

In the National Company Law Tribunal,
Kolkata Bench, Kolkata

CP (IB) No.758/KB/2017

In the matter of:

State Bank of India

.....Applicant/Financial Creditor

-Versus-

Ghotaringa Minerals Ltd.

.....Respondent/Corporate Debtor

Coram:

V.P. Singh, Member (J)

Jinan K.R., Member (J)

For the Applicant/Financial Creditor : 1. Ms. Poonam Keswani, Advocate
2. Mr. Dwaipayan Ghosh, Advocate

For the Respondent/Corporate Debtor : 1. Ms. Nikita Jhunhwala, Advocate

ORDER

Per Jinan K.R., Member (J)

A mentioning application in the above referred CP was filed at the instance of applicant/financial creditor in the instant case seeking certain corrections regarding the typographical mistake connected with the gender of the advocate, email id and abbreviation of the IBBI etc.

2. So also, the corporate debtor requested to correct the building name in the address of the proposed IRP.

3. Upon hearing Ld. Counsel for the applicant/financial creditor and upon perusal of the order, except the building name, all other errors pointed out by the Ld. Counsel is hereby rectified by invoking the Adjudicating Authority power under Rule 154 of the National Company Law Tribunal Rules, 2016 read with

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Sec.420 (2) of the Companies Act, 2013. Regarding the building name, there is no error as per the address given in the application. Hence, not considered.

4. The corrected order to be uploaded today.

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**V.P. Singh,
Member (J)**

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**Jinán K.R.
Member (J)**

Signed on 22nd February 2018

In the National Company Law Tribunal,
Kolkata Bench, Kolkata

CP (IB) No.758/KB/2017

In the matter of:

An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

And

In the matter of:

State Bank of India

.....Applicant/Financial Creditor

-Versus-

Ghotaringa Minerals Ltd.

.....Respondent/Corporate Debtor

Order Delivered on 16th February 2018

Coram:

Jinan K.R., Member (J)

For the Applicant/Financial Creditor : 1. Ms. Poonam Keswani, Advocate
2. Mr. Dwaipayan Ghosh, Advocate
3. Ms. Neha Negar Alam, Advocate
4. Mr. Aritra Basu, Advocate

For the Respondent/Corporate Debtor : 1. Mr. Arovind Jhunjhwal, Advocate
2. Mr. Debagrha Basu, Advocate
3. Mr. Shaunak Mitra, Advocate
4. Ms. Nikita Jhunjhwal, Advocate

ORDER

Per Jinan K.R., Member (J)

Petitioner has filed this application under Sec.7 of the Insolvency and Bankruptcy Code, 2016 (from now on referred to I & B Code, 2016) for initiating corporate insolvency process read with Rule 4 (1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against the respondent/

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corporate debtor, Ghotaringa Minerals Ltd. Petitioner has stated that corporate debtor has committed default in making payment of Rs.982,82,01,341.70 as on 13/12/2017.

2. The brief facts of the case, as stated in the application, are that State Bank of India is a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 having its Registered Office at Samridhhi Bhavan, Block B, 1, Strand Road, Kolkata - 700 001, West Bengal. The Identification number of the applicant/financial creditor is not applicable as per submission of the applicant. Mr. Gurupada Chakravorty, Assistant General Manager has filed this application on behalf of the applicant/financial creditor on the basis of Letter of Authority dated nil annexed with the application and marked as Exhibit A.

3. The Corporate Debtor, Ghotaringa Minerals Ltd., Identification No. is U101020R2003PLC007348.

4. The name and registration number of the proposed interim resolution professional is Mr. Ashok Kumar Gulla; Registration No. is IBBI/IPA-003/IP-N00024/2017-18/10174 of 9C, 9th Floor, Hansabya Building, 15, Barakhamba Road, Connaught Place, New Delhi - 110 001, email ID ashok.gulla@rbsa.in.

5. The case of the applicant is that the total amount to the principal borrower is as under: -

- (i) Fund Based limit sanctioned for Rs.628,36,00,000/-;
- (ii) Non Fund Based limit for Rs.165,25,00,000/-.

In order to avail the credit facility, the principal borrower Visa Steel Ltd. executed the following documents along with various guarantors including corporate debtor in favour of the applicant:

- a) Sanction letter dated 18/8/2006 for renewal of working capital credit facility of principal borrower is annexed with the application and marked as Exhibit F.

- b) Sanction letter dated 4/4/2008 for renewal of credit facility of principal borrower is annexed with the application and marked as Exhibit G.
- c) Sanction letter dated 4/4/2008 for sanction of short term loan and ad hoc LC limit of principal borrower is annexed with the application and marked as Exhibit H.
- d) Master restructuring agreement between the principal borrower and the banks as lenders annexed with the application and marked as Exhibit M.
- e) Deed of Personal Guarantee by Shri Vishambhar Saran as guarantor dated 19/12/2012 annexed with the application as Exhibit T.
- f) Deed of Guarantee executed by Ghotaringa Minerals Ltd. dated 19/12/2012 as the guarantor in favour of the applicant, annexed with the application as Exhibit X.
- g) Guarantee agreement dated 28/3/2015 by Ghotaringa Minerals Ltd. in favour of the applicant, annexed with the application as Exhibit HHH.
6. Applicant has annexed a copy of the working of computation of the amount with the application and marked as Exhibit C. Particulars of amount due as on 13/12/2017 are as under: -
- | | |
|--|---------------------|
| Fund Based Limit total outstanding | Rs.977,61,86,875.84 |
| Non Fund Based Limit total outstanding | Rs.5,20,14,465.86 |
| Total | Rs.982,82,01,341.70 |
7. Applicant/financial creditor has also annexed with the application report of CIBIL marked as Exhibit SSS wherefrom it appears that the account of the respondent/corporate debtor is doubtful.
8. Applicant/financial creditor has annexed with the application copy of the statement of accounts of the financial creditor along with the Income Tax certificate certified under Banker's Books of Evidence Act as Exhibit TTT.

9. Applicant/financial creditor has also annexed with the application letter of balance confirmation in the loan accounts as on 31/3/2017 marked as Exhibit HHHH.
10. Applicant/financial creditor has also annexed with the application guarantee agreement dated 28/3/2015 executed by the respondent/corporate debtor in its favour and marked as Exhibit HHH.
11. To prove its case the applicant/financial creditor has also annexed with the application deed of hypothecation dated 14/9/2016 between Visa Steel Ltd. as one of the borrower and co-obligor and lender marked as Exhibit MMM. On the strength of above referred deed of guarantee executed by the corporate debtor, it is contended that corporate debtor is liable for the amount claimed because it defaulted the payment.
12. Respondent/corporate debtor filed objection and contended that the authorized letter of the applicant is defective, and the person concerned has no authority to file the said application. As such the application filed is not maintainable.
13. The respondent further contended that Visa Steel Ltd., the principal borrower, was referred to the Corporate Debt Restructuring Empowered Group. On 25/9/2012 the applicant approved the restructuring package and certain additional financial assistance was to be extended to the principal borrower. Pursuant thereto a letter of approval dated 27/9/2012 was issued by CDR EG, in view of which the respondent/corporate debtor provided guarantee to all the lenders of the principal borrower vide guarantee agreement dated 19/12/2012.
14. The respondent further contended that the principal borrower has not yet crystallized and the same should be first adjudicate before the applicant can proceed against the respondent/corporate debtor who is a guarantor and not the borrower. As such, the application filed is premature and should be dismissed.

15. Applicant/financial creditor has also filed rejoinder wherein it has reiterated the said facts what has been narrated in its application for corporate insolvency resolution process and prayed that the application should be admitted and consequential direction may be issued.

16. Heard arguments of Ld. Counsel for the applicant/financial creditor as well as Ld. Counsel for the respondent/corporate debtor.

17. The principal borrower has evidently availed credit facility to the tune of Rs.628,36,00,000/- as per Fund Based Limit and Rs.165,25,00,000/- as per Non Fund Based Limit by executing various security documents referred in the petition. The corporate debtor has executed guarantee agreement Exhibit HHH. It is good to read Clause 12 and 27 in the said Deed of Guarantee. It reads as follows: -

“12. The rights of the Lenders against the Guarantor shall remain in full force an effect notwithstanding any arrangement which may be reached between the Lenders and the other Guarantor, if any, or notwithstanding the release of the other or others from liability and notwithstanding that any time hereafter the other Guarantor may cease for any reason whatsoever to be liable to the Lenders, the Lenders shall be at liberty to require the performance by the Guarantor of its obligations hereunder to the same extent in all respects as if the Guarantor had at all times been solely liable to perform the said obligations.

27. The Guarantor agrees and declares that the rights and powers conferred on the Lenders by these presents shall be joint and several and shall be deemed always to be so and they may be exercised by the Lenders accordingly.”

18. The above said clause in the deed of agreement impose a contractual liability on the corporate debtor to pay the dues in the account of principal debtor. The

contention of the corporate debtor that claim raised against the corporate debtor is premature has no legal force.

19. The applicant alleged that the corporate debtor, has committed default in making payment of Rs.982,82,01,341.70 as on 13.12.2017. It has come out in evidence that corporate debtor failed to discharge its liability as a guarantor and thereby committed default. Petitioner has filed this application in the proper format as prescribed in I & B Code and Adjudicating Authority Rules which is complete.

20. The corporate debtor's main challenge in this case is that filing of this petition as against the corporate debtor without exhausting the remedy available to the applicant as against the principal borrower Visa Steel Ltd. a petition of this nature is not maintainable. Ld. Counsel for the corporate debtor submits that corporate debtor provided guarantee to all the lenders of the principal borrower by executing guarantee agreement and therefore corporate debtor is not liable for the amount as claimed by the applicant/financial creditor. Law is settled regarding the liability of a guarantor in a case of this nature. Guarantors liability being co-extensive with that of the principal borrower, there is no legal bar in initiating action against the corporate debtor who is a guarantor.

21. In **State Bank of India v. Indexport Registered and others, AIR 1992 SC 1740** the Hon'ble Supreme Court has held that

“the decree holder bank can execute the decree against the guarantor without proceedings against the principal borrower. Guarantor's liability is co-extensive with that of the principal debtor. In that case, this court further observed that “the execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree-holder. The question arises, where a decree which is framed as a composite decree as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole

or part of the decretal amount covering mortgage decree can be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the principal borrower. The court further observed that the liability of the surety is co-extensive with the principal debtor, unless it is otherwise provided by the contract”.

22. The above said proposition is squarely applicable in the case in hand. Bear in mind the above said proposition, it appears to me that the contention of the corporate debtor that without first adjudicating the liability of the principal borrower, initiation of proceedings in this case is not maintainable is found devoid of any merit. The above said factors proves that the attempt of the corporate debtor is only an attempt to evade payment which is found liable to pay to the financial creditor. The corporate debtor has failed to repay the debt outstanding in its name.

23. One another contention taken by the corporate debtor is that the person who filed the application has no authority to file the application because of defective authorization letter. Mr. Gurupada Chakravorty, Assistant General Manager has filed this application on the basis of Letter of Authority Annexure A. The said authorization seems to have issued by giving special authority to the said manager though no date of issuance is mentioned in the said letter of authority. However, as per the said letter, the said manager had given special authority to file the application before the NCLT. So, he has been given a valid authority to file an application of this nature before this Tribunal. Therefore, the above said objection is also found not sustainable.

24. As held in *Innoventive Industries Ltd. v. ICICI Bank* [2017] 139 CLA 335 by the Hon'ble NCLAT, this adjudicating authority if satisfied that there is occurrence of default and the application filed is complete the application filed under section 7 of the I & B Code is liable to be admitted. Here, in this case, none of the objections of the corporate debtor is found sustainable under law.

25. The applicant/financial creditor has also proposed the name of Interim Resolution Professional, Mr. Ashok Kumar Gulla, who is competent to work as IRP. Applicant/financial creditor has also annexed with the application written communication of the proposed IRP in Form 2 as Exhibit B wherein it appears that no disciplinary proceeding is pending against him. Therefore, an application filed by the applicant/financial creditor under Sec 7 of I & B Code deserves to be allowed.

ORDER

The petition filed by the applicant/financial creditor under Sec.7 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Resolution Process and declare a moratorium and public announcement as stated in Sec.13 of the I & B Code, 2016.

The moratorium is declared for the purposes referred to in Sec.14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in clause (b) of sub-section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

- a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action

under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

- d) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.

The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

The order of moratorium shall affect the date of such order till the completion of the corporate insolvency resolution process.

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

Necessary public announcement as per Sec.15 of the IBC, 2016 may be made.

Mr. Ashok Kumar Gulla; Registration No. is IBBI/IPA-003/IP-N00024/2017-18/10174 of 9C, 9th Floor, Hansabya Building, 15, Barakhamba Road, Connaught Place, New Delhi – 110 001, email ID ashok.gulla@rbsa.in. is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.

The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors.

26. Let the certified copy of the order be issued upon compliance with requisite formalities and a copy of the order may also be sent to the Applicant/Financial Creditor as well as Corporate Debtor and IRP through email.

27. List the matter on 14th March 2018 for filing of the progress report.

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Jinan K.R.
Member (J)

Signed on 22nd February 2018