BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

AT BENGALURU

IN THE MATTER OF

THE INSOLVENCY AND BANKRUPTCY CODE, 2016

AND

IN THE MATTER OF GREAT BANK OF INDIA LTD AND QUEEN FLIER PVT LTD

CP/IB/1000/BB/2017

Between:

Great Bank of India Ltd, Bengaluru
Bengaluru ***Financial Creditor/ Applicant***

And:

Queen Flier Pvt Ltd
Bengaluru ***Corporate Debtor/ Respondent***

1. Queen Flier Pvt Ltd (QFPL or the Company) is a private limited company which was incorporated under the Companies Act, 1956 on January 01, 2012 having its registered and corporate offices at Bengaluru, India. The company was founded by one of the foremost and extravagant entrepreneurs in India with an objective to compete with other airline companies and to prove that her airline would be the best in the industry. She had an empire of other business houses as well and was extremely profitable in whatever business she started. In the business world she was known as 'Lady Midas'.

2. Since the entrepreneur was new to the airline industry, she did not want to venture her business through organic growth by starting from scratch. Rather she chose to do the business through inorganic growth by acquiring an airline company which was willing to sell itself. She had talks with some of the airline companies in India so that she could procure it. Luckily for her, one of the companies which was ailing was willing to sell itself. The terms of purchase of the target airline company were successful. QFPL approached the Great Bank of India Ltd (GBI or the Bank) to finance its purchasing requirements. The bank was one of the major lenders to the entrepreneur's group companies and never regretted in doing so since the returns were more than its expectations. Any loan that was granted to the group company was solely for the competence and reputation of the entrepreneur who was skillful in her business endeavors. Since QFPL approached GBI for the required loans, it was more than willing to lend the money. Given her relationship with GBI over the years, the entrepreneur submitted a loan proposal for sanction of INR 10,000 crores. GBI was initially skeptic to grant such a big loan since QFPL was a new company and did not have any past track record of success. The bank was also worried, particularly, about the airline sector since this sector was always risky and volatile across the world. However, since QFPL was headed by the well known entrepreneur, it convinced itself to grant the loan.

3. In order to hedge its risk, GBI took several guarantees from the Chairman and Managing Director (CMD) of QFPL i.e. the Lady Midas on several of her most valuable properties. That apart, the bank also took collateral as guarantee from the group companies of QFPL to protect the loans granted by it. Even the other directors of QFPL gave collaterals on their personal properties towards this gargantuan loan. The situation was such that if there was a default of this loan and if the bank was to enforce its securities, the entire group would collapse including the CMD and others directors would be at streets with their families as they had risked all their networth for this loan. The collaterals granted were much more than the loan to be provided by the bank but with the risk of value of the assets depreciating. Apart from GBI, the company had obtained loans with 7 other banks to the tune of INR 1,000 crores for other purposes of its business and they were collateralized with same and other properties of the company and the directors stood as guarantors for these loans as well. Here also, the loans were instantly provided by these banks since the request came from Lady Midas.

4. The Letter of Sanction was issued by GBI to QFPL on April 01, 2012 with loan facilities in such a way that the Cash Credit (CC) limit was INR 7,500 crores and the Letter of Credit (LC) limit was INR 2,500 crores. The agreed interest rate for the loan facility was 12% per annum. The amounts were to be disbursed as and when the company made requests to release the funds. As soon as the loans were sanctioned by the bank, the company started its talks with Boeing and Air Bus companies to lease a fleet of aircrafts to start the business. Though it had acquired the target airliner with around 10 aircrafts, the lease period of these aircrafts was almost over and there was a need to pay the lease amounts which were long overdue by the target company as per the merger terms. Since the company wanted to start with a flare on the air, it ordered some of the extravagant aircrafts with relatively lesser seating capacities and which were much faster than normal Indian aircrafts. These specified requirements of the company were out of the normal and were not suitable for low cost airliners. Since there was hardly any difficulty in obtaining the loans, the company was spendthrift in leasing the aircrafts. It appointed some of the highly paid pilots for its aircrafts and planned to lure much of the young Indian travelers by recruiting smart and attractive airhosts and hostesses with high salaries. The company started its business operations on July 01, 2012.

5. The company did well in terms of attracting much of the air travelers' population due to its extravaganza and had reported above normal profits in the initial few quarters. However, due to intense competition from other airliners that had low-cost strategy, the profits of the company started to dip gradually. After a year since its operations, the company could hardly meet its breakeven. Adding to this, adverse income-tax policies of the Government were some of the reasons for loss of profits in the company. The usual tax depreciation that was being given to the airline sector was significantly reduced by the Government and there was no tax-push by the Government. It was at this juncture the company thought it should go to international by starting to fly to nearby international cities so that it could recoup its losses. Therefore, QFPL made appropriate application to the Aviation Ministry and the DGCA permitting it to fly international flights to South East Asian and Middle East countries, to start with. The application was made some time in December 2013. The Ministry and the competent authorities after carefully considering the application rejected the same stating that it was too early for a recently started company to fly international. The reason stated that there was '5/20 Rule' as per the Aviation Policy in which any airline which wants to go international should have been in the industry at least for 5 years which does not include corporate reorganization with any existing airline and that the company should have at least a fleet of 20 aircrafts. It further gave a response that though QFPL

had more than 20 aircrafts on its own and from its target company, QFPL per se has not been in the industry at least 5 years though its target company was in existence for more than 10 years in the airline business. Therefore, its request was shot down. The scenario was such that had QFPL been allowed to go international there would have been a turnaround in its business prospects as it had learnt some hard lessons on the cost cutting and efficiency.

6. The rejection of its proposal by the government was a big blow to QFPL which already started to dwindle in its business and there was nose-diving in its revenues and profits. Soon, the company was unable to pay-off its prompt interest payments though it was promptly paying them until recently. Being CC and LC, there was a need only to pay interest payments and there was no need to pay the principal amount unless there was clear demand from the banks to pay the principal amount apart from interests. The company started to frequently default in its interest payments which ran into several hundred crores every year. Since the company started to default its interest payments, the subsequent tranches of funds to the company under CC limits and to the suppliers of goods and services under the LC limits were stalled by the bank. Though the upper limit of the limits under CC and LC was INR 10,000 crores the company had utilized only INR 6,000 crores as on March 31, 2013. The non-release of funds by GBI completely choked the company from running its business. The CMD of the company directly spoke to the CMD of GBI to not to stop the payments as agreed since any further blocking of funds will only ruin the chances of revival of the company from its distress. But the bank didn't listen. It categorically said that unless the pending interest dues are paid up front, there won't be any further release of funds though it has been agreed between them. The CMD stated that the entire loan has been well collateralized and that reneging from a covenant unilaterally was unfair. She further said, had this been the attitude of GBI, it would not have approached it at all for the loan arrangements. She told what the bank was doing was not helping her business, but in fact, was killing her business!

7. Since there were no other sources of funds, the company started to report huge losses and the interest payments piled up into thousands of crores. Understanding that there will not be a miracle in its business, the CMD called the consortium of 8 banks from which QFPL had borrowed loans of which GBI was the lead bank which had lent money more than 75% of the total loans. The banks too accepted the invitation for a 'Debt Restructuring'. The first meeting of the consortium was held sometime in March 2014. The meeting of the banks and the CMD of QFPL came up with several options to repay the loan and the relevant ones were:

    - *There will be moratorium of loan demand for a period of two years i.e. till year ending March 2016.*
    - *All the bank accounts of the company shall be closed so that there will not be any payments made or received by it without the knowledge of the consortium. There has to be only one bank account to meeting its statutory payments through a newly opened bank account with the lead bank, GBI.*
    - *There will be 'Tagging Arrangement' where the company if it earns any revenue, 25% of such monies from whatever source, should be first paid to the banks.*
    - *There will be flexibility where the company can pay any amount of money as and when it earns from any source so that the loan dues are reduced.*
    - *There will be reduction in interest payments from current 12% to 10% during the moratorium.*
    - *The company can provide additional securities if it wants additional funds from the banks subject to their consideration.*

8. This debt restructuring scheme was a breather to the company for a period of two years. The company asked for release of the remaining INR 4,000 crores from GBI under its CC and LC limits so that it can meet its expenses and to pay its suppliers so that it can continue as going concern. But GBI rejected the request flatly saying that it cannot afford to risk any funds further and insisted to make the interest payments as per the scheme. This put the company in dock as it had plans of revival based on these additional funds. It did not have any new assets to provide security to release further funds. This rejection added to its surmounting losses. The company did honor some of the terms of the scheme such as the tagging arrangement and making payments as and when it earned income but was in need of more funds.

9. In the meantime, there was a change in the Central Government in May 2014. A new party emerged to form the government with thumping majority which was unheard of in the recent few decades of Indian politics. The new government came into power with promises of some big bang reforms in every sector. In June 2015, the Aviation Ministry came up with a proposition that the '5/20 Rule' was no longer the need of the hour and had planned to scrap it. In the sense, for Indian carriers to fly international there was no need to have 5 years of experience and a fleet of 20 aircrafts. The applications of the companies which wanted to go international were considered on case-to-case basis. It was rumored that the scrap of this rule was to benefit an Indian group conglomerate namely, The Bye-Bye Sons Ltd, which wanted to venture into the airline industry. The scrapping of this rule really upset QFPL which was eager to fly international. However, by the time this rule was scrapped the financial strength of the company was too feeble to rejuvenate and fly international. It again made an effort to GBI to release remaining funds as agreed so that it can avail the scrap of the 5/20 rule so that it can try turning around its loss making business. However, GBI and the consortium outright rejected the request as the company was too financially weak to risk additional funds.

10. Meanwhile, the company could not pay much of its interests during the moratorium period and had defaulted in some of the terms and was able to fulfill some. At the end of the moratorium period in March 2016, the consortium or the Joint Lenders' Form (JLF) met to discuss the further course of action. During the meeting, there were some observations made such as:

    - *QFPL initially was spendthrift in its resources and had wasted much of its initial funds which was the root cause of downfall of the company.*
    - *Post restructuring scheme, the company was able to pay the reduced interest rates only for about a year and thereafter, it started to default those interest payments too.*
    - *All the monies that were disbursed initially were used only for business purpose but extravagantly.*
    - *Had the 5/20 Rule been scrapped earlier, the company would have been profitable and this situation of the company could have been averted.*
    - *Adverse tax regime had badly hurt the company's profits.*
    - *If additional funds would have been released and properly utilized, the company may have showed signs of revival.*
    - *To the best of the JLF's knowledge, the company and CMD were not involved any money laundering/ diversion of the funds that were disbursed.*

11. The company requested the JLF to grant one last extension to see if it will be able to settle the dues to the banks more specifically, GBI on piecemeal basis. Given the relationship and good business given by the group companies in the past, GBI, being the biggest creditor of the JLF granted an extension by one more year i.e. end of March 31, 2017 to come up with an acceptable solution to

settle all the dues to the banks, especially, GBI. However, GBI wasn't sure whether the company will be able to do something within one year since the interests were mounting exponentially and the business of the company almost died. Given this fear, on April 15, 2016, GBI issued a notice under section 13(2) of the SARFAESI Act, 2002 to QFPL asking it to pay the interest and the principal amounts within a period of 60 days failing which it will take steps as per section 13(4) of the SARFAESI Act, 2002. Interestingly, GBI also moved the Debts Recovery Tribunal (DRT) in Bengaluru against all the corporate and non-corporate guarantors requiring them to pay the dues of the company for which they stood as guarantors failing which their assets secured would be liquidated. QFPL being the actual borrower was also made a party to the application filed before the DRT.

12. The company made a detailed representation on May 01, 2016 to GBI stating that it was unfair that it is being issued both section 13(2) notice under the SARFAESI Act and is also being proceeded with before the DRT albeit the main relief was against the guarantors before the DRT when the JLF proceeding was ongoing. The company requested the bank to recall its notice under section 13(2) and not initiate any steps under section 13(4) of the SARFAESI Act and to stick to the JLF resolution. To this representation, GBI did not reply. GBI waited for 60 days and issued several possession notices to the company pertaining to the various properties that were collateralized stating that it has taken possession of the properties under section 13(4) of the SARFAESI Act. Following GBI, all other banks also issued notices under section 13(2) and demanded the company to pay the pending dues. Additionally, other banks also initiated proceedings against the guarantors and the company before the DRT to recover its dues. The company and all the guarantors made appearance before the DRT in all the cases filed by all the banks and were effectively contesting them.

13. Under such circumstances, in December 2016, the Insolvency and Bankruptcy Code, 2016 (the Code) got the assent of the President of India and came into force. On March 27, 2017 GBI (Financial Creditor) filed an application before the National Company Law Tribunal (NCLT), Bengaluru under section 7 of the Code read with Rule 4 and Form 1 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against QFPL (Corporate Debtor) to initiate corporate insolvency resolution process (CIRP) after complying with all the requirements under the Code and Rules. Given the huge amount involved, it engaged a top law firm in Bengaluru to protect its interests. The application came up for hearing and GBI, the financial creditor, argued that there has been a 'default' by QFPL, the corporate debtor in paying the principal amount and the interests accrued on it and claimed that that the principal amount disbursed as on date was INR 6,000 crores and the interest (including penal interest) at the rate of 24% per annum was INR 6,000 crores. In total, the principal and the interest due as per the bank were at INR 12,000 crores. The NCLT ordered notice to the company, the corporate debtor, to be present before it by April 03, 2017 failing which the application of the financial creditor will be admitted and the consequence of the Code will follow.

14. The company received the notice of the NCLT on March 31, 2017 (which coincided with the date of lapse of the extension granted by the JLF to come up with a repayment formula) and hurriedly engaged another top law firm in Bengaluru to represent it before the NCLT. Given the stakes and the complexity involved in the matter, both the law firms hired top senior advocates practicing before the Supreme Court of India to appear on their behalf. The case came up for hearing on April 03, 2017. The company's law firm sought an adjournment stating that it received the notice only

the previous Friday so it needs some more time to prepare and file its written objections to the application of the bank. The NCLT said, since it had only 14 days' time to ascertain the question of 'default' and since already 8 days had lapsed it said it can at best give time only upto the next day. To this, the company's law firm objected and stated that it was a very short date, rather hours, to file its objections. To which, the NCLT agreed and finally posted the matter on April 06, 2017 to submit its defense against the application.

15. Both the law firms and the senior advocates had brainstorming sessions to discuss the history of the facts and the application of relevant laws to the case. Both the parties, by and large, spotted the following issues to be addressed before the NCLT, Bengaluru. The bank had a good case and the company had a valid defense! It's April 06, 2017.

16. The parties were required to frame their arguments on the following broad questions and had the liberty to the frame any additional questions:

I. Whether there was a 'Default'

Bank: The company had committed 'default' as required under section 7(1) of the Code and therefore, it was a straight case to be admitted. Further, the loans granted to the company have been treated as 'doubtful' in the books of the bank. Being a public bank, there is public interest involved in getting back the money. Notice of demand was issued under the SARFAESI Act.

Company: The company argued that there was absolutely 'no default' as there was no 'demand' from the bank as per the Code. The loan granted was ongoing and was not a term loan which has to be paid on a definite date. Therefore, only if the bank makes a 'demand' for the purpose of the Code and there is failure to pay the debt, there is said to be default. Further, treating a loan as 'doubtful' is not sufficient to treat the same as 'default'.

II. Whether ongoing Debt Restructuring Scheme is a proof that there is no default

Bank: The restructuring scheme clearly failed as the company was dragging in making the payments and clearly had no means to pay. Such a scheme is not a bar to initiate CIRP.

Company: The bank is blowing hot and cold. The present application is being filed when the scheme was still in force. Therefore, there is certainly no default as the bank was participating in the scheme.

III. Whether issuance of possession notices under SARFAESI Act is a bar to file application before NCLT

Bank: The bank argued that steps taken under other laws are not a bar to file an application under the Code as both enactments act independently.

Company: The company argued that the present application is not maintainable as the bank has already initiated steps under the SARFAESI Act by issuing possession notices to the company and that it can proceed under those notices itself instead of filing the present application which makes the present application infructuous.

IV. Whether filing of application before DRT on same issue against the company and the guarantors is a bar to initiate proceedings under the Code

Bank: The bank argued that NCLT and DRT are operational as per their own procedures and rules and ensue if different remedies. Therefore, there is no bar. Further, no application has been filed against guarantors before NCLT to result in parallel proceedings.

Company: The company argued that parallel proceedings before two forums on the same issue was generally prohibited under law on the principles of natural justice and more specifically, under section 10 of the Code of Civil Procedure, 1908 (CPC) and therefore, the present application before NCLT is not capable of being continued with. The claim against the guarantors has to be transferred to NCLT and hence not maintainable before DRT as per the Code.

V. Whether non-disbursement of entire loan amount as agreed in the sanction letter was fair on the part of the bank

Bank: The company already started to default in its payments to the extent the loans were already granted. The bank cannot risk further. In any case, the company should have only filed a civil suit to honor the agreement and cannot raise it as a defense for the pending amounts.

Company: Had the bank released the further sum especially when the 5/20 Rule was relaxed the company would have revived and the delay in payments and request for restructuring scheme wouldn't have arisen. The bank is taking advantage of its own mistake.

VI. Whether there is a 'dispute' with regard to total amount to be paid

Bank: The bank is asking only for the amounts that have been disbursed and the interests on it. The penal interest is always applicable if the payments are not made on time. In any case, dispute on interest cannot go against the main application itself when the original claim is justifiable.

Company: The calculation of interest at 24% was not agreed as the agreed rate was only 12% and hence the due is not INR 12,000 crores but much lower than that, especially, when the company had made some repayments as per the scheme and before that. It further submitted that though the aspect of 'dispute' is relevant only for an application filed by operational creditors, the logic of the law is that if there is a genuine dispute regarding the very amount itself to be paid then such application cannot be entertained.

It is made clear that it has to be assumed that the IB Code, related Rules, other relevant laws, rules, etc. as on February 09, 2018 shall be applicable to the case. Students are required to be updated with change in laws upto the date of the moot competition though the problem states that the hearing date is on April 06, 2017.