by an order dated 11/01/2019 observed that the process required to be followed was similar to that of 'Corporate Insolvency Resolution Process' for the purpose of proper Resolution of IL & FS and its group companies. The Hon'ble Appellate Authority further observed that in such

cases the Committee of Creditors (CoC) may be required to be constituted for determining the viability, feasibility and financial matrix of the plan or offer, if any, given by one or other party for acquisition of one or other group companies or its assets and in the absence of any other knowledgeable person such as the 'Resolution Professional', (if) such Committee of Creditors cannot be constituted, in the meantime the IL & FS and its board may be allowed to proceed with the matter.

6. The Hon'ble NCLAT by an order dated 04/02/2019 permitted the UoI and IL & FS to engage Hon'ble Justice Mr. D. K. Jain (Retd.) to supervise the operation of the Resolution Process. Basing on the recommendations of Hon'ble Justice Jain, the resolution was then to be placed before the NCLT (this Tribunal) for approval. The approval by this Tribunal would formalize and finalize the resolution of the individual or collective group entities. By their order dated 12/03/2020 the Hon'ble Appellate Tribunal accepted 15/10/2018 as the cut-off date for distribution of assets and termed it as the date of initiation of Resolution Process of the IL & FS and its group companies. The Hon'ble Appellate Tribunal further directed that the Union of India, the Board of Directors of IL & FS and the 'Committee of Creditors' already constituted or which may be constituted to conclude resolution of all the entities preferably within 90 days. The developments thereof were to be brought to the notice of Hon'ble Appellate Tribunal every

month. That is how the resolution of IL & FS and its group entities came to be worked out.

7. The Applicant is a subsidiary of IL & FS. R1 is the Claims Management Consultant appointed by the New Board of IL & FS for the purposes of collection and verification of claims of the Creditors of IL & FS group concerns including R3. R3/Hazaribagh Ranchi Expressway Limited (HREL) is the wholly owned subsidiary of the Applicant and is engaged in the construction of Hazaribagh-Ranchi section of National Highway No.33 in the State of Jharkhand on a 'build-operate-transfer' (on annuity) basis in accordance with the terms of the Concession Agreement dated October 8, 2009 (HREL Concession Agreement) entered into between HREL and the National Highways Authority of India (NHAI).

8. In line with the 'Asset Level Resolution' being undertaken in respect of the IL & FS Group as contemplated in the Resolution Framework, a publicly solicited bid process for certain assets in the domestic roads vertical, including HREL was initiated by the New Board on December 18, 2018 and binding bids were received in respect of certain subsidiaries of ITNL including R3 on 30.08.2019.

9. The New Board, to ensure fair and transparent consideration of stakeholders' rights in respect of the 'Sale Company' in the context 'Asset Level Resolution', appointed R1 as Claims Management Consultant to *inter alia* undertake the process of

collection and verification of claims from the creditors of Sale Company. The job of the Claims Management Consultant as per the Resolution Framework is (i) to invite claim from all the creditors of the Sale Company, (ii) to verify the claims submitted by such creditors and making available a list of creditors (along with the amount of verified claims and the categorisation of such claims) to the creditors of that Sale Company.

10. Accordingly, the Claims Management Consultant received claims from various creditors and the claims were verified by them. It is submitted that the Applicant has extended financial debt from time to time to R3 aggregating to Rs.354.73 crores. The Applicant has preferred a claim before R1 to the extent of Rs.354.73 crores in respect of the financial debt provided to R3 and the same was admitted by R1 and R1 classified the claim of the Applicant as a Financial Creditor.

11. At this juncture, it is relevant to note that the R3 borrowed money from financial institutions by issue of debentures to extent of Rs. 715 crores. A Debenture Trust Deed (DTD) dated 10.02.2017 was entered between R3 and IDBI Trusteeship Services Ltd (Debenture Trustee). Further, a Tripartite Subordination Agreement of the even date was executed by the “original subordinated lender” (Applicant), R3 and the Debenture Trustee. The parties are more often relying on certain clauses of the Subordination Agreement and they are extracted below:

Clause. 2.1

"Each party hereby irrevocably undertakes, agrees and acknowledges that until the Final Redemption Date:

(i) the Subordinated Debt shall not be due and payable until after the Final Redemption Date.

(ii) the Subordinated Debt is, and shall remain at all times, whether a bankruptcy, insolvency or liquidation of the Company has occurred, or otherwise, fully subordinated to the Debt and shall not be due and payable until all and any rights and claims which the Debenture Holders may now or hereafter have against the company in respect of the Debt have been is irrevocably paid and discharged in full and the Final Redemption Date has occurred.

(iii) any amounts received by the Subordinated Lender towards the Subordinate Debt("Payments"), shall be deemed not to be received towards a payment in respect of the Subordinated Debt and shall be held in trust by the Subordinated Lender for the benefit of the Debenture Holders. The Subordinated Lender shall: (a) within a period of 1(one) Business Day from the date of receipt of such Payments, inform the Debenture Holders of such receipt of Payments; and (b) within a period of 2(two) Business Days from the receipt of such Payments, transfer such Payments to a designated account of the Debenture Holders/Debenture Trustee (as intimated by the Debenture Holders/Debenture Trustee to the Subordinated Lender), who shall hold such Payments in trust for the benefit of the Debenture Holders/Debenture Trustee to be applied in accordance with paragraph (iv) below.

(iv) all payments so held in trust by the Debenture Holders/Debenture Trustee as specified in Clause 2.1 (ii)(Subordination) above, shall be applied first towards discharge of the Debt. Any balance remaining after irrevocable and unconditional payment and discharge in full of the Debt to the satisfaction of the Debenture

Holders/Debenture Trustee shall be applied in or towards payment for redemption of the Subordinated Debt after the Final Redemption Debt.

(v) the Subordinated Debt shall at all times until the Final Redemption Date, remain unsecured and shall not benefit from any lien, security interest. or guarantee of payment or similar arrangement.

(vi) The Subordinated Lender agrees to not ask for demand or receive from the Company (whether by set-off or in any other manner and whether from the Company or any other person) any payment, redemption repayment/payment/prepayment, or any dividend or distribution in respect or on account of the Subordinated Debt in cash or in kind, prior to the Final Redemption Date;

(vii) no Subordinated Lender shall invoke any default in respect of the Subordinated Debt, petition for, initiate, support (or vote in favour of any resolution for) or take any other action or steps whatsoever for or which may lead to any reorganization, administration. Litigation, dissolution, winding-up proceedings or any voluntary arrangement or assignment for the benefit of any of the Company's creditors or similar proceedings involving the Company;

(viii) the Subordinated Lenders shall not be subrogated to the rights of the Debenture Holders/Debenture Trustee to receive payments or distributions of assets or other property of the Company until the Final Redemption Date;

(ix) the Company will not enter into any agreement or arrangement with any Subordinated lender with regard to the Subordinated Debt or any part thereof, which is in contravention of the terms of this Agreement, without the prior written consent of the Debenture Holders/Debenture Trustee; and

(x) No waiver, consent, instruction, authorisation or approval under or any amendment, modification or

supplement to the terms and conditions of the Subordinated facilities, which is in contravention of the terms of this Agreement, shall be valid, unless given, made or approved with the prior written consent of the Denture Holders Debenture Trustee; and

(xi) any action taken by the Company or any Subordinated Lender that is not in accordance with the provisions of this Clause 2.1 shall be, to such extent, null and void ab initio."

Clause 2.2
"Upon the occurrence of an Event of Default, the monies outstanding under the Subordinated Debt, shall cease to be outstanding automatically without any further action and the Subordinated Lender shall have no claims whatsoever subsisting against the Company."

12. It is submitted that surprisingly on 06.11.2019, i.e. one day immediately after the day of R3's CoC meeting, R1 turned a complete *volte face* and issued an email to the Applicant stating that upon a further review of the Subordination Agreement, R1 was proceeding to reject the Applicant's claim in respect of the ITNL loans on account of Clause 2.2 of the Subordination Agreement, stating that "……Pursuant to the CoC meeting held yesterday for Hazaribagh Ranchi Expressway Limited, we perused the Subordination Agreement dated 10th Feb 2017 wherein para 2.2 does indicate that ITNL's claim stand extinguished in the event of default. The "event of default" is mentioned under Para 14 of the DTD dated 10th Feb 2017. […] In accordance with the two abovementioned documents, we shall be rejecting ITNL's claim on Hazaribagh Ranchi Expressway Limited […]."

13. In response to the above email, the Applicant issued a letter refuting R1's incorrect decision to reject the Applicant's claim. The Applicant, in the letter *inter alia* contended that:
    (i) R1 had earlier admitted the ITNL claim on the basis of the proof of claim with the supporting documents filed by the Applicant with R1;
    (ii) Upon a holistic reading of the DTD, the Subordination Agreement and all other provisions of the debenture documents entered into in connection with the Secured Debentures, it is clear, the intention of the parties to these documents is with regard to the timing and conditions for payment of Applicant's Loan. In fact, certain clauses in the Subordination Agreement expressly contemplate the subsistence of the debt due to the Applicant by R3 even in case of bankruptcy or insolvency of R3 (which are Events of Default as defined under the DTD).

14. The Applicant submits that R3 had availed financial debt from the Applicant. The Debenture Trust Deed (DTD) and the Sponsor Support Undertaking were executed between the parties to provide financing and re-financing facilities to R3. Both these agreements contain several provisions permitting and in fact, in certain circumstances, requiring the Applicant to provide financial support to R3 in connection with the Project. It is further submitted that upon a conjoint reading of the DTD, the Escrow Agreement, the Sponsor Support

Undertaking and the Concession Agreement, it is evident that these agreements:

(i) contemplate the payment by R3 of amounts owed by it to Applicant in all circumstances (including financial debt granted by the Applicant to R3);

(ii) provide for timing of the payment in the manner and subject to the conditions provided therein;

(iii) contemplate the situations in which the Applicant may or may not 'demand payment' from R3 in respect of Applicant's Loans; and

(iv) do not extinguish the financial debt availed by R3 from the Applicant upon the occurrence of an Event of Default or for that matter, any other event (except upon repayment).

15. In relation to the Subordination Agreement, it is submitted that the terms 'bankruptcy', 'insolvency' and 'liquidation' of R3, are instances of 'Event of Default' under the DTD. Further, the language of Clause 2.1 (ii) of the Subordination Agreement states that,

> *"2.1 (ii) the Subordinated Debt is, and shall remain at all times, whether a bankruptcy, insolvency or liquidation of the Company has occurred, or otherwise, fully subordinated to the Debt and shall not be due and payable until all and any rights and claims of the Debenture Holders may now or hereafter have against the Company in respect of the Debt have been irrevocably paid and discharged in full and the Final Redemption Date has occurred."*

16. The Applicant submits that Clause 2.1(ii) contemplates that the Subordinated Debt (debt owed by R3 to the Applicant) shall subsist even upon the occurrence of any "Events of Default" (as defined under the DTD) and that the repayment of such Subordinated Debt is only subject to certain conditions. Therefore, it is submitted that it is evident that the Subordination Agreement contemplates continuation of the Subordinated Debt even after the occurrence of certain 'Events of Default', as understood in the context of the DTD. Additionally, there are multiple provisions of the DTD and the Subordination Agreement which clearly contemplate the subsistence of the Subordinated Debt granted by the applicant to R3 even after an Event of Default has occurred. In fact, save for Clause 2.2 of the Subordination Agreement, all other provisions of the Subordination Agreement clearly evidence the intention of the parties in this regard (i.e., continuation of the Applicant's loans).

17. Against the aforesaid background, it is submitted that, R1 has considered and admitted the Applicant's Claim after verification of the Claim (including the Subordination Agreement which was submitted along with the Claim), and has rejected the Applicant's Claim on the basis of only an isolated reading of Clause 2.2 of the Subordination Agreement, which appears to be in apparent inconsistency with Clause 2.1(ii) of the Subordination Agreement. It is further submitted that this has been undertaken on account

of representations made by the Debenture Holders. It is further submitted that in respect of the apparent inconsistency between the terms of the Clauses 2.1(ii) and 2.2 of the Subordination Agreement, Clause 2.1(ii) expressly contemplates the subsistence of the Subordinated Debt even upon the occurrence of 'Events of Default', which R1 has not taken into consideration.

18. It is submitted that while rejecting the Applicant's Claim, R1 has ignored the financial statements of R3, wherein the financial debt granted by the Applicant to R3 was shown. Further, continuation of the Subordinated Debt even beyond the occurrence of an 'Event of Default' is also evident from the R3's Escrow Agreement which, under Clause 4.1 and 4.2, provide for repayment of Subordinated Debt during continuation and in case of termination of the R3's Concession Agreement, which event is itself defined as an 'Event of Default' under the DTD, as more particularly set out in Clause 14.29 of the DTD. It is pertinent to note that the provisions of the Escrow Agreement (which are in *pari materia* with the provisions of the R3's Concession Agreement) have an overriding effect over the provisions of debenture documents in case of any conflict/inconsistency between provisions of the Escrow Agreement and the provisions of the other debenture documents including the DTD. Hence in view of this the applicant contends that:

    (i) even after termination of the R3's Concession Agreement (which constitutes an Event of Default

under the DTD), the R3's Escrow Agreement contemplates payment of Subordinated Debt from the amounts lying in the escrow account;

(ii) The Debenture Trustee has expressly agreed, in the R3's Escrow Agreement, R3's Supplementary Escrow Agreement and the DTD that (a) the terms of the R3's Escrow Agreement prevail over the terms of R3's Supplementary Escrow Agreement; and (b) the terms of R3's Concession Agreement have an overriding effect and amongst the provisions of any financing agreement (which under the DTD also includes the Subordination Agreement).

19. It is submitted that R1 exceeded its role as the Claims Management Consultant by effectively proceeding to adjudicate on the validity of the Applicant's Claim by considering rival submissions by other financial creditors. At the outset, it is submitted that the Debenture Holders/ Debenture Trustee had no locus to raise any issues in relation to the Applicant's Claim before the Claims Management Consultant. Further, it is submitted that the Claims Management Consultant's role under the Resolution Framework, as mentioned above, is to "collect" and "verify" claims in respect of a Sale Company as specified in the Resolution Framework. Drawing an analogy to the role of the "Resolution Professional" in the context of the Insolvency and Bankruptcy Code, 2016 (IBC) where the resolution professional is required to collect, collate and admit/reject

the claims of the creditors of a "corporate debtor" undergoing a resolution process.

20. It is submitted that the role of R1 is set out in Clause 11.2 (a) & (b) of the Resolution Framework at Pg. 52 (Vol-I) of the application and the same is as below:

> ***Clause 11.2…***
> *"(a) the Resolution Consultant will invite claims existing as of the Cut-Off Date (defined in paragraph 14.1 below) from all creditors of each Sale Company, in accordance with the well established legal principles (including with regard to provisions of legislations relating to the subject matter which is reasonably proximate to those affecting the IL&FS Group);*
> *(b) the Resolution Consultant will verify the claims submitted by each of the creditors of the relevant Sale Company and the list of creditors (and the amount of verified claims along with the categorisation of such claims i.e. whether financial or operational debt, guarantees and other contingent liabilities, secured or unsecured etc.) shall be made available to the creditors of that Sale Company;"*

21. The Applicant, the promoter/sponsor of R3, had also executed the Sponsor Support Undertaking dated February 10, 2017, which *inter alia* contemplates (Clause 2.1.9) payment by R3 of amounts owed by it to the Applicant, in all circumstances (including financial debt granted by the Applicant to R3) but sets forth situations in which the Applicant may or may not 'demand payment' from R3 in respect of the Applicant's Loans.

22. Further, R3, NHAI and Bank of India (as the escrow bank) and the Debenture Trustee had executed an Escrow Agreement dated May 18, 2017 and a Supplementary Escrow Agreement dated May 18, 2017. Clause 4.2 of the Escrow Agreement *inter alia* specifically provides for repayment of "Subordinated Debt" even upon termination of the R3's Concession Agreement which is, amongst others, an 'event of default' under the DTD.

23. It is further submitted that issues relating to the determination of claims by the Resolution Consultant are mentioned in Clause 11.4 at Pg. 52 (Vol-I) of the Application. It is submitted that the financial debt extended to the extent of Rs. 354.73 crores by the Applicant is reflecting in R3's Balance sheets.

24. The Applicant submits that the 'Events of Default' are set out in Clause 14 of the DTD. Clause 14.8 of the DTD provides that if the Government of India or any other relevant Government Authority declares a general moratorium or standstill in respect of the payment or repayment of any Financial Indebtedness owed by the Company and such declaration is not withdrawn within 45 days of its declaration, it will be construed as 'Event of default'. As per Clause 14.8 of DTD, an 'Event of default' occurs if a moratorium order has been passed and has not been withdrawn for 45 days. R1 contended that order dated 15.10.2018, triggered the 'Event

of default' under this Clause and the same is palpably wrong since under DTD a moratorium order would constitute an 'Event of Default' only if continued for 45 days. Therefore, it is submitted that, even assuming without accepting the contention of R1, 'Event of Default' occurred at best only on the 45th day of Moratorium Order i.e. on 30.11.2018.

25. It is submitted that the mandate of the R1 is to invite, collect/vet and verify the claims on the basis of the documents available existing as of 15.10.2018 but R1 exceeded its mandate and sought to consider the claim as on 30.11.2018. (Since the 'event of default' allegedly occurred on 30.11.2018). Hence, it is submitted that the subsequent rejection of the Applicant's claim is contrary to and in excess of R1's mandate. The stand of R1 that the loan of the Applicant had extinguished vide Clause 2.2 of the Subordination Agreement, is incorrect in view of the fact that it is a settled principle of law that if there is a conflict between the earlier clause and a latter clause in the contract and it is not possible to give effect to all of them, the rule of construction mandates that the earlier clause must override the latter clause. To buttress this point, the Counsel for the Applicant relied on the judgement in the case of Radha Sundar Dutta v. Mohd. Jahadur Rahim & Ors., (1959) SCR 1309; Forbes v. Git, AIR 1921 PC 209 and Vestas Wind Technology India Pvt. Limited v. Inox Receivables Limited, 2019 SCC Online 554.

26. It is further submitted that, Clause 2.1 (ii), (iv), (v) and (viii) of the Subordination Agreement contemplate the existence of applicant's loan at all points of time irrespective of the occurrence of an 'Event of default' under DTD. Hence there is no question of the extinguishment of the debt of the Applicant. R1 has not considered the provisions of Clause 2.1 of the Subordination Agreement in its proper perspective, which demonstrates non-application of mind and an unfair approach by R1. Clause 2.2 of the Subordination Agreement contemplates extinguishment of the Applicant's loan upon the occurrence of an 'Event of Default'. Hence there is clear conflict between Clause 2.1 and 2.2 of Subordination Agreement and this aspect has not been considered by R1. In these circumstances, based on the principles of interpretation of contracts, Clause 2.1 will prevail over Clause 2.2 of the Subordination Agreement.

27. It is submitted that Section 28 of Indian Contract Act, 1872 provides that any agreement or part thereof which either:
    a) restricts a party from enforcing his rights under or in respect of the contract by the usual proceedings; or
    b) extinguishes the rights of any party or discharges any party from any liability, under or in respect of any contract on the expiry of a period so as to restrict any party from enforcing his rights, is void to that extent.

28. It is further submitted that, in the case on hand, Clause 2.2 of the Subordination Agreement, which contemplates the

extinguishment of the Applicant's loan on an 'Event of Default' is clearly contrary to Section 28 of the Indian Contract Act and the said clause is void.

29. It is further submitted that in the larger public interest also the action of R1 has to be set aside. The Applicant has borrowed money externally and given loan to its other group entities. The aggregate external fund based debt burden of the IL & FS group as on 08.10.2018 was approx. Rs.94,215 crores. Out of this amount, Rs.10,173 crores was borrowed from public fund creditors such as Pension Funds, Provident Funds, Army Group Insurance Fund, amongst others and Rs.44,075 crores was borrowed from Indian Scheduled Banks. By saying so, the Applicant submits that there is substantial public interest involved in this case and the rejection of claim in this manner will jeopardise the larger public interest.

30. It is submitted that the Hon'ble Supreme Court in numerous decisions highlighted that a "resolution professional" does not perform an adjudicatory function in the context of claims management. The Applicant relied on the judgement of the Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. v. Union of India (2019) 4 SCC 17 and Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta 2019 (16) SCALE 319 wherein it has been held that the resolution professional is only required to "vet and verify" claims filed by the creditors and ultimately, determine the amount of each claim.

31. It is submitted that the claim admission process in respect of Resolution of IL & FS Group are based on and mirror the principles enshrined under the Insolvency & Bankruptcy Code, 2016 (IBC). Therefore, applying the abovesaid principles pertaining to collection and verification of claims relating to R3, it would follow that the role of the R1 is not to adjudicate on the claims that are submitted to it by creditors of R3 but instead to simply vet, verify and admit/reject such claims. However, in complete disregard of these established principles, R1 has proceeded to consider rival contentions on the Applicant's Claim made by other creditors of R3 (i.e., the Debenture Holders), and ultimately rejected the Applicant's Claim (after having admitted the same in the first instance). Under these circumstances, where it is not denied that the Applicant granted loan to R3, it is submitted that rejection of Applicant's claim by R1 on a wholly erroneous interpretation of an isolated and contradictory provision of the Subordination Agreement, that too on the basis of contentions of other creditors of R3, is a clear overreach on part of the R1.

32. It is submitted that R1 determined the rights of the parties by reviewing and rejecting the claim and the same constitutes an adjudication more particularly when the CoC and the debentures holders were expressly advised that such matters are reserved for determination by the NCLT. However, R1 considered these rival submissions from the Debenture holders, reconsidered the Subordination Agreement and while

accepting the debenture holder's contentions, rejected the Applicant's claim by considering the rival contentions and interpreted the documents. All the actions of R1 are against the mandate to merely vet and verify the claims on the basis of the documents available and entered into the realm of adjudication by rejecting the claim. It is true that Regulation 14(2) of the CIRP Regulation permit the revision of the claim on the basis of additional documents/information. In the present case, the Subordination Agreement was available with R1 from the time of submission of the claim itself. Since R1 had no legal authority and jurisdiction to adjudicate upon a claim, the action of R1 in rejecting the claim is liable to be set aside and the applicant's claim has to be reinstated. Hence this Application.

Reply of Respondent No. 1

33. It is submitted that the appointment and role of Claims Management Consultant is set out in clause 11.2 of the Third Progress Report dated 17.12.2018 submitted by R2 to the Hon'ble NCLAT, wherein it is provided that a Resolution Consultant would be appointed by the New Board for claim verification of the Sale Companies. Accordingly, R1 was appointed by the IL & FS Board as Resolution Consultant. R3 is one of the Sale Companies for which the Applicant (being the 100% owner) has filed a claim. The Resolution Consultant is required to collect and verify the claim, maintain an updated list of creditors, which would mean that the list of creditors would have to remain updated at all times pursuant

to information received, which would assist in the distribution process for the IL & FS Group entities.

34. It is submitted that the claims management process is to be carried out in accordance with the provisions of the IBC and its associated Rules and Regulations, including the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations") as per the affidavit filed by R2 before the Hon'ble NCLAT.

35. It is submitted that the determination of the claim was carried out by R1 on a best estimate basis in accordance with the provisions of Regulation 14 of the CIRP Regulations which reads as under:

> *"**14. Determination of amount of claim.***
> *…(2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision."*

36. It is submitted that R3 pursuant to DTD dated 10.02.2017 issued debentures amounting to Rs. 715 crores to various debenture holders viz. i) HDFC Asset Management Company Ltd, ii) India Infradebt Ltd., iii) J. P. Morgan; and iv) L&T Infra Debt Fund Ltd. Along with the DTD, IDBI Trusteeship Services Ltd as the Debenture Trustee had also entered into various other transaction documents, in relation to the Debentures.

One such document is Subordination Agreement executed between R3, the Applicant and the Debenture Trustee. On 06.11.2019, in the CoC meeting, R1 rejected the claim of the Applicant submitted for Rs. 354.73 crores in respect of dues of R3, in view of clause 2.2 of the Subordination Agreement quoted *supra*.

37. It is submitted that the Applicant has provided two replies to R1. In none of the letters and responses have they disputed or objected to the fact that an 'event of default', as per the terms of the DTD has occurred. The main issue revolves around clause 2.2 of the Subordination Agreement.

38. R1 submits that based on the said clause, the default having occurred, there is no debt remained outstanding as due to the Applicant. Hence the claim was rejected.

39. It is submitted that in terms of Regulation 14 of the CIRP Regulations, R1 has the right to revise the claim and upon revision the entire claim has been rejected. Thus R1 as the Claims Management Consultant done its duty properly.

40. It is submitted that the process of verification includes review of all documents provided, checking on specific issues with the entity, checking with other contracting parties and seeking clarification from the claimant. Post conduct of the above process, R1 admits amounts as a best estimate based on the information and documents available.

41. It is submitted that R1 is well within its powers and responsibility provided under the Resolution Framework to form a view over a claim on a best estimate basis of the documents/information available with R1. Further, R1 also has the right to revise such amounts on further vetting and verification.

42. It is further submitted that verification process is not an adjudication process and R1 like the Resolution Professional has to see the documents and evidence before it to decide on the issue. To buttress the point, R1 has relied upon case of Hon'ble NCLAT in *Navneet Kumar Gupta vs. Bharat Heavy Electricals Ltd (CA (AT) (Ins) No.743 of 2018)* decided in Feb, 2019, wherein it was held that the job of the Resolution Professional is to verify basis the evidence available.

43. It is submitted that the other affected Creditors who are the beneficiaries have not been impleaded in this case. In fact, the claim has been revised on the objection of the Debenture Holders. Hence it is essential to hear the affected parties before taking decision on the interpretation of the contract.

<u>Submissions on the Subordination Agreement</u>

44. R1 submits that the Applicant completely skirted Clause 2.2 of the Subordination Agreement and in trying to create an issue of interpretation, Applicant has only dealt with 2.1 and not at all dealt with clause 2.2.

45. R1 submits that Clause 2.2 of the Subordination Agreement is a specific undertaking between the Parties and cannot be read down or given a destructive interpretation without a clear reason or an express inconsistency. There cannot be an interpretation provided that would have an effect of varying the agreed terms.

46. It is submitted that the settled principle of a prior clause taking precedence is in a situation where one clause after another talk about conflicting issues. If 2.1 is read clearly, the same talks about the situations and the concept of Applicant's loans being subordinate to that provided by the Debenture Holders. Whereas, clause 2.2 goes a step further and mentions that other than the general subordination, in case of an event of default the outstanding amount of the Applicant's loan will cease to exist. The other prior clauses talk about the timing of payment while the clause 2.2 talks about the existence of the debt. There is no conflict and therefore there is no requirement to apply the principle raised by the Applicant or delve into the relevant case laws cited.

47. R1 submits that in the email of 06.11.2019, addressed to the Applicant, R1 clearly referred to the fact that an 'Event of Default' had occurred and also required the Applicant to confirm if they feel otherwise. There being no objection raised then by the Applicant in respect of event of default and also considering the fact that NCLAT by order dated 15.10.2018

declared moratorium, it is submitted that Event of Default has been admitted and acquiesced.

48. It is submitted, clause 14.2 (b) of DTD, provides for a cure period of 45 days, only for those events which are curable. Certainly, the Moratorium Order was not something that was curable. Therefore, the claim that there is no 'Event of Default' as on cut-off date is incorrect and cannot be accepted.

49. It is submitted that Clause 14 of DTD deals with an 'Event of Default' and Events of Default include non-payment of the debt on due date, insolvency proceedings, failure to make payment and a final judgement from a competent court except those appealable orders, declaration of a general moratorium by any government authority, etc.

50. The Counsel for R1 relied on the following judgements to submit on the laid down principles of interpretation:

    a. *Kamla Devi vs. Seth Takhatmal & Anr. (MANU/SC/0016/1963)-wherein it is stated that "When a court is asked to interpret a document, it looks at its language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the Court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his*

expressed intentions."

b. *Bank of India vs. K. Mohandas & Others [(2009) 5 SCC 313]- "28. The true construction of a contract must depend upon the import of the words used and not upon what the parties chose to say afterwards. Nor does subsequent conduct of the parties and the performance of the contract, affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surroundings, circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the parties."*

c. *Nabha Power Ltd (NPL) vs. Punjab State Power Corporation (Civil Appeal No. 179 of 2017 decided on 5th October 2017 by the Hon'ble Supreme Court)-wherein it is observed that "We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is*

necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any 'implied term' but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract."

d. *The Rajasthan State Industrial Development and Investment Corporation and Arv s. Diamond and Gem Development Corporation Ltd and Anr. (Civil Appeal Nos. 8222-8223 of 2003 decided on 12th February 2013 by the Hon'ble Supreme Court) - "16. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however is reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be*

interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. (Vide: United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal, AIR 2004 SC 4794; Polymat India P. Ltd. & Anr. v. National Insurance Co. Ltd. & Ors., AIR 2005 SC 286)."

51. It is submitted that Subordination Agreement should be read as a whole and a contract should be interpreted without giving any outside aid. The clauses of the contract have to be given a literal meaning, construed strictly and interpreted in a manner that the terms are in no way varied.

52. It is submitted that Subordination Agreement does not need a considerable effort for interpretation. Clause 2.2 of the Subordination Agreement is blatant, express and there is no clause in conflict with it.

<u>Conclusion:</u>

Upon going through the pleadings and on hearing the Counsel for the Parties, the following are the observations of this Bench:

A. It is a settled proposition in law that the role of Resolution Professional (RP) in the IBC proceedings when admitting the claim, the RP is only acting as Administrator and have to collate and determine the claim based on the 'Claim Form' submitted by the Creditors. Here, in this case, the financial

debt of the Applicant is clearly established from the balance sheets of the R3, Subordination Agreement and DTD. Based on these factors, R1 determined the claim of the Applicant for Rs. 354.73 crores. Subsequently, on the intervention of the Debenture Holders, the R1/Claim Management Consultant whose functions are akin to that of a Resolution Professional, revised the claim based on Clause 2.2 of the Subordination Agreement.

B. However, it is to be noted that R1 completely ignored Clause 2.1(ii) of the Agreement. Clause 2.1(ii) reads as below:

> *"(ii) the Subordinated Debt is, and shall remain at all times, whether a bankruptcy, insolvency or liquidation of the Company has occurred, or otherwise, fully subordinated to the Debt and shall not be due and payable until all and any rights and claims which the Debenture Holders may now or hereafter have against the company in respect of the Debt have been is irrevocably paid and discharged in full and the Final Redemption Date has occurred."*

Clause 2.1(ii) clearly provides that the subordinated debt shall remain irrespective of occurrence of bankruptcy, insolvency, liquidation of the company, however, fully subordinated to the debt of the debenture holders and shall not be due and payable until all and any rights and claims of the debenture holders against the Company in respect of the debt have been irrevocably paid and discharged in full.

C. This tripartite Subordination Agreement does not and will not be applicable to other creditors of R3. So, the logical corollary of the subordination agreement is that till the debenture holders are satisfied in full, the Applicant will not get anything from R3. This contract when interpreted gives the abovesaid meaning. The debt of the Applicant only become subordinated to the debt of the Debenture Holders as far as R3 is concerned.

D. R1 being a Claim Management Consultant who is playing the role of Resolution Professional, after the determination of claim, should not have ventured into the business of interpreting the Subordination Agreement on the intervention of the debenture holders. This means that R1 has taken the role of the Adjudicator which is diagonally opposite to the dictum of the Hon'ble Supreme Court in the case of *Swiss Ribbons* and *Essar Steel India Limited (supra)*.

E. Since this Asset Resolution process of IL & FS companies is almost treated as per IBC proceedings, we feel that R1 has exceeded its jurisdiction and in exercise of wrong jurisdiction reversed the earlier decision of admitting the claim.

F. The event of default as referred in Clause 2.2 of the Subordination Agreement is limited only to the default relating to the debenture holders in the normal circumstance. Here the default has not happened only to the debenture holders but due to the extraordinary circumstances, on the

intervention of Union of India, a Resolution process has been sought for IL & FS group companies and hence, we are of the view that the 'event of default' mentioned in Clause 2.2, is not applicable in cases of insolvency/bankruptcy or liquidation proceedings as mentioned in Clause 2.1(ii) of the Subordination Agreement.

G. Even in public interest also, where thousands of investors running into several crores of rupees are getting affected, the hard earned money invested by the investors cannot be destroyed on the stroke of a clause in an Agreement which provides extra cushion to the Debenture Holders. But at the same time the rights of the Applicant/Creditors are totally destroyed and it/they is/are left high and dry for no fault of theirs. Such kind of a beneficial interpretation will in no way affect the debenture holders in view of the fact that the Applicant's debt is always a subordinated debt as provided in the agreement and the CoC while deciding the distribution will take into account clause 2.2 of the Subordination Agreement. Hence, we are of the view that based on Clause 2.2 of the Subordination Agreement the outright rejection of the claim of the Applicant is not correct.

H. In the case on hand, in fact, a situation as envisaged under Clause 2.1(ii) of the Agreement has occurred, and even assuming that the resolution process being worked out to the group companies of IL & FS including R3 is taken as an event of default, the provisions of Clause 2.1(ii) prevails over

Clause 2.2 and hence there is no cessation of the debt of the Applicant.

I. In view of the above discussion, the Application is allowed in part on contest. Payer clauses (a), (b) and (e) are allowed as prayed for. The rejection by R1, vide its email dated 06.11.2019, letters dated 21.01.2020 and 19.03.2020, of the Applicant's claim of Rs. 354.73 crores (approximately) in respect of Hazaribagh Ranchi Expressway Limited (R3) is set aside. R1 is directed to reinstate the said claim of the Applicant. No order need be passed as to prayer clauses (c) and (d). There would be no order as to costs.

Sd/-
V. NALLASENAPATHY
Member (Technical)

Sd/-
JANAB MOHAMMED AJMAL
Member (Judicial)

NATIONAL COMPANY LAW TRIBUNAL
COURT No. – I, MUMBAI BENCH

*** *** ***

CA No. 1029/MB/2020
In
CP No. 3638/MB/2018

Union of India
V/s
Infrastructure Leasing and Financial Services Ltd. & Ors.

*** *** ***

Dated 1st December, 2020

ORDER

The matter is taken up on VC. Counsels for both the parties are present. The order is pronounced. CA No.1029 of 2020 is allowed on contest, vide separate order.

Sd/-	Sd/-
V. NALLASENAPATHY	**MOHAMMED AJMAL**
Member (Technical)	**Member (Judicial)**