

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

CP (IB) 507/MB/2018

Under Section 7 of the Insolvency and
Bankruptcy Code, 2016 r.w. Rule 4 of the
Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016

In the matter of

State Bank of India

..... Financial Creditor
(Petitioner / Applicant)

v.

M/s. Applicomp (India) Limited

..... Corporate Debtor / Co-obligor
(Respondent)

Order Pronounced on: 25.09.2018

Coram :

Hon'ble M. K. Shrawat, Member (J)

For the Petitioner :

Mr. Gaurav Joshi, Sr. Counsel a/w. Mr. Animesh Bisht, Advocate, Ms. Saloni Kapadia and Ms. Surbhi Pareek, Advocate i/b. Cyril Amarchand Mangaldas – Advocates for the Financial Creditor / Petitioner.

For the Respondent :

Mr. Sandeep Ladda, Advocate a/w. Mr. Arup Dasgupta, Advocate and Mr. Shey Shah, Advocate i/b. Jhangiani Narula & Associates – Advocates for the Respondent/Corporate Debtor / Co-obligor.

Per: M. K. Shrawat, Member (J)

ORDER

1. The Petitioner/Applicant viz. 'State Bank of India' (hereinafter as **Financial Creditor**) has furnished Form No. 1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) in the capacity of "Financial Creditor" on 05.04.2018 by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as **Code**).
2. Further under the head "Particulars of Corporate Debtor / Co-obligor" the description of the Debtor / Co-obligor is stated as 'M/s. Trend Electronics Limited' (hereinafter as

Debtor / Co-obligor) having Registered office at, 'Gangapur GIN, Compound Station Road, Station Road, Ahmednagar, Maharashtra – 414001'.

3. In the requisite Form, under the head "Particulars of Financial Debt" the total amount of Debt in default is stated as ₹ 456.90/- Crores as on 31.12.2017. The details of the outstanding amount is as follows :

*Total Overdue as on December 31, 2017
(In INR Crores)*

<i>Facility</i>	<i>Principal</i>	<i>Interest</i>	<i>Penal Interest</i>	<i>Total Defaulted Amount</i>	<i>Initial Date of Default</i>	<i>Days of Default till December 31, 2017</i>
<i>SBI RTL Facility</i>	<i>51.80</i>	<i>260.46</i>	<i>3.03</i>	<i>315.29</i>	<i>31.01.2017</i>	<i>334</i>
<i>SBBJ RTL Facility</i>	<i>2.50</i>	<i>13.85</i>	<i>0.16</i>	<i>16.51</i>	<i>31.01.2017</i>	<i>334</i>
<i>SBH RTL Facility</i>	<i>7.50</i>	<i>40.99</i>	<i>0.46</i>	<i>48.95</i>	<i>31.01.2017</i>	<i>334</i>
<i>SBM RTL Facility</i>	<i>6.25</i>	<i>31.62</i>	<i>0.35</i>	<i>38.22</i>	<i>31.01.2017</i>	<i>334</i>
<i>SBP RTL Facility</i>	<i>1.14</i>	<i>5.83</i>	<i>0.06</i>	<i>7.03</i>	<i>31.01.2017</i>	<i>334</i>
<i>SBT RTL Facility</i>	<i>5.00</i>	<i>25.59</i>	<i>0.31</i>	<i>30.90</i>	<i>31.01.2017</i>	<i>334</i>
<i>Grand Total</i>	<i>74.19</i>	<i>378.34</i>	<i>4.37</i>	<i>456.90</i>		

4. Brief Background :

- 4.1. The Corporate Debtor / Co-obligor is a co-obligor of the Videocon Industries Limited. The Videocon Industries Limited (**VIL**) is a Principal Borrower of the above mentioned Loan facilities and the Debtor / Co-obligor had, vide a Rupee Term Loan Agreement (**RTL**) dated 08.08.2012, has co-obliged the amount borrows by the VIL.
- 4.2. After sanctioning and disbursing of the above mentioned facilities the Account of the VIL has turned into Non-Performing Assets (NPA) on 30.04.2017.
- 4.3. The RTL was signed by the 12 Co-obligors along-with the VIL. Since the VIL has defaulted in making the re-payment of the availed loan facilities the Financial Creditor has filed Insolvency Petition / Application against each of the Company

praying for the commencement of the CIRP. The Petition / Application against principal borrower was filed on 01.01.2018 and thereafter this Petition / Application has been filed.

5. Submissions by the Financial Creditor :

- 5.1. The Learned Sr. Counsel for the Financial Creditor has submitted that pursuant to the request of the VIL along-with the Debtor / Co-obligor, the Financial Creditor has duly sanctioned and disbursed the loan amount in aforesaid manner.
- 5.2. It is further submitted that the Insolvency Petition / Application against the VIL was Admitted for the commencement of the CIRP by this very Bench on 06.06.2018.
- 5.3. It is further submitted that, in light of the commencement of the CIRP against the Principal Borrower, admittedly there is a default on part of the Debtor / Co-obligor as per S. 3 (12) of the Code.
- 5.4. The Learned Sr. Counsel for Financial Creditor has also submitted that, since the co-obligor is jointly and severally liable to repay the loan amount this Petition / Application deserves to be Admitted for the commencement of the CIRP.

6. Submissions by the Corporate Debtor / Co-obligor :

- 6.1. The Learned Advocate for the Corporate Debtor / Co-obligor firstly has raised the issue of the maintainability of this Application under provisions of the Code.
- 6.2. It is submitted that the Financial Creditor has disbursed the Loan facilities to the VIL and not to the Debtor / Co-obligor hence the same cannot be termed as 'Financial Debt'.
- 6.3. It is further submitted that the Debtor / Co-obligor is a co-obligor to the VIL and hence cannot be termed as Guarantor or Indemnifier under the provisions of the Contract Act, 1872. It is also submitted that the Code does not envisage the separate proceedings against the co-obligor / guarantor.
- 6.4. It is also pleaded that, since the Petition / Application against VIL is Admitted under provisions of the Code, the Debt in question is discharged and hence the Debtor / Co-obligor is not liable to make the payment.

6.5. It is also submitted that since the CIRP was already commenced against the VIL by the Order dated 06.06.2018 there cannot be initiation of CIRP against this Debtor / Co-obligor for the same debt amount.

6.6. It is also submitted that, since the Financial Creditor has proposed the different IRP's for each of 12 co-obligors, whereas the assets of the VIL and the Co-obligors are common, hence it will be difficult to conduct the CIRP.

6.7. In light of above submissions the Learned Advocate has vehemently pleaded that this Petition / Application is not maintainable under the provisions of the Code.

7. Findings :

7.1. The Bench has gone through the submissions made by both the sides and also perused the documents on record. The Bench also carefully perused the decisions of various Courts cited by both sides.

7.2. On careful perusal it is noticed that, the Principal Borrower i.e. VIL had duly availed the Facilities and thereafter had defaulted in repaying the amount availed under Facilities therefore this very Bench has Admitted the Petition / Application against the Principal Borrower and commenced the CIRP.

7.3. That, it is accepted position that the Debtor / Co-obligor is a co-obligor to the VIL in respect of availed Facilities and has duly signed the RTL.

7.4. Considering the above facts, it is noticed that the nature of Debt is a "Financial Debt" as defined under section 5 (8) of the Code. It has also been established that admittedly there is a "Default" as defined under section 3 (12) of the Code on the part of the Debtor / Co-obligor.

7.5. That, on the basis of the evidences on record, it is noticed that the Financial Creditor has duly sanctioned the Facilities and duly disbursed those to the Principal Borrower but there is non-payment of Debt on the part of, both, the Principal Borrower and the Debtor / Co-obligor.

7.6. That, before coming to final decision it is appropriate to frame a question of law that **"Whether the Insolvency Application can be Admitted against the Co-obligor where the CIRP against the Principal Borrower is already commenced?"**

7.7. To answer this question, it is appropriate to place on record certain facts. This Petition / Application is filed much before the passing of Resolution Plan or any

Order for Liquidation in the case of Principal Borrower hence, as regards to the submissions made by the Learned Advocate for the Debtor / Co-obligor about *Discharge of Surety* it is worth to place on record the legal position that, the surety is discharged as soon as the Principal Borrower is discharged from his liabilities. It is noticed that in the Insolvency Proceedings the discharge of the liabilities of Principal Borrower happens at the time of approval of Resolution Plan and the Debt of the Principal Borrower is **not discharged** in absence of the Resolution Plan in the case of Principal Borrower. And therefore the provisions of the S. 134 of the Indian Contract Act, 1872 **cannot** be applied upon the Debtor / Co-obligor. If the Resolution Plan got approved in the case of Principal Borrower, then, in that case the Debt would have been Discharged. **But here the case is not so.**

- 7.8. It is also worth to place on record the dictionary meaning of the word 'co-obligor'. The Legal meaning envisaged that, "*One who is bound together with one or more others to fulfil an obligation. He may be jointly or severally bound*". It is also worth to place on record the legal meaning of 'Contract of Guarantee' provided by the S. 126 of the Indian Contract Act, 1872 and it reads as '*A Contract to perform the promise, or discharge the liability, of a third person in case of his default is called Contract of Guarantee*'.
- 7.9. In light of above definitions / meaning it is noticed that, since the Debtor / Co-obligor is a co-obligor to the VIL he is bound to fulfil an obligation of the VIL. Further VIL is not a Third Party to the Debtor / Co-obligor thus jointly to be called as 'Guarantor' to the Principal Debtor / Co-obligor.
- 7.10. It is further noticed that the co-ordinate Benches of this Tribunal has already Admitted the Petitions filed by the Financial Creditors in case of other 7 co-obligors namely, M/s. Tecno Electronics Limited, M/s. PE Electronics Limited, M/s. Evans Fraser and Co. (India) Limited, M/s. Electroworld Digital Solutions Limited, M/s. Value Industries Limited, M/s. Millennium Appliances India Limited, M/s. Sky Appliances Limited. In those cases also The Learned Advocate for the Debtor / Co-obligor has preferred the similar arguments which are preferred before this Bench and the same had been dealt by the co-ordinate Benches.
- 7.11. Hence, for the reasons mentioned herein above there is no cause for dissenting from the co-ordinate Benches and therefore in my opinion this Petition / Application deserves to be Admitted.

7.12. Further, before passing a concluding remark we want to place a reliance on the decision of the Hon'ble NCLAT in *State Bank of India v. D. S. Rajendra Kumar (Company Appeal (AT) (Insolvency) No. 87 of 2018)* dated 18.04.2018 wherein it is held as under :

"5. However, it is made clear that order of 'Moratorium' will be applicable only to the proceedings against the 'Corporate Debtor / Co-obligor' and the 'Personal Guarantor', if pending before any court of law/Tribunal or authority but the order of 'Moratorium' will not be applicable for filing application for triggering 'Corporate Insolvency Resolution Process' under Sections 7 or 9 or 10 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") against the 'Guarantor' or the 'Personal Guarantor' under Section 60(2)."

7.13. Further, the Bench is also acquainted with the decision of this very Bench in the case of '*Schweitzer Systemtek India Private Limited*' wherein it was held that the Moratorium is only applicable to the assets of the Debtor / Co-obligor and not to the assets of the Guarantors. And also with the decision of this very Bench in the case of '*Bell Finvest (India) Limited v. Asha's Hospitality and Management Facility Private Limited (CP 1406/IBC/NCLT/MB/MAH/2017)*' dated 20.04.2018 wherein this Bench has Admitted the Insolvency Application against the Corporate Guarantor and also against the Principal Borrower.

7.14. In light of above discussion and also respectfully following the above-cited decision of the NCLAT the answer of the above framed Legal question is in **Affirmative** and therefore it is my conscientious view that this Petition / Application deserves **Admission**.

7.15. The Financial Creditor has proposed the name of Insolvency Professional. Consequently, as there is no disciplinary proceeding pending against the proposed IP, the Insolvency Professional proposed by the Financial Creditor, **Mr. Avil Menezes**, O/at. **403, Crescent Business Park, Sakinaka, Andheri (E), Mumbai, Maharashtra – 400072**, having registration No. **IBBI/IPA-001/IP-P00017/2016-17/10041**, having E-mail address as, **avil@caavil.com** is appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.

7.16. Having admitted the Application, the provisions of **Moratorium** as prescribed under **Section 14 of the Code** shall be operative henceforth with effect from the

date of order shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor / Co-obligor etc. However, the supply of essential goods or services to the “Corporate Debtor / Co-obligor” shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.

7.17. That as prescribed under Section 13 of the Code on declaration of Moratorium the next step of Public Announcement of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.

7.18. That the Interim Resolution Professional shall perform the duties as assigned under Section 15 and Section 18 of the Code and inform the progress of the Resolution Plan and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.

8. The Petition/Application is hereby “**Admitted**”. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of receipt of the certified copy of this Order.

9. Ordered Accordingly.

Dated : 25.09.2018

SD/-
M. K. SHRAWAT
MEMBER (JUDICIAL)

Avinash