

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI****Company Appeal (AT) (Insolvency) No. 597 of 2018**

(Arising out of Order dated 29<sup>th</sup> August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad, in C.P. (IB) No. 192/7/HDB/2018)

**IN THE MATTER OF:****MAIF Investments India Pte. Ltd.****...Appellant****Vs****M/s. Ind-Barath Energy (Utkal) Limited****....Respondent****Present:**

**For Appellant: Mr. Arun Kathpalia, Senior Advocate with Mr. Krishnendu Datta, Mr. Lzafeer Ahmed, Ms. Bani Brar, Mr. Rhia Mehta and Mr. Parinaz Vakil, Advocates.**

**For Respondent: Mr. Niraj Kumar, Mr. K. Aravind and Mr. Satendra K. Rai, Advocates.**

**Mr. Yogesh Kumar Jagia and Ms. Tanya Nagi, Advocates.**

**J U D G M E N T****SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellant- 'MAIF Investments India Pte. Ltd.' filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) against 'M/s. Ind-Barath Energy (Utkal) Limited'- ('Corporate Debtor'). The 'Bank of Baroda' another 'Financial Creditor' also filed an application under Section 7 of the 'I&B Code'. By the impugned order dated 29<sup>th</sup> August, 2018 passed by the Adjudicating Authority (National Company

Law Tribunal), Hyderabad Bench, Hyderabad, Section 7 application filed by the Bank of Baroda has been admitted and 'Interim Resolution Professional' has been appointed but Section 7 application preferred by the Appellant- 'MAIF Investments India Pte. Ltd.' has been dismissed on the ground that default is deemed to have been repaid in view of the invocation of pledge of shares and conversion of 'Compulsorily Convertible Debentures' ("CCD" for short) into equity shares.

2. The brief fact of the case is that 'M/s. Ind-Barath Energy (Utkal Limited)'- ('Corporate Debtor') is a Public Limited Company engaged in the business of developing, constructing, operating power generation and related transmission and distribution facilities and is a subsidiary of 'Ind-Barath Thermotek Private Limited' ("IBTPL" for short). The 'IBTPL' is, in turn, a subsidiary of 'Ind-Barath Power Infra Limited' ("IBPIL" for short).

3. The case of the Appellant is that 'MAIF Investments India Pte. Ltd.' and one 'MAIF Investments India 2 Pte. Ltd. ("MAIF-II or 2" for short) are promoters and 'IBTPL', 'IBPIL' and 'M/s. Ind-Barath Energy (Utkal Limited)'- ('Corporate Debtor') along with one 'Arkay Energy Rameswaran Limited' entered into a Subscription Agreement on 23<sup>rd</sup> December, 2016 in terms of which the Appellant provided a bridge loan for a sum of Rs.102 Crores by subscribing to 10,200,000 'Optionally Convertible Debentures' ("OCD" for short) of the 'Corporate Debtor' at Rs.100/- per 'OCD' (in February 2017) for an aggregate consideration of Rs.102 Crores.

4. Further, the case of the Appellant is that separately and independent of the Subscription Agreement, the Appellant and its sister entity, 'MAIF-II' **Company Appeal (AT) (Insolvency) No. 597 of 2018**

had also subscribed to certain 'Non-Convertible Debentures' ("NCD" for short) and 'CCD' in the holding company of the 'Corporate Debtor' (unrelated to the present transaction) by way of Investment Agreement and a Debenture Trust Deed.

5. Clause 9.1 of the Subscription Agreement of 2016 contemplates that a default under either agreement i.e. the Investment Agreement or the Debenture Trust Deed shall be considered as a default under the Subscription Agreement of 2016.

6. On 21<sup>st</sup> May, 2017 and 21<sup>st</sup> August, 2017 and thereafter till August, 2018, the interest payments on the 10,200,000 'OCDs' held by the Appellant was required to be made by the 'Corporate Debtor' in terms of Clause 10.1 of the Subscription Agreement of 2016.

7. It is alleged that no such payments, as mandated by the terms of the Subscription Agreement of 2016, were made by the 'Corporate Debtor' resulting in an event of default under the Subscription Agreement of 2016. Further, admittedly, all three events of defaults have also occurred under the Investment Agreement.

8. On 9<sup>th</sup> June, 2017 (till 11<sup>th</sup> July, 2018), the Appellant's agent 'SBI-SG Global Securities Pvt. Ltd.' demanded interest payments on the 'OCDs' falling due on 21<sup>st</sup> May, 2017, 21<sup>st</sup> August, 2017 and thereafter on 21<sup>st</sup> November, 2017, 21<sup>st</sup> February, 2018, 21<sup>st</sup> May, 2018 and 16<sup>th</sup> August, 2018.

9. The Appellant and 'MAIF-II' also addressed a letter dated 15<sup>th</sup> April, 2018 to the 'Corporate Debtor', 'IBPIL', 'IBTPL', the Promoters and 'Arkay Energy Rameswaram Limited' *inter alia* calling upon them to redeem the 'OCDs' in terms of Clause 3.3 read with Clause 9.4 of the Subscription Agreement of 2016. However, no payments were made by the 'Corporate Debtor' despite the amounts becoming due and payable. It was in this background, the Appellant filed an application under Section 7 of the 'I&B Code'.

10. Learned counsel for the Appellant submitted that the 'Corporate Insolvency Resolution Process' having initiated against 'M/s. Ind-Barath Energy (Utkal) Limited'- ('Corporate Debtor'), the dismissal of Section 7 has lost its force but the question remains as to whether the Appellant comes within the meaning of 'Financial Creditor' or not for the purpose of constitution of the 'Committee of Creditors' and determining its claim.

11. Reliance has been placed on the Investment Agreement dated 25<sup>th</sup> June, 2015 and the Subscription Agreement dated 23<sup>rd</sup> December, 2016, pursuant to which, the investments were made in the 'Corporate Debtor' and its holding Company. According to the Appellant, both the Agreements are inter-connected so much so that event of default is common to both agreements, relevant of which as detailed below:

<b>AGREEMENT DT</b>	<b>NATURE OF INVESTMENT</b>	<b>APPEALLANT</b>	<b>MAIF-2</b>
25/06/2015	Equity Shares	1	0
23/12/2016	OCD	102 Crore	

**Investment made in holding company of corporate debtor**

<b>AGREEMENT DT</b>	<b>NATURE OF INVESTMENT</b>	<b>APPELLANT</b>	<b>MAIF-2</b>
25/06/2015	CCD	9,06,559	
	NCD		699 Crore
	Additional NCD		80 Crore

12. According to the Promoters, on 29<sup>th</sup> August, 2017, demand notice was issued jointly by the Appellant and 'MAIF-2' under both the agreements to 'Corporate Debtor', its holding company and step up holding company asking to redeem 'NCD' and convert 'CCD'. They also informed about their entitlement to vote based on the securities pledged. On failure to redeem, on 31<sup>st</sup> August, 2017, the Appellant and 'MAIF-2' invoked pledge of 49% equity shares of the 'Corporate Debtor' and 51% equity of holding company.

13. According to learned counsel for the Promoters, invocation of pledge is not in dispute before any forum. It was submitted that with invocation of pledge, the Appellant became equity shareholder of the 'Corporate Debtor' of 49% and 51% of holding company; hence the Appellant got control on management of the 'Corporate Debtor'. On 12<sup>th</sup> September, 2017, the Appellant and 'MAIF-2' through their trustee issued notice under Section 100(2) of the Companies Act, 2013 to holding company to hold EoGM to convert 'CCD' and reconstitute Board of Directors so as to give 100% control on holding company. This was stayed by the National Company Law Tribunal at the instance of holding company but subsequently the Company Petition was withdrawn on 6<sup>th</sup> March, 2018 and on 26<sup>th</sup> March, 2018 by giving notice 'CCD' were converted into equity which gave rise to filing of petition under Section 59 of the Companies Act, 2013 by the

Appellant and dismissal order of the appeal which was fixed for 20<sup>th</sup> December, 2018.

14. It is submitted that by order dated 20<sup>th</sup> June, 2018, both the petitions under Section 7 of the 'I&B Code' and Section 59 of the Companies Act, 2013 were taken together. By letter dated 21<sup>st</sup> December, 2017, the Appellant agreed for 100% equity of the 'Corporate Debtor'. On 3<sup>rd</sup> April, 2018, the Appellant filed Contempt Petition under Section 425 of the Companies Act, 2013 and the same is pending before the National Company Law Tribunal. On 15<sup>th</sup> April, 2018, the Appellant with 'MAIF-2' jointly issued demand notice for redemption of 'OCD' of 102 Crores by claiming independent right under the Subscription Agreement dated 23<sup>rd</sup> December, 2016 and subsequently filed petition under Section 7 of the 'I&B Code'.

15. From the record, it appears that Clause 9 of the Subscription Agreement stipulates mechanism of redemption. Clause 9.2 provides for put option to enable to buy 'OCD', Clause 9.3 is for failure to purchase 'OCD', Clause 9.4 stipulates creation of redemption reserve account after 12 months and to redeem 'OCD' out of this fund only.

16. According to the Promoters, the Appellant in compliance of Clause 9.2 never issued notice for put option because debt was satisfied by invocation of pledge and the Appellant issued notice on 15<sup>th</sup> April, 2018 for redemption contrary to Clause 9.2 of the Subscription Agreement and hence neither debt was owed nor due.

17. According to learned counsel for the 'Resolution Professional', the Appellant has made a total claim of about Rs.143.02 Crores and 'MAIF-2' has made a total claim of about Rs.1439.34 Crores. The basis of the Appellant's claim is stated to be on account of a Subscription Agreement dated 23<sup>rd</sup> December, 2016 entered into by the Investors with 'IBTPL' and the 'Corporate Debtor', amongst others, for subscribing to 102,00,000 'OCDs' issued by the 'Corporate Debtor'.

18. According to the 'Resolution Professional', upon review of the claims, it was seen that the claims of the Investors primarily arise out of the Investment Agreement. From the documents submitted by the Investors along with the claim form, it was noted that:

a. Pursuant to the Investment Agreement, the Investors had made investments in the Respondent and 'IBTPL' in the following manner:

a) Appellant subscribed to the following securities:

i. 906559 (Nine Lakhs Six Thousand Five Hundred and Fifty Nine Only) 'CCDs' of Rs.10/- each in 'IBTPL';

ii. 1 equity share of 'IBTPL';

iii. 1 equity share of the Respondent;

b) 'MAIF-II' subscribed to 'NCDs' issued by 'IBTPL' for a total subscription amount of Rs. 799 Crores;

b. By the Share Pledge Agreement, the Respondent, 'IBTPL' and 'IBPIL' pledged over 5100 equity shares representing 51% of share capital of 'IBTPL' and 505,779,500 equity shares representing 48.99% of share capital of the Respondent. For this purpose,

separate powers of attorneys dated 9<sup>th</sup> July, 2015 were also executed in favour of the Debenture Trustee.

- c. Subsequently, since the Respondent was in need of temporary financing for certain purposes (as set in the Subscription Agreement), the Respondent and the promoters of the group requested the Appellant to subscribe to 102,00,000 'OCDs' to be issued by the Respondent. Accordingly, Appellant subscribed to the said 'OCDs' for a total consideration of Rs.102 Crores.
- d. Under the terms of clause 2.1 of the Subscription Agreement, the Respondent, 'IBTPL' and 'BPIL', amongst others, were required to comply with their obligations under Investment Agreement.
- e. Under clause 7.2 of the Subscription Agreement, the Investors were entitled to the benefit of indemnification under clause 10 of the Investment Agreement.
- f. Under clause 8.2 of the Subscription Agreement, the Respondent, 'IBTPL' and 'BPIL', amongst others, were jointly and severally liable to ensure the performance of the Subscription Agreement.
- g. Admittedly, on account of defaults committed by the 'Corporate Debtor' and 'IBTPL', the Investors sought to exercise their rights under the Investment Agreement, the Debenture Trust Deed and the Share Pledge Agreement and on 31<sup>st</sup> August, 2017, the Debenture Trustee invoked the pledge of the shares in its favour in terms of the Share Pledge Agreement.

19. The Adjudicating Authority on consideration of the matter held that the default, if any, committed by the 'Ind-Barath Energy (Utkal) Limited' is



deemed to have been repaid in view of invocation of pledge shares and the conversion of 'CCDs' into equity shares.

20. The questions arise for consideration in this appeal is:

- (i) Whether the Appellant is a 'Financial Creditor' of the 'Corporate Debtor'? and;
- (ii) Whether the debt of the Appellant stands paid as held by the Adjudicating Authority?

21. Section 3(11) defines 'debt' means:

**“3. Definition.—** (11) *"debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;*

22. Section 5(7) defines 'Financial Creditor' whereas Section 5(8) defines 'Financial Debt', which reads as follows:

**“5. Definitions.—** (7) *"financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to"*

*"5 (8) "financial debt" means a debt along with interest, if any, which is disbursed against the*

*consideration for the time value of money and includes—*

*(a) money borrowed against the payment of interest;*

*(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;*

*(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*

*(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*

*(e) receivables sold or discounted other than any receivables sold on non-recourse basis;*

*(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

*[Explanation.- For the purposes of this sub-clause,-*

- (i) *any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*
- (ii) *the expression, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development Act, 2016 (16 of 2016));*
- (g) *any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*
- (h) *any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*
- (i) *the amount of any liability in respect of any of the guarantee or indemnity for any of the*

*items referred to in sub-clauses (a) to (h) of this clause;”*

23. In the present case, there has been a disbursement of Rs.102 Crores in favour of the ‘Corporate Debtor’ by way of ‘OCDs’. In terms of Section 5(8)(c), any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument, comes within the meaning of ‘financial debt’. Therefore, from the aforesaid fact, we find that there is a disbursement of Rs. 102 Crores in favour of the ‘Corporate Debtor’ and the ‘OCDs’ originally met is against time value of money and *per se*, constitute ‘financial debt’ in the light of Section 5(8)(c) of the ‘I&B Code’.

24. The next question is whether the debt amount payable by ‘M/s. Ind-Barath Energy (Utkal) Limited’- (‘Corporate Debtor’) is deemed to have been repaid in view of invocation of pledge shares and the conversion of ‘CCDs’ into equity shares?

25. Admittedly, by Subscription Agreement dated 23<sup>rd</sup> December, 2016, the Appellant provided a bridge loan for a sum of Rs. 102 Crores by subscribing to 10,200,000 ‘Optionally Convertible Debentures’ (“OCD” for short) of the ‘Corporate Debtor’ at Rs.100/- per ‘OCD’ (in February 2017). The interest payments on the 10,200,000 ‘OCDs’ held by the Appellant were required to be made by the ‘Corporate Debtor’ in terms of Clause 10.1 of the Subscription Agreement of 2016. The Appellant’s agent ‘SBI-SG Global Securities Pvt. Ltd.’ demanded interest payments on the ‘OCDs’ falling due on 21<sup>st</sup> May, 2017, 21<sup>st</sup> August, 2017 and thereafter on 21<sup>st</sup>

**Company Appeal (AT) (Insolvency) No. 597 of 2018**

November, 2017, 21<sup>st</sup> February, 2018, 21<sup>st</sup> May, 2018 and 16<sup>th</sup> August, 2018. However, such interest payments on the 'OCDs' as were due have not been paid by the 'Corporate Debtor'.

26. Admittedly, the Appellant and 'MAIF-II' also addressed a letter on 15<sup>th</sup> April, 2018 to the 'Corporate Debtor', 'IBPIL', 'IBTPL', the Promoters and 'Arkay Energy Rameswaram Limited' *inter alia* calling upon them to redeem the 'OCDs' in terms of Clause 3.3 read with Clause 9.4 of the Subscription Agreement of 2016. However, no payments were made by the 'Corporate Debtor' despite the amounts becoming due and payable.

27. According to the Promoters, on failure to redeem, on 31<sup>st</sup> August, 2017, the Appellant and 'MAIF-2' invoked pledge of 49% equity shares of the 'Corporate Debtor' and 51% equity of holding company. However, it has not been made clear as to why such plea was not taken when the Appellant and 'MAIF-2' addressed a letter on 15<sup>th</sup> April, 2018 to the 'Corporate Debtor', 'IBPIL', 'IBTPL', the Promoters and 'Arkay Energy Rameswaram Limited', wherein they *inter alia* called upon them to redeem the 'OCDs' in terms of Clause 3.3 read with Clause 9.4 of the Subscription Agreement of 2016.

28. The redemption of the 'NCD' and the 'CCD' are different than the conversion within the 'OCD'. What has been stated to have been redeemed is relating to 'NCD' and the 'CCD' and not the 'OCD'. On 12<sup>th</sup> September, 2017, the Appellant and 'MAIF-2' through their trustee issued notice under Section 100(2) of the Companies Act, 2013 to holding company to hold EoGM to convert 'CCD' as distinguished from the 'OCDs' for which Rs. 102

**Company Appeal (AT) (Insolvency) No. 597 of 2018**

Crores were disbursed by the 'Corporate Debtor'. At the instance of the holding Company, the matter which was pending before the National Company Law Tribunal was stayed which was reason for withdrawal of the Company Petition. Subsequently, the petition under Section 59 of the Companies Act, 2013 was filed by the Appellant, which was dismissed on 20<sup>th</sup> December, 2018.

29. The aforesaid fact shows that the dispute relating to redemption of 'NCD' and 'CCD' were alleged to have been converted into equity shareholder of the 'Corporate Debtor' with 49% and 51% of holding company. Apart from the fact that it does not relate to the 'OCD', the dismissal of the application under Section 59 of the Companies Act, 2013 shows that it has not been accepted by the National Company Law Tribunal that the debenture stands converted as share in favour of the Appellant.

30. Such a finding given on a petition under Section 59 of the Companies Act, 2013 by the National Company Law Tribunal, the same National Company Law Tribunal being the Adjudicating Authority in the application under Section 7 filed by the Appellant was wrong to hold that by invocation of pledge of shares and conversion of 'CCD' into equity shares the debt amount stands paid. Under the law, there is no presumption of payment of debt merely on the invocation of the pledge till conversion of the debenture into share is accepted under the law. Further, the 'OCD' being the subject matter for disbursement of amount of Rs.102 Crores, it cannot be linked with 'NCD' and 'CCD', which were subscribed pursuant to an agreement

which is independent to Subscription Agreement dated 23<sup>rd</sup> December, 2016.

31. The Promoters confused the Adjudicating Authority by co-relating the two independent agreements i.e. one Subscription Agreement dated 23<sup>rd</sup> December, 2016 and the separate agreement which the Appellant and its sister entity, 'MAIF-II' has entered into for subscription to certain 'NCD' and 'CCD' in the holding company of the 'Corporate Debtor' which are unrelated to the agreement dated 23<sup>rd</sup> December, 2016. The Adjudicating Authority failed to consider the same and thereby, wrongly held that the debt has been paid and there was no default on conversion of the 'CCD'. It also failed to consider that the interest to which the Appellant was entitled for different debt for which notice was given and, as discussed above, had not been paid by the 'Corporate Debtor' and there was a default of more than Rs.1 Lakh on the part of the 'Corporate Debtor'.

32. For the reasons aforesaid, we hold that the Appellant- 'MAIF Investments India Pte. Ltd.' is a 'Financial Creditor' of 'M/s. Ind-Barath Energy (Utkal) Limited'- ('Corporate Debtor'). Further, we hold that by the invocation of the pledge of shares pursuant to the Subscription Agreement, no presumption can be drawn that the disbursement of Rs.102 Crores so made was towards the 'OCD' and stands paid.

33. We, accordingly, set aside the impugned order and direct the 'Resolution Professional' to treat the Appellant as a 'Financial Creditor' for the purpose of constitution of the 'Committee of Creditors' and allow the Appellant- 'MAIF Investments India Pte. Ltd.' to take part as a member of

**Company Appeal (AT) (Insolvency) No. 597 of 2018**

the 'Committee of Creditors' with voting share to the extent of the amount disbursed and claimed by it.

34. The appeal is allowed with aforesaid observations and directions. No cost.

[Justice S.J. Mukhopadhaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

NEW DELHI

23<sup>rd</sup> April, 2019

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