

**NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, CHENNAI**

CP/604/ (IB)/CB/2018

Under Section 7 of the IBC, 2016

In the matter of

M/s.BMD PRIVATE LIMITED

....Applicant/Financial Creditor

Vs.

M/s. SVL LIMITED

...Respondent/Corporate Debtor

Order delivered on: 10.09.2018

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**K. ANANTHA PADMANABHA SWAMY, MEMBER (J)
S.VIJAYARAGHAVAN, MEMBER (TECHNICAL)**

For the Petitioner/FC : *Shri.Issac Mohanlal, Senior Advocate*
: *Shri.P.John, Advocate*
: *Shri.Joydeep Math, Advocate*
For the Respondent/CD : *Shri.Y.P.Thakur, Advocate*
: *Shri.Vishnu Mohan, Advocate*

ORDER

Per: S.VIJAYARAGHAVAN, MEMBER (TECHNICAL)

1) Under consideration is a Company Petition filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short **IB Code 2016**) r/w rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity, **IB Rules 2016**).

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2) The Corporate Debtor (for brevity “CD”) is a public limited investment company having its registered office at 123, Angappa Naicken Street, Chennai, Tamil Nadu- 600001.

3) M/s.BMD Renewable Energy Private Limited, a private Company having its registered office at LNJ Nagar, Mordi Banswara, Rajasthan- 327001 is the wholly owned subsidiary of the FC. The shareholding pattern of BMD Renewable is as below;

S.No	Name of Shareholders	No. of shares held	% of total share capital
1	M/s.BMD Private Limited	1,62,09,990	100.00
2	M/s.BMD Private Limited with Shri Shekhar Agarwal as nominee of BMD Private Limited	10	0.00
	Total	16,210,000	100

4) Leitwind Shriram Manufacturing Private Limited is a Company engaged in the business of design, manufacture and installation of wind electric generators, having its registered office at Sigappi Achi Building, 4th Floor, Door No. 18/3, Chennai, Tamil Nadu – 600008 (“LSML”) and is a subsidiary of the Corporate Debtor. The shareholding pattern of LSML is as follows;

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S.No.	Name of Shareholders	No. of shares held	% of total share capital
1	M/s. Windfin B.V., Netherlands	19,49,26,787	49.79
2	M/s.SVL Limited	18,98,78,801	48.50
3	M/s.Shriram EPC Ltd., and Nominees	40,76,474	1.04
4	P.Ashok	26,25,471	0.67
	Total	16,210,000	100

FACTS OF THE CASE:

5) The FC and LSML executed a term sheet on 04.09.2015 (“Term Sheet”) for setting up of a 12 MW wind farm for the purpose of generation of electricity etc. The timeline for completion of the Project was until 28.02.2016. The total consideration for the project payable by BMD to LSML was INR 79.60 crores. According to the terms of the Term Sheet, an amount of INR 5,97,00,000 was released by BMD Renewable in favour of LSML on 30.12.2015 against an Advance Bank Guarantee dated 14.09.2015 of INR 5,97,00,000 issued by Oriental Bank of Commerce for and on behalf of LSML to the FC. The advance bank guarantee was valid until 31.03.2016 and the last date for making claims was 30.06.2016. (Annexure D).

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6) In terms of the Term Sheet and the Definitive Agreement, BMD Renewable had further remitted a sum of INR 2,81,18,000 to LSML on 15.02.2016.(Annexure G).

7) Thereafter, the parties mutually decided not to continue with the performance of the contract and LSML agreed to refund to the FC, all sums received by LSML in respect of the project with liquidated damages as follows;

Particulars	Sum (In INR)
Sum remitted by the FC to LSML on 30.12.2015	5,97,00,000*2 = 11,94,00,000
Sum remitted by the FC to Choksi on 03.02.2016	44,70,000
Sum remitted by the FC to Choksi on 08.02.2016	32,27,000
Sum remitted by the FC to LSML on 15.02.2016	2,81,18,000
Liquidated Damages payable by LSML to the FC	3,98,00,000
TOTAL	19,50,15,000

8) Accordingly, LSML was liable to refund to the FC, a sum of INR 19,50,15,000 inclusive of liquidated damages to the tune of INR 3,98,00,000. On 14.12.2016 LSML refunded a sum of INR 2,00,00,000 to the FC by way of RTGS. (Annexure H).

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9) The CD executed Corporate Guarantee dated 27.06.2017 to the extent of INR 11,53,15,000 in favour of the FC. The Corporate Guarantee was effective from 27.06.2017 for a period of 6 months and the FC could make a claim against the Corporate Guarantee within 30 days of the expiration of 6 months. **(Annexure M)**. The advance bank guarantee of INR 5,97,00,000/- was extended on 29.06.2017 until 30.09.2016 with a claim period up to 31.12.2017. **(Annexure N)**. On 15.09.2017 LSML released a sum of INR 50,00,000 to the FC. **(Annexure P)** and on 26.09.2017 the FC invoked and encashed the advance bank guarantee for a sum of INR 5,97,00,000 **(Annexure Q)**.

10) After much deliberations by the FC, the Corporate Guarantee was renewed on 08.12.2017 for a sum of INR 11,03,15,000 along with interest calculated at 12.25% which is equivalent to INR 2,49,30,991 payable until 26.03.2018. Thus the total amount guaranteed to be paid by the CD to the FC on or before 26.03.2018 was INR 13,52,45,991. This corporate guarantee was effective from 27.12.2017 and was valid for a period of 3 months from the effective date. Accordingly, the Corporate Guarantee was valid up to 26.03.2018 and the FC was entitled to make the claim before the CD until a maximum of 30 days i.e. from 27.03.2018 to 26.04.2018.

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Particulars	Sum In INR
Total sums liable to be refunded by LSML to the FC	19,50,15,000
Sums refunded by LSML on 14.12.2016	2,00,00,000
Sum refunded by LSML on 15.09.2017	50,00,000
Bank Guarantee encashed on 26.09.2017	5,97,00,000
Amount payable	11,03,15,000
Interest @12.25% from January'17 to March'18	2,49,30,991
Total Amount payable by LSML to the FC as on 31.03.2018	13,52,45,991

COUNTER STATEMENT FILED BY THE RESPONDENT:

11) The Respondent is setting forth the following objections to the present application:

a. The Respondent states that the application should be rejected solely on the ground that the Applicant is not a financial creditor and that the present claim does not comply with the requirements of Sections 5(7) and 5(8) of the Insolvency and Bankruptcy Code, 2016 which deals with a "financial creditor" and "financial debt" respectively and that the issue as to whether the Applicant falls within the meaning and scope of "financial creditor" in terms of section 5(7) of the IBC, 2016 and

whether the alleged debt is a "financial debt" within the meaning of section 5(8) of IBC, 2016 is to be deliberated upon before going into the details of the claim.

b. The Respondent has stated that the Applicant has not advanced or lent any *"debt along with interest, if any, which is disbursed against the consideration for the time value of money"*. Further, the claim does not fall under any of the categories mentioned in sub-clauses (a) to (i) of Section 5(8) of IB Code. Therefore, admittedly, the Applicant has no locus standi to initiate the instant proceedings under Section 7 of the IB Code.

c. The Applicant has not filed any proceedings against Leitwind Shriram Manufacturing Limited and has chosen instead to proceed against this Respondent singly without jointly proceedings against this Respondent and Leitwind Shriram Manufacturing Limited, which is against the mandate issued to Mr. Shantanu Agarwal and Mr. Y.P. Thakur in the set-up of the Applicant under the resolution of its Board of Directors meeting held on 30.03.2018 (Annexure A to the Applicant's Petition) which had clearly resolved *"to initiate the corporate insolvency resolution process against M/s. Leitwind Shriram Manufacturing Limited (Subsidiary of "SVL Limited") and M/s. SVL Limited, for this purpose, to*

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file an application with the National Company Law Tribunal ('NCLT) under section 7 of the Insolvency and Bankruptcy Code 2016 .. .",

and accordingly, Mr. Y.P. Thakur who had filed the instant petition on behalf of the Applicant has no authority to file the instant proceedings.

d. The Hon'ble NCLAT, New Delhi has held in *B.V.S. Lakshmi vs. Geometrix Laser Solutions Private Limited* that to come within the definition of 'Financial Debt' as defined under sub-section (8) of Section 5, the Claimant is required to show that (i) there is a debt along with interest, if any, which has been disbursed and (ii) such disbursement has been made against the 'consideration for the time value of money'. Thereby, if the Claimant claims to be 'Financial Creditor' he will have to show that debt is due which he has disbursed against the 'consideration for the time value of money' and that the borrower has raised the amount directly or through other modes like credit facility, note purchase facility, etc. In the present case, the alleged debt is not one such facility which is in consideration for time value of money. It is solely a Corporate Guarantee given pursuant to the alleged dues of LSML, a sister concern of the Respondent, under the Agreements for setting up a wind farm.

e. The Respondent is only a guarantor and not the principal debtor even according to the Applicant. Hence, when the relationship

between the Applicant and the principal debtor is itself only that of an "Operational Creditor", the Applicant cannot claim to be a "financial creditor" in respect to a guarantor in relation to the same "operational debt" of the principal debtor.

f. In the present case, admittedly, there has been no borrowing or disbursement of any monies either to the Respondent or to LSML and the transaction is only in the nature of Agreements to set up a wind farm between LSML and the Applicant. Hence, a guarantee given in respect of LSML's liability under the said Agreements cannot be considered as a "financial debt" by any stretch of imagination.

g. Further the said Term Sheet is not a binding and concluded contract. The only binding contracts are executed by and between BMD Renewable Energy Private Limited and LSML as evidenced by the Wrap Agreement, the Shared Services Agreement, the Development Services Agreement, the Foundation Purchase Order, the Supply Agreement and the Erection and Commissioning Agreement, all executed on 08.01.2016, only between BMD Renewable Energy Private Limited and LSML. Therefore, as essentially all these definitive and binding agreements have been executed between BMD Renewable Energy Private Limited and LSML, the Applicant herein viz. BMD Private Limited has no manner of right or authority to either initiate or maintain

any claim, action or proceeding against LSML or this Respondent, as it is a rank stranger and third party to the said definitive and binding agreements exhibited under Annexure E-Colly.

h. It has further been stated that the confirmation at Annexure F, G and H to the Applicant's Petition issued respectively by the Bank of Baroda, the Central Bank of India and the Bank of Baroda have been addressed and issued to "BMD Renewable Energy Private Limited" confirming that payments have been either released from or received into the bank account maintained and operated by BMD Renewable Energy Private Limited. This essentially testifies that payments under the definitive and binding agreements dated 8th January 2016 towards LSML or CEIL have been released in connection with the establishment of the wind project by BMD Renewable Energy Private Limited and certainly not by the Applicant herein viz. BMD Private Limited.

i. The purported corporate guarantee dated 27.06.2017 at Annexure M and the corporate guarantee dated 08.12.2017 at Annexure S along with the Petition are unenforceable since they are incomplete and do not form a binding contract. Although the purported corporate guarantees have three parties to them, viz. the Respondent, LSML and the Applicant (who have been expressly referred to as "Parties" therein), it is evident from a mere perusal of the documents that they have not been

signed and executed by LSML and the Applicant which renders the execution of the purported corporate guarantees invalid since the same is not a binding instrument in the eye of law and therefore no reliance or relief can be founded on the basis of the said purported corporate guarantees .

j. The Respondent is neither a party nor has otherwise assumed any obligations in terms of or under the Term Sheet dated 04.09 .2015 executed by and between the Applicant and LSML (*Annexure C to the Applicant's Petition*) and the Applicant cannot assert any right or claim founded on the same either against this Respondent and/ or LSML since the validity of the said Term Sheet had already expired by 15.10.2015 in terms of Clause 28 thereof and read with clause 12 thereof, which has envisaged the execution of the definitive agreements / Contracts.

k. In the letter dated 27.03.2018 being Annexure U to the Applicant's Petition, the Applicant had called upon both this Respondent and LSML to satisfy the demand to make a payment of INR 13,52,45,991/-. In terms of Annexure U, as the Applicant had raised a demand on both the Supplier (LSML) and the Guarantor (this Respondent), there is no option for the Applicant, to single out only this Respondent and file the instant petition, by leaving out LSML to whom

the advances for establishing the project was issued, that too not by the Applicant, but by BMD Renewable Energy Private Limited.

1. Further, the Applicant itself is not clear as to who the "Respondent/Corporate Debtor" is and who has committed the alleged default. In the Petition it has been averred that "the Corporate Debtor, namely Leitwind Shriram Manufacturing Private Limited" whereas the claim is made against this Respondent. In para 42 of the petition it has been stated that *"the first default on the part of the Corporate Debtor occurred sometime in December 2016 when the Corporate Debtor failed to refund the monies to the Applicant/ Financial Creditor"*, - The same is wholly incorrect and fallacious since at that point of time no purported Corporate Guarantee was ever executed by this Respondent in favour of the Applicant in December 2016 and therefore, the alleged default is not by this Respondent and hence, the present petition is liable to be dismissed.

REJOINDER :

12) The Applicant in the rejoinder has stated that the Respondent/ Corporate Debtor has not denied the existence of the liability to pay sums to the Applicant. In fact, the Respondent/ Corporate Debtor has made clear admissions regarding the following:

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- (i) The transaction between the Applicant and LSML, right from the Term Sheet stage until the execution of the Definitive Agreements;
- (ii) The termination of the transaction between the Applicant and LSML, and the subsequent admission of LSML to repay all sums received by it and its agent in terms of the Term Sheet and the Definitive Agreements;
- (iii) The execution of the Corporate Guarantee dated 27.06.2017 and the Corporate Guarantee dated 08.12.2017, effective from 27.12.2017 and the liability therein of the Respondent/ Corporate Debtor to pay the sums set out therein; and
- (iv) The fact that the sums guaranteed to be paid by the Respondent/Corporate Debtor to the Applicant under the corporate guarantee dated 08.12.2017 remains outstanding as on date and still remain unpaid.

13) It has been submitted that the Applicant is a financial creditor of the Respondent/ Corporate Debtor, to whom a financial debt is owed. Upon termination of a pre-existing agreement LSML, agreed to repay to the Applicant the sums already remitted to it by the Applicant. Upon admission of LSML to return the monies to the Applicant, such monies became crystallised to be paid by LSML to the Applicant. Thereafter, upon the

failure of LSML to pay such sums to the Applicant, the Respondent, being a group company of LSML executed a corporate guarantee securing such outstanding amount. Thereafter, upon invocation of the said guarantee, the sums due and payable are qualified to be a financial debt under the provisions of the IB Code.

14) It has further been stated that a contract of guarantee is nothing but an undertaking to pay in the event of default of a party that has onus to pay certain sums to the party guaranteed under the contract of guarantee. It is therefore not essential that all the three parties to the arrangement to execute the guarantee. It is sufficient for the guarantor to have executed such document in favour of the guaranteed party qua the liability of a third party. In the instant case, the corporate guarantees have been duly signed and executed, and bear the stamp of the Respondent / Corporate Debtor, being the guarantor.

15) It is stated that the entire transaction between the Applicant, LSML and the Respondent qualifies to fall within the above said provisions of sub-section (f) and (i) of Section 5(8). This is so because, upon LSML admitting its liability to pay the sums due to the Applicant, and upon the Respondent/ Corporate Debtor executing a corporate guarantee securing

such payment to the Applicant, the amount of monies payable became crystallized in favour of the Applicant. It is further relevant to point out that as per Section 5(8) (i), any amount of liability in respect of a guarantee for any of the items referred to (a) to (h) of Section 5(8) of the 1B Code is regarded as financial debt. Therefore, the relationship between the Applicant and the Respondent is that of a Financial Creditor and a Corporate Debtor.

SUR-REJOINDER:

16) It has been reiterated that the Applicant is not a FC and if at all any monies are owed by the LSML, it is owed only towards BMD Renewable Energy Private Limited and not towards the Applicant herein and therefore no “such monies became crystallised to be paid by LSML to the Applicant,” was alleged to be false. When it is the consistent case of this Respondent that the purported Corporate Guarantee is void ab initio and is otherwise also legally not maintainable being incomplete and not executed by all the Parties thereto, no right or authority could be derived under that instrument, much less to be in the nature of a *“financial debt under the provisions of the IB Code”* as canvassed wrongly by the Applicant.

17) It has been stated that a Term Sheet was executed between Leitwind Shriram Manufacturing Limited (“LSML”) and the Applicant on 04.09.2015 and it is noteworthy as the purpose was only for setting

up a wind farm and no transaction in the nature of lending or borrowing or disbursal of any financial assistance was contemplated by the said Term Sheet, as would morefully clear from the recitals of the said Term Sheet also. The Applicant cannot seek to place any reliance on the Definitive Agreements as it is a rank stranger to the same. The Applicant is neither a party nor privy to the said Definitive Agreements, including the Wrap Agreement and other agreements executed between BMD Renewable Energy Private Limited and LSML. In any case, Clause no.10.11 of the Wrap Agreement which is one of the main agreements constituting the Definitive Agreements executed on 8th January 2016 expressly provides that "*this Wrap Agreement supersedes and merges all prior discussions, understandings and agreements*" and in view thereof, it ought to be appreciated that the Term Sheet stood superseded with the execution of the Definitive Agreements and therefore neither through the Term Sheet, nor under the Definitive Agreements (it not being a party thereto) can it derive any alleged rights or authority or cause of action for any monies that may have been released to LSML by BMD Renewable Energy Private Limited (and not by the Applicant herein which is BMD Private Limited) it being completely a separate and distinct legal entity in the eye of law. It is reiterated that the Definitive Agreements were

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not terminated between the Parties thereto. It is also reiterated that the purported Corporate Guarantee dated 08.12.2017 which has formed the basis for filing of the instant Application is *void ab initio* as it is not supported by any consideration, as stipulated by section 25 of the Indian Contracts Act. Under the purported Corporate Guarantee, the Applicant being defined as "Customer", Leitwind Shriram Manufacturing Private Limited being defined as "Supplier" and this Respondent being defined as "Guarantor", it has been falsely represented that the "Supplier had entered into a Contract dated 4th September 2015 with the Customer", while only a non-binding Term Sheet and not a concluded contract or definitive agreement has been entered into. Secondly, it has also been falsely represented in the purported Corporate Guarantee that "*Whereas the Customer has released a payment of Rs.15,52,15,000/-*", while the fact remains that no such money, leave alone Rs.15,52,15,000/- was released by the Customer viz. the Applicant herein to either the Supplier being LSML or the Guarantor being this Respondent. Since, no underlying consideration as mandated by section 25 of the Indian Contract Act has been extended by the Applicant either to LSML or to this Respondent, the purported execution of the Corporate Guarantee dated 08.12.2017 fails inescapably as *void ab initio*. Further, as the purported Corporate

Guarantee clearly envisages that it is being made between the Guarantor, the Supplier and the Customer, in as much as the Supplier being LSML and the Customer being the Applicant herein not having joined in and executed the same, the said instrument fails otherwise also as an in-complete and inchoate document, incapable of being enforced either specifically or being relied on for any purpose whatsoever, more so for an alleged application under section 7 of the IB Code.

ORDER

1) In this case the BMD Pvt Ltd who is a party to the contract for erection and commission of the wind power plant has made this application under Section 7 of IBC, 2016 against the guarantor SVL Ltd. In this case, it is seen that many of the supporting Agreement, Shared Service Agreement, Development Agreement, Supply Agreement together with the advance bank guarantee given by the Oriental Bank of Commerce.

2) Further, the Term Sheet has been signed by the applicant with LSML. In the advance bank guarantee BMD Pvt Ltd is shown as the purchaser whereas the other party is LSML in the Wrap Agreement BMD Renewable Energy Pvt Ltd and LSML and the same is the case with the Development Agreement and Supply Agreement and also with the Erection and Commission Agreement contract. The

only direct connection between the petitioner and the Respondent is in the Corporate Guarantee Agreement which as in Pg 275. Further the Tribunal observes that the guarantee agreement need not necessarily be a tripartite agreement and that it is sufficient if the guarantor has signed the guarantee agreement to make it enforceable.

3) In this case the only legal point raised by the Respondent is to state that the Petition is not maintainable under Section 7 of the IBC, 2016 as the debt doesn't come under Section 5(8)(a) to (h). It has also been stated that Section 5(8)(i) also refers to the sub clause (a) to (h) in this clause. Hence, a guarantee is not enforceable as a financial debt as it is not covered under section 5(8)(a) to (h).

4) In view of the terms of the aforesaid Corporate Guarantee dated 08.12.2017, the amount owed by the CD to the FC got crystallized. This would clearly establish the CD's financial debt and its liability to pay the same to the FC with interest at the rate of 12.25% as consideration for the 'time value of money' this would fall squarely under the case/event envisaged under section 5(7) read with section 5(8)(f) and 5(8)(i) of the IBC, 2016

5) The Tribunal observes that the definition of operation debt under IBC, 2016 reads as follows;

“(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority”

As per the definition a debt to be an operational debt should be a claim with regard to provisions of goods or services. In this case, there is no supply of goods or services between the guarantor and the creditor. The claim by the creditor against the guarantor is for a crystallized sum with interest as agreed to by the parties which does not fall within the definition of the operational debt whereas the amount claimed will fall under the section 5(8)(f) which reads as follows;

“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-

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

(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-clause (a) to (h) of this clause;”

In this regard it is observed that once the amount payable is quantified and the interest element was added it had become a financial debt. Even otherwise, to aver that the guarantee to an operational debt cannot be invoked under the provisions of IBC, 2016 will negate the very purpose of the statute.

6) In this case, the Respondent has not denied the fact that they have given corporate guarantee to the Applicant towards the amount payable by the related company. LSML under the provisions of the Contract Act Section 126 a guarantor cannot ask the creditor to proceed first against the principal debtor nor

can he demand a notice from the creditor that the principal debtor has defaulted because it is the surety's duty to ensure that the principal debt or settles his liability. Under Section 126 of the Contract Act, a contract of guarantee need not necessarily be in writing; it may be expressed by words of mouth, or it may be tacit or implied and may be inferred from the course of the conduct of the parties concerned.

7) It is a settled law that a 'corporate guarantee' is a stand alone document and can be invoked by the creditor and the guarantor is liable to honour its liability under the terms of the guarantee.

8) Further, in the reply filed by the Respondent it has been stated that the Respondent is not a party to the Term Sheet dated 04.09.2015. In this regard, the Tribunal observes that the matter in discussion is in relation to the guarantee agreement for the amount claimed under the guarantee agreement and about the liability of the respondent to pay because of the default in the payment. The Respondent has relied upon Clause 28 read with Clause 12 of the Term Sheet to deny his liability on the ground that they are not party to the Term Sheet and also in the definitive agreements/contracts (para L of the reply filed by the Respondent)

".. the validity of the said term sheet had already expired by 15th October 2015 in terms of clause 28 thereof and read with clause 12 thereof, which has envisaged the execution of the definitive agreements/contracts."

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In this regard the Tribunal observes that the terms of the guarantee agreement reads as follows;

“However, while executing the project a new tariff order had been announced by MPERC reducing the feed-in-tariff from Rs.5.92 per KWH to Rs.4.78 per KWH which leads to the project un-viable. Hence the customer and the supplier has mutually agreed to terminate the contract and supplier has agreed to refund the money received from the customer along with the Liquidated Damages (LD). “

From the above it is observed that the guarantee agreement has superseded the Term sheet and the validity of the Term sheet has no relevance on the sum quantified under the guarantee agreement.

9) In this case vide the copy of the Corporate guarantee enclosed with the application (Pg 266) it is mentioned;

“Hence the customer and supplier has mutually agreed to terminate the contract and supplier has agreed to refund the money received from the customers along with the liquidated damages and the amount has also been arrived at Rs.11,53,15,000/- in the Corporate Guarantee”

Further, in the extended corporate guarantee dated 08.12.2017 it is stated that

“ The total money to be refunded to customer is as under:

Description	Amount in Rs.
Total Amount Received	155,215,000.00
Add : LD	39,800,000.00
Total	195,015,000.00
Less : Amount Refunded on 14.12.16	(20,000,000.00)
Amount Refunded on 15.09.2017	(5,000,000.00)
BG Encashed	(59,700,000.00)
Amount to be paid	110,315,000.00

<i>Interest @12.25% from Jan'17 till March 2018 on a cumulative basis</i>	<i>24,930,991.00</i>
<i>Amount to be paid by LSML on 31.03.2018</i>	<i>135,245,991.00</i>

Therefore, to provide security to the customer for the balance amount of Rs.13,52,45,991/- (Indian Rupees Thireteen Crores Fifty Two Lakhs Forty Five thousand Nine hundred and ninety one only) with cumulative interest @ 12.25% from Jan'17 till March 2018, the Guarantor issues this Corporate Guarantee. If any partial or full payment is made in the next 3 months from the date of this Corporate Guarantee, the cumulative interest will be reduced accordingly."

10) The Tribunal observes that section 60(2) and section 60(3) of the IBC, 2016 also refer to guarantors but both the sections are applicable only in case of personal guarantors and hence not applicable in the instant case.

11) The Tribunal observes that the CIRP can be initiated by the petition filed by the financial creditor as well as the Operational creditor. The Tribunal observes that the amended section 14 of the IBC, 2016 reads as follows;

*"(3) The provisions of sub-section (1) shall not apply to—
(a) such transaction as may be notified by the Central Government in consultation with any financial regulator;
(b) a surety in a contract of guarantee to a corporate debtor."*

In terms of the Respondent's contention section 14(3) will not be applicable to any CIRP proceeding initiated under IBC, 2016 which will negate the very purpose of section 14(3) of the IBC, 2016.

12) Further, Section 31(1) of the IBC, 2016 is also applicable in the case of a petition initiated by the Operational creditor also and the interpretation that the guarantee given in respect of the operational debt cannot be enforced is at

total variance with respect to section 31(1) of the IBC, 2016 which relates to the Approval of resolution plan which shall be binding on the guarantors.

13) The petitioner/Financial Creditor has complied with all the requirements stipulated under the provisions of the I & B Code, 2016 and the Rules framed there under.

14) In these circumstances, we hereby **admit the instant petition.**

15) The instant petition is admitted and we order the commencement of the Corporate Insolvency Resolution Process against the Respondent/Corporate Debtor which shall ordinarily get completed within 180 days reckoning from the day this order is passed.

16) We appoint Mr. Shiv Nandan Sharma as Interim Resolution Professional as recommended by the Applicant. There is no disciplinary proceedings pending against the IRP and his name is reflected in IBBI website. The IRP is directed to take charge of the Respondent/Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under section 15 of the I & B Code, 2016 within three days from the date the copy of this order is received and call for submissions of claims in the manner prescribed.

17) We declare the moratorium which shall have effect from the date of this order till the completion of corporate insolvency resolution process for the

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purpose of referred to in section 14 of the I & B Code, 2016. We order to prohibit all of the following namely:

(i) 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.

(ii) Transferring, encumbering, alienating or disposing of by the corporate debtors any of its assets or any legal right or beneficial interest therein;

(iii) 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)

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

18) The supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. The provisions of Sub-section (1) of Section 14 shall not apply to such transactions, as notified by the Central Government.

19) The IRP so appointed shall comply with the provisions of sections 13(2), 15, 17 & 18 of the Code. The directors, Promoters or any other person associated with the management of Corporate Debtor are directed to extend all assistance

and cooperation to the IRP as stipulated under Section 19 and for discharging his functions under Section 20 of the I & B Code.

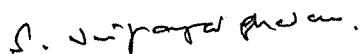
20) The petitioner/Financial Creditor as well as the Registry is directed to send the copy of this order to IRP on his appointment so that he could take charge of the Corporate Debtor's assets etc and make compliance with this order as per the provisions of the I & B Code, 2016.

21) The Registry is also directed to communicate this order to the Financial Creditor and the Corporate Debtor.

With the above directions the **petition is allowed.**

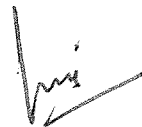
The details of the IRP are as follows;

Mr. Shiv Nandan Sharma,
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Mob: 9810064242
IBBI/IPA-001/IP-P00384/2017-2018/10641.



(S.VIJAYARAGHAVAN)
MEMBER (TECHNICAL)

/sd/



(K.ANANTHA PADMANABHA SWAMY)
MEMBER (JUDICIAL)