

Resolution of Aditya Estates Private Ltd. (AEPL)

Though small in terms of size and value, resolution of Aditya Estates Private Ltd. (AEPL) provides some interesting aspects of the insolvency process under the IBC. This is such a case in which a foreign bank provided debt to a foreign company operating outside India, which happened to be a related party of AEPL, the Corporate Debtor (CD). The said loan was backed by a corporate undertaking given by the AEPL. The Adjudicating Authority considered this undertaking as corporate guarantee and declared AEPL a Corporate Debtor and the foreign bank a Financial Creditor under the IBC.

NCLT on February 26, 2019, admitted the CIRP application of the ICICI-UK for and ordered initiation of insolvency process for AEPL. The court also appointed Mr. Alok Saksena as Interim Resolution Professional who was subsequently confirmed as its Resolution Professional by the Committee of Creditors. The CD had only a leasehold property in New Delhi, which was its registered office. The liquidation value of the property was estimated to be around ₹306.80 crores which was reduced to ₹153.40 crores after adjusting the liabilities of getting it converted from leasehold to freehold. Ultimately, the Committee of Creditors approved the Resolution Plan of Adani Properties Pvt. Ltd. with 93.01% votes. Thus, the CD was resolved through a Resolution Plan amounting ₹265 crore which is about 138 % higher than the liquidation value.

The present case study, sponsored by IIPI, has been developed by Mr. Alok Saksena in which he has provided a first-hand step by step guide for resolution of a small sized distressed company having a single property situated in one of the poshest localities of India.

Read on to know more...



Alok Saksena

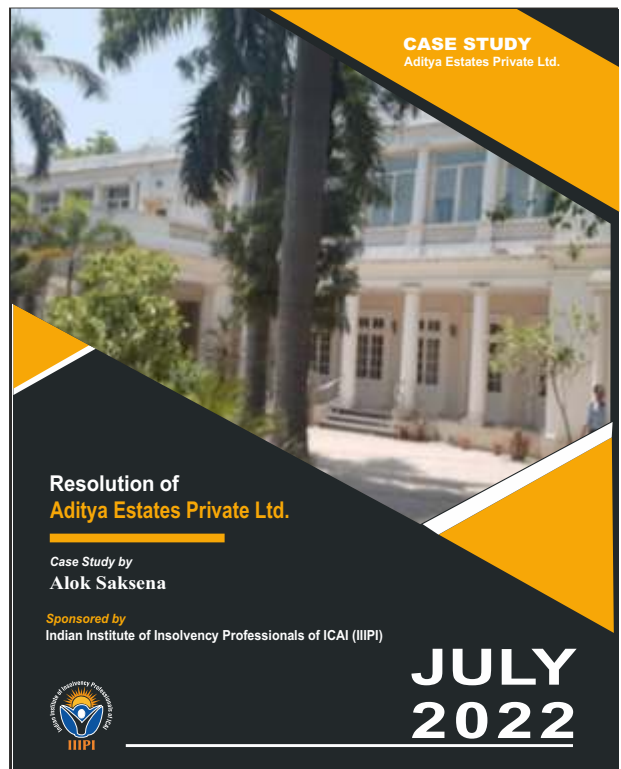
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1. Introduction:

The resolution of Aditya Estates Private Ltd. (AEPL) involves complicated legal battles wherein the Corporate Debtor (CD) argued that the property under question stood released as the debt against it which was granted to Duncan Macneill Power India Ltd. (DMPIL) a related party of AEPL was repaid to ICICI Bank- India. This argument was accepted by the Debt Recovery Tribunal (DRT) which passed an order of release of the property to which ICICI Bank-India the creditor filed an appeal in the appellate tribunal. Besides, AEPL also contended that ICICI Bank UK PLC (ICICI-UK) was not a Financial Creditor (FC) under the definition of Insolvency and Bankruptcy Code, 2016 (IBC). The judgement of NCLAT on these issues provides more clarity on various provisions of the IBC.

2. Profile of Corporate Debtor

AEPL, the CD in this case with registered office at House No.3, Bhagwan Das Road, New Delhi-110001 (hereafter, property at B. D. Road) was incorporated by Mr. Aditya Kumar Jajodia in 1984. The company was primarily engaged in real estate sector with owned or leased



properties.

AEPL was a group company of Jajodia Group of Companies, which was primarily engaged in tea growing and manufacturing business. Besides AEPL, the major subsidiaries of the group included Duncan Macneill Power India Ltd. (DMPIL), Assam Oil Company Ltd – UK (AOCL), and Assam Company India Ltd. (ACIL), which was a listed entity and a major tea company of India. The Jajodia Group of Companies fell into financial crisis as its foray into oil sector incurred losses. Besides, downturn in the tea business further increases the financial crisis.

AEPL had provided corporate guarantee to secure repayment of a term loan amounting ₹24.95 crores disbursed by the ICICI Bank-India to DMPIL. It mortgaged the property at B. D. Road to ICICI Bank-India through a Power of Attorney against the loan availed by DMPIL. In a suit filed before the Debt Recovery Tribunal (DRT), DMPIL claimed to have paid entire outstanding of ₹24.95 crores along with interest and sought release of the mortgaged property from ICICI Bank-India. The DRT ordered for release of the property, but ICICI Bank-India challenged the order in Debt Recovery Appellate Tribunal (DRAT), which set aside the order of the DRT on the ground that the entire outstanding payment was not made. ICICI -UK moved Delhi HC against the Release of the Property mortgaged to ICICI Bank -India on the ground that AEPL has provided a corporate undertaking for the liabilities due to AOCL and obtained a stay on such release.

Subsequently, ICICI-UK filed a petition before NCLT, New Delhi under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) for enforcing the Corporate Undertaking given by AEPL through ICICI Bank-India against the loan of USD 63 million availed by AOCL. As per this loan agreement the AEPL had undertook to repay the loan in case of default. This undertaking of AEPL was treated as a corporate guarantee to ICICI-UK on the basis of which it was recognized as a financial creditor under the IBC thereby having rights to file application against the CD for commencement of the CIRP.

3. Commencement of CIRP of AEPL

ICICI-UK had given a term loan of USD 63 million to AOCL in 2007. Besides, ICICI Bank-India had provided a loan of ~₹23 Crore to DMPIL, wherein the AEPL had given an undertaking to repay the said loan from sale of its

property at B. D. Road. Accordingly, ICICI-UK filed a Corporate Insolvency Resolution Process (CIRP) petition under Section 7 of the IBC in 2018 for initiating resolution process of AEPL. The NCLT Principal Bench, New Delhi admitted the petition and initiated CIRP vide its order¹ in C.P. No. 974 (PB)/ 2018 on February 26, 2019, by holding that ICICI-UK is a Financial Creditor (FC) of the CD. In arriving to these findings, the Bench considered the documents between four parties, namely, ICICI Bank-India, DMPL, ICICI-UK and the CD. The court also appointed Mr. Alok Kailash Saksena as Interim Resolution Professional (IRP) who was later confirmed as Resolution Professional (RP) by the Committee of Creditors (CoC) dated March 26, 2019.

4. Complicated Documentation involved in the Loan Transaction and undertaking by the CD

The admission order took into account the complicated documentation as mentioned below:

- (a) Facility Agreement between AOCL and ICICI-UK through which the AOCL had secured a loan of USD 63 million.
- (b) Facility Agreement dated December 21, 2007, wherein ICICI Bank-India granted a loan ₹ 24.95 Crores to DMPIL and took a guarantee of the CD along with mortgage of the property at BD Road.

ICICI Bank-India, AEPL and DMPIL entered into a Debt Asset Swap Agreement (DASA), but ICICI-UK was not part of DASA agreement.

- (c) ICICI Bank-India, AEPL and DMPIL entered into a Debt Asset Swap Agreement (DASA), but ICICI-UK was not part of DASA agreement. Along with the DASA agreement two more agreements were executed as follows:
 - i. The CD executed an irrevocable Power of Attorney in favour of ICICI Bank-India, appointing ICICI Bank-India as its Attorney, to sell, transfer, assign and/or otherwise dispose of the property, including through any encumbrance on the property inter alia for satisfaction of the dues owed to ICICI Bank-India as well as the FC namely ICICI-UK.

¹ NCLT, Principal Bench - New Delhi: C.P. No. 974 (PB)/ 2018 dated February 26, 2019

ii. Multi party undertaking executed at New Delhi inter alia between the FC and AOCL wherein AOCL agreed that upon occurrence of event of default, any amount which is in excess of the amount received for the payment of statutory dues and satisfaction of outstanding amount under the transaction document would be used to extinguish the outstanding amount under the facility agreement dated December 21, 2007, signed between the FC and the AOCL.

(d) Article of association of the CD were amended in 2015 after the DASA and multi-party undertaking by incorporating new article 34 where 'lenders' were defined to include loans granted by ICICI Bank-India to DMPIL and loan granted by ICICI-UK to AOCL, and the 'property' was defined as the property at BR. Further, the articles placed restrictions on the CD from directly or indirectly dealing with the property without the written consent of the 'lender'.

(e) The questions before the NCLT were whether ICICI-UK is a party of the agreement between the ICICI Bank-India and the CD? Whether ICICI-UK is directly a party or beneficiary of clauses in DASA? Whether any Right has been created in favour of ICICI Bank to recover its dues from the property of the CD mortgaged to ICICI Bank-India? If that is the case, then ICICI-UK would be covered by the expression of FC as defined in Section 5 (7) & (8) of the IBC. After analysing complex documents created between the parties namely, ICICI Bank-India, DMPIL, CD and ICICI-UK the bench proceeded to decide the issues and the various contentions raised thereon.

(f) The primary contention of the CD was that ICICI-UK was not a signatory to the DASA, which was essentially between ICICI Bank-India, DMPIL and the CD. In this agreement, the CD had mortgaged its property in favour of ICICI Bank-India against a debt of ₹24.95 Crores which it had availed from a sanctioned loan amounting ₹335 Crores. Therefore, ICICI-UK has no right created on the assets of CD by virtue of this agreement. The next contention was that in terms of the undertaking ICICI-UK had access to the sale proceeds of the property only in the event of default between ICICI Bank-India and DMPIL and since the loan was



repaid by DMPIL as per the order of the Debt Recovery Tribunal (DRT), there was no default and consequently ICICI-UK had no right over its property and its dues are not financial debt. It was further contented that even if the DASA and undertaking are deemed to be creating a charge or

CD argued that the loan was repaid by DMPIL as per the order of the Debt Recovery Tribunal (DRT), there was no default and consequently ICICI-UK had no right over its property and its dues are not financial debt.

interest on the mortgaged property at BR, ICICI-UK cannot be termed as a guaranteed holder.

(g) After considering all the contentions, the Bench held that ICICI-UK is not a part of the loan advanced by ICICI Bank-India to DMPIL or part of the DASA agreement. However, it is a party to the escrow agreement. Further, the amendment carried out in the Article of Association of the CD and the undertaking given to ICICI-UK created a right to sell the property and pay the liabilities. It held that ICICI-UK would be a financial creditor qua the CD. As far as the DASA agreement, it was seen that although ICICI-UK is not a part of DASA, it figures as a beneficiary in various paras of DASA. The Hon'ble NCLT also considered the objection that the debt was time barred but it held otherwise after considering the terms of repayment of principal and interest.

5. Challenges to CIRP Admission Order

The suspended director of the CD filed an appeal before the National Company Law Appellate Tribunal (NCLAT) challenging the CIRP initiation order on various grounds, which were raised before the NCLT. The grounds of appeal and decision of NCLAT order² in CA(AT) 270/ 2019 dated 5th September 2019 are tabulated below:

² NCLAT, New Delhi: Company Appeal (AT) 270/ 2019 dated September 05, 2019

Table-1: NCLAT decisions on various grounds of appeal contended by the suspended Director

Grounds of Appeal	Decision of NCLAT
ICICI-UK is not a signatory to the DASA (which is essentially between ICICI Bank- India and Duncan Macneill for its loan of ₹24.95 crores) and can claim no right under the agreement.	ICICI Bank UK PLC although not a signatory is mentioned as a party. It is immaterial as the CD has undertaken obligations to repay the loan of ICICI Bank UK PLC of USD 63 million.
The payment to ICICI-UK under DASA would arise only in the event of default of loan granted by ICICI Bank-India to DMPIL. Since the entire liability of DMPIL was discharged by the CD, no repayment can be made to ICICI-UK.	NCLAT observed that even as on CIRP Admission date the entire liability of ICICI Bank-India was not discharged as outstanding interest was not fully repaid. .
No separate guarantee was given by CD to ICICI Bank-UK for its loan to AOCL and the reliance on the undertaking is not relevant once the DASA becomes ineffective due to repayment.	NCLAT observed that the liability of ICICI Bank-India was still not fully discharged and that the undertaking created an effective right to ICICI Bank-India and ICICI-UK.
The reliance on Articles of Association cannot create any right under IBC to be treated as a Financial Creditor.	The amendments in the Article of Association whereby it lists ICICI-UK as a 'lender' for its dues from AOCL fortifies the view that it has acknowledged the liability of financial debt to ICICI-UK.

The tribunal vide an order dated September 05, 2019, dismissed the said application to which the suspended director filed a civil appeal in the Supreme Court on September 30, 2019 but failed to get any relief.

6. Public Announcement, Claims and CoC

Public Announcement for initiation of CIRP was made on March 01, 2019. Creditors had filed their claims which were submitted to NCLT and CoC was constituted as tabulated below:

Table -2: Constitution of the CoC

Name	Voting Share
ICICI Bank UK PLC	89.52%
ICICI Bank Limited	3.38%
Sprit Infrapower & Multiventures Pvt. Ltd.	6.99%
Shailja Commercial Trade Frenzy Limited	0.11%

AEPL, the CD had only one property at B. D. Road. It had no other assets and no income. The said property was under perpetual lease from the Land & Development Office (L&DO), Government of NCT of Delhi. Therefore, the resolution of the CD was centred around the said

property and its value. This property was spread on 3.44-acre plot in posh Luytens' Delhi with a colonial bungalow constructed during British period which passed through the ownership of several kings and business stalwarts. It finally came under the ownership of the suspended director's family through the controlling interest in the CD.

7. Valuation and Challenges

Valuers were appointed by the RP within the stipulated timeline who arrived at an average liquidation value of ₹306.80 crores. Both valuers have stated that buyer/ auction purchaser is liable to pay L&DO transfer fees (unearned increase) and conversion from leasehold to freehold. Once such payment to L&DO is considered from buyer/ auction purchaser the valuation shall reduce by 50%. Accordingly, Average Liquidation Value stood at ₹153.40 crores. Therefore, the valuation had two values i.e., average liquidation value of ₹306.80 crores and net value of ₹153.40 crores after payment of liabilities to convert it from lease hold to free hold.

8. EOI and Final List of PRA

Form G was issued within the prescribed timelines and following list of Property Resolution Applicants (PRAs) was issued.

Table-3: List of Property Resolution Applicants (PRAs)

S. No.	Name of Prospective Resolution Applicant
1	Adani Properties Private Limited.
2	Mr. Anil Rai Gupta.
3	Dalmia Cement (Bharat) Limited.
4	Mr. Malvinder Singh.
5	Mr. Narayana Murthy.
6	Panch Tatva Promoters Private Limited.
7	Mr. Paras Pramod Agarwal.
8	Veena Investments Private Limited.
9	Welspun Logistics Limited.

A consultant was appointed to evoke the interest in resolution applicants. Considering that the property was located at a prime locality which required interest from very High Net Worth Individuals (HNWI), the consultant approached several HNWI locally and globally.

9. Resolution Plans

Adani Properties Private Limited (APPL) and Veena Investments Private Limited (VIPL) submitted their resolution plans within the prescribed timelines. The other resolution applicants had reservations on the complex documentation and on the issue of leasehold land which was under perpetual lease. They expressed the view that land should ideally be converted to freehold by the CD with the support of interim finance and thereafter resolution process should be commenced. The RP explained to the resolution applicants that IBC was a time bound process and the issue of conversion from perpetual lease to freehold was a time-consuming process which cannot be done within the timelines of CIRP. He also

informed that there was no restriction on change of shareholding of the CD and it may only entail paying

On request of CoC, to make the plan unconditional as per the requirements of IBC, APPL revised their offer from ₹400 Crores to ₹265 Crores, net reduction of ₹135 Crores.

certain transfer fees which should be factored in.

There were several challenges in preparing the Information Memorandum (IM) and the Data Room as the suspended management was not particularly co-operative. The Data Room required a huge documentation of the property since its first origin of the perpetual lease dated way back to 1920 C.E. There were series of transfers and mutations and the same needed lots of efforts in collating, analysing the linked documents and putting in the organised manner to ensure resolution applicants had all the information and least number of queries arose.

We had intense negotiations on the plan submitted by APPL and VIPL, which consumed a lot of time. The negotiations centred around the issue of conversion of property from perpetual leasehold to freehold and the various cost associated with the same. These issues being critical were elaborately discussed between the resolution applicants. The approach of APPL was to initially offer ₹400 crores with a condition that L&DO Charges for conversion of the perpetual leasehold to freehold, transfer fees, along with other charges would be paid from the said 400 crores. On request of CoC, to make the plan unconditional as per the requirements of IBC, APPL revised their offer from ₹400 Crores to ₹265 Crores, net reduction of ₹135 Crores. This reduction was to be attributed to conversion cost, taxes, transfer fees etc., so as to perfect the titles. This reduction was independently verified by the CoC through an external agency.

Table 4: Comparison of the two resolution plans

Highlights of APPL's Resolution Plan	Highlights of VIPL's Resolution Plan
<ol style="list-style-type: none"> Initially offered ₹400 crores with a condition that L&DO Charges along with other charges would be paid from the said ₹400 crores. On request, of CoC, to make the plan unconditional and remove the uncertainty of payment to L&DO and other agencies, APPL revised their offer from ₹400 Crores to ₹265 crores, net reduction of ₹135 crores. All Amount was to be paid upfront. 	<ol style="list-style-type: none"> Offered ₹225 crores with a condition that L&DO Charges along with other charges would be paid from the said ₹225 crores. The plan proposed that the L&DO Charges ought to be waived and not levied on the Resolution Applicant and in case the said charges are not waived, the plan would stand withdrawn.

Thereafter, the CoC took a prudent decision of de-linking the L&DO Charges and other charges from the financial proposal of the plan.

In case of VIPL, the offer of ₹225 crores was along with the condition that L&DO Charges along with other charges would be paid from the said ₹225 Crores. The plan proposed that the L&DO Charges ought to be waived and not levied on the RA and in case the said charges are not waived, the plan would stand withdrawn. After detailed discussion, the CoC concluded that VIPL's plan was conditional, non-compliant and uncertain.

10. CoC's Decision on the Resolution Plan

The CoC decided that Resolution Plan of VIPL, was non-compliant, conditional, and uncertain and was not considered any further and was not to be put up for voting.

In case of APPL, the CoC took an independent assessment from reputed advisors on the reduction of ₹135 crores. The independent assessment estimated the conversion cost

around ₹140 crores and therefore the reduction from ₹400 crores (including L&DO Charges) to ₹265 crores (Excluding L&DO Charges) was found to be reasonable. The same was put up for voting. Furthermore, the Resolution Plan of APPL was found compliant based on section 29A Affidavit and further verification of affidavit conducted by specialised agency. The plan met all the conditions of Section 30 and the regulations and found to be financially viable as well.

11. Comparison of Approved Plan with Liquidation Value

Finally, the property at B. R. Road fetched ₹265 crore through resolution plan which was ₹111.6 above its liquidation value. Thus, the value of approved plan was about 138 % higher than the liquidation value. The recovery was around 44% of the admitted claims of financial creditors amounting ₹593.55 crore). There was no Operational Creditor (OC) in this case. The voting patten for approval of the Resolution Plan is as follows:

Table-5: Voting Pattern for Approval of Plan

S.No.	Name of FC	Voting Share %	Voted
1	ICICI Bank UK PLC	89.52%	For
2	ICICI Bank Limited	3.38%	For
3	Sprit Infrapower & Multiventures Private Limited	6.99%	Against
4	Shailja Commercial Trade Frenzy Limited	0.11%	For

Since 93.01% votes were casted in favour of the plan and only 6.99% were against the plan, it was approved with more than requisite majority i.e., 66% votes in favour of the plan.

12. Objections of Dissenting Creditor

Dissenting Creditor, Sprit Infrapower & Multiventures, raised objections before the Adjudicating Authority (AA)/ NCLT on the ground that the Resolution Plan of APPL was initially of ₹400 crores and later revised to ₹265 crores which was below the liquidation value of ₹306.80 crores. Therefore, it can not be approved. The AA, after detailed discussion on the issue of valuation, taking into account the report of the valuer, and the independent assessment held that the net liquidation value excluding L&DO Charges was ₹153.40 crores (as per the valuers, who had reduced the liquidation value of ₹306.80 cores by 50% for unearned charges towards L&DO and other charges). Therefore, the resolution plan offering ₹265 crores excluding L&DO Charges and other charges was higher

than the liquidation value. Thus, the objections of the dissenting creditor were overruled by the AA.

13. Approval of the Resolution Plan

The AA relied upon the decision of the Supreme Court in the case of *Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh & Ors*³ in and held that the commercial wisdom of COC shall prevail and cannot be interfered upon, and the Resolution Plan can also be lower than the liquidation value. The AA therefor rejected the contentions of the dissenting creditor and approved the Resolution Plan of APPL. No appeal was filed against the order of approval of the Resolution Plan.

³ Supreme Court: Civil Appeal No. 4242 of 2019.

Thus, the CIRP process was concluded within the 270 days. Subsequently, Interim Management Committee (IMC) was formed, comprising of five members with the RP as its Chairperson for effective implementation of the Plan. Accordingly, all payments were done, and CD was handed over to Resolution Applicant to bring a successful resolution towards closure.

14. Learnings for Insolvency professional

The Fair value and Liquidation value of the CD can be done showing different values based on different situations. There need not be a single value as it is understood. In the instant case there were two valuation (i) firstly, on an as is where is basis wherein the valuer considered the perpetual lease and the payment against L&DO Charges [estimated and uncertain] (ii) secondly, the valuation considered the conversion of lease hold into

free hold. This brings various options at the table of the CoC in evaluating the resolution plans.

The Fair value and Liquidation value of the CD can be done showing different values based on different situations.

The second learning would be evaluating the complex documents which establish the rights of the creditors and classify it as a Secured Financial Creditor. In the instant case on the face of the documents it appeared that ICICI-UK was not a FC. It was not a secured creditor as well. The issue of ICICI-UK was decided by the AA and the appellate authorities, but it required further evaluation by the RP to treat it as a Secured Financial Creditor. This decision of RP was also separately challenged by the erstwhile promoters, but the AA found no infirmity in the same.

