

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

C.P. NO.725/I&BP/2017

Under section 7 of the IBC, 2016

In the matter of
The Mauritius Commercial Bank
...Financial Creditor/Applicant

v/s.

Varun Corporation Ltd.
....Corporate Debtor

Order delivered on: 30.06.2017

Coram:

Hon'ble B.S.V. Prakash Kumar, Member (Judicial)

Hon'ble V. Nallasenapathy, Member (Technical)

For the Petitioner:Mr. Fredun E. De'Vitre, Sr. Advocate
i/b Lex Firmus a/w Sanjeev Kumar, Adv.,
A.E. Kisku, Adv. Anshul Sehgal.

For the Respondent: ... Mr. Shyam Kapadia i/b Crawford Bayley & Co.

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

It is a Company Petition filed u/s 7 of The Insolvency and Bankruptcy Code by a Mauritius company, namely, The Mauritius Commercial Bank against the Corporate Debtor namely, Varun Corporation Limited for this Debtor Company stood as Corporate Guarantor to the loan of USD 30 million borrowed by one of the debtor group companies, namely Real Point Mauritius Ltd (RPML) from the

Financial Creditor and then this Principal Borrower (RPML) having defaulted in repaying this loan along with interest, this debt has been crystallised against this corporate debtor who stood as guarantor. When this debtor also failed to discharge its obligation of repayment of due outstanding against the principal debtor, this financial creditor, by filing this Petition, sought for initiation of Insolvency Resolution process against this Corporate Debtor. The Applicant Bank claim against the corporate debtor as on 31.01.2017 is USD 17,122,179, this computation has been shown in Exhibits 17 & 18 of the Company Petition.

Brief facts of the case:

2. This principal borrower (RPML) has been incorporated in the year 2008 as wholly owned subsidiary of this Corporate Debtor in Mauritius. At all points of time, the directors of its holding company i.e., Corporate Debtor, have remained as directors of this principal borrower. One Mr. Yudishthir D. Khataw and Mr. Sumegh Mody remained as directors of this principal borrower and this corporate debtor as well; this fact has not been disputed by this corporate debtor. This principal borrower, to acquire shares of its group Indian company namely Varun Shipping Company Limited (VSCL), availed USD 30million loan from this Mauritius Bank situated in Mauritius Country by entering into Facility Agreement dated 2.12.2008. This Corporate Debtor Company, being holding company of RPML, executed corporate guarantee for the aforesaid amount of USD 30 million to secure repayment of the outstanding dues in the event of default in repayment by the principal borrower, i.e. RPML. The aforesaid Sumegh Mody, being common director of RPML and the Corporate Debtor, signed the Facility Agreement on behalf of RPML and Corporate Guarantee Agreement on this Corporate Debtor as well. Before execution of this Corporate Guarantee by this Debtor, it had passed a Board Resolution on 2.12.2008 agreeing to give corporate guarantee to the aforesaid loan taken by RPML from the Financial Creditor (Board Resolution at Page 122 of CP).

In furtherance of it, on 26.3.2009, the Debtor Company, through Mr. Sumegh Mody, executed an irrevocable and unconditional corporate guarantee in favour of the Creditor for full repayment of all monies as agreed by RPML in the event RPML defaulted in making repayment of USD 30million availed through Facility Agreement.

3. This guarantee agreement executed in favour of a Foreign Bank located in Mauritius having fallen within the ambit of FDI through automatic route, since the debtor company is under an obligation to make post facto intimation of the same to RBI, this debtor company on 26.3.2009 forwarded the copy of this corporate guarantee to its dealer Bank, namely Bank of Baroda along with Form ODI to enable the Bank to send it to RBI. This fact is also not denied by the corporate debtor. Interesting part is, even the letter written to the Bank of Baroda is signed by the same Mr. Sumegh Mody as director of the Debtor Company. To prove that FDI guidelines have been complied with, this Corporate Debtor, by its letter dated 1.4.2009 sent the letter acknowledged by the Bank of Baroda, dealer Bank along with this guarantee agreement to the creditor as well, this was done perhaps to impress upon the Creditor Bank that the Corporate Debtor completed whatever formalities to be followed in availing facility for getting Foreign Direct Investment. Somewhere in the 2012, when RPML defaulted in its payment obligations under Facility Agreement after payment of instalments, this Facility Agreement was amended on 2.4.2012 and the loan was restructured. Besides this, in the auditor's report of RPML as of 31st March, 2009, it has been reflected that this Bank loan of USD 30 million has been secured and has been guaranteed by the Varun Corporate Limited (corporate debtor), the holding company. By looking at the **Annual Report** of the Corporate Debtor for the period of 15 months ended **30th June 2009**, it has been reflected under the head of contingent liabilities as follows:

“Contingent Liabilities:

Contingent liabilities are not provided for and are disclosed by way of notes.

(a)

(b)

(c)

(d) Since the net worth of subsidiary company (RPML) is eroded, the company has agreed to provide financial support to the subsidiary to meet its debts and liabilities as to continue it as a going concern.”

4. When RPML again defaulted in repayment of its outstanding dues to the creditor, the creditor sent a demand notice dated 20.3.2015 to the RPML. On having RPML failed to honour its obligation in discharging its liability, the creditor this time issued notice to the debtor company on 27.5.2016 setting out that the debt has become crystallised against the guarantor/Corporate debtor for RPML defaulted in repayment of the debt.

5. As RPML defaulted in making repayment, the creditor filed a suit against RPML on 19.11.2015 before the Supreme Court of Mauritius, Commercial Division for a sum of USD 14,904,587 dues arose out of Facility Agreement, basing on that suit claim, the said Court, on 16.11.2016, decreed against RPML to pay the creditor a sum of USD 14,904,587 together with accruing interest till date of final payment with costs. As the amount payable to the creditor not being realized despite the suit was decreed against RPML, this Creditor has, in the month of April 2017, filed recovery proceedings against the Debtor Company on the same claim, because the Bank is entitled to proceed against the guarantor as well. On such filing, the Corporate Debtor made a bald denial before Mauritius Supreme Court that the Corporate Debtor did not execute the agreement, but this debtor

has never denied the letter written to the Bank of Baroda for sending the copy of this guarantee agreement to RBI and the covering letter dated 1.4.2009 sent to the creditor along with Agreement of Guarantee stating that dealer Bank has been instructed to send the copy of the agreement to RBI for post facto approval. Of course, this debtor made the same denial to the demand notice sent by the creditor Bank on 26.5.2016.

6. Since the efforts to realise its money with the help of one or other jurisdiction not being fructified, the creditor filed this Company petition before this Bench u/s 7 of the Insolvency and Bankruptcy Code.

7. On receipt of notice in this case, the Corporate Debtor principally raised the following objections to admit this Petition:

- i. Since this Corporate Debtor has not executed Corporate Guarantee to the creditor on RPML behalf, this proceeding being summary in nature with narrow conspectus, this issue being denial of execution of the bank document, the same cannot be tried before this forum, henceforth, this petition liable to be dismissed.
- ii. Assuming this Corporate Guarantee executed by the debtor, then also, this corporate guarantee agreement purported to have been executed by the debtor is not an enforceable instrument because RBI circular on Foreign Direct Investment does not permit an Indian party to make investment in Overseas Joint Venture (JV)/Wholly Owned Subsidiary (WOS) exceeding 400% of the net worth of Indian Company as on the date of the then last audited balance sheet. Admittedly, as on the date of the purported guarantee, the net worth of the corporate debtor was approximately ₹15crores, therefore at the most, it could give guarantee to around 60crores which is four times

to the net worth of the company, but not for USD 30 million (150 crores).

- iii. Upon the inquires of the debtor, for it has been learnt that its Dealer Bank i.e., Bank of Baroda has not forwarded the guarantee agreement copy to RBI as required under law, the approval for RBI not being granted, this Corporate Guarantee for FDI without intimation to RBI is invalid and not enforceable in the eye of law.
- iv. The debtor says that this petitioner instead of electing a forum to proceed against this debtor, it had first obtained decree against RPML, then a suit against this debtor on the same debt before Supreme Court of Mauritius, while the said suit pending there, this Petitioner now finally landed up before this forum, where consequences of its order are harsh with drastic implications.
- v. The Debtor says since this guarantee agreement is unstamped, according to Section 3(b) of Maharashtra Stamp Act (MSA), this instrument being chargeable, this court can't even look into this document *for any purpose whatsoever* (section 35 of Stamp Act 1899/ section 34 of MSA) unless and until it fulfils impounding as required under Section 33 of Maharashtra Stamp Act. To justify this argument, the debtor counsel relied upon *Avinash Kumar Chouhan v. Vijay Kumar Mishra* (2009) 2 SCC 532, and *Jupudi Kesava Rao vs. Pulavanthi Venkata Subba Rao & Ors* (1971) 3 SCR 590.

8. By looking at the first objection of denial of execution of Corporate Guarantee, it appears to us that it is a bare denial made by the Corporate Debtor because the very person who signed in the loan agreement on RPML behalf is shown as signed upon Corporate Guarantee agreement. The man said to have executed loan agreement has not denied execution of the loan agreement on RPML behalf. If we see the loan agreement executed

by the Principal Borrower, it is evident that loan agreement discloses that this Corporate Debtor would stand as guarantor to this loan, corroborating to this fact, the Corporate Debtor company passed a resolution to stand as a guarantor to this loan taken by RMPL, thereafter in the year 2009 Annual Report, the corporate debtor stated that it would meet the contingent liabilities of RPML, in furtherance of it, the Corporate Debtor company itself forwarded a letter to the Bank of Baroda, their dealer bank to send post facto intimation to the RBI stating that Corporate Loan Guarantee Agreement has been executed by this Corporate Debtor to a company situated in Mauritius. Moreover, in the respective year financial statements it has been showing that Corporate Guarantee has been given to RMPL which is 100% subsidiary of this Corporate Debtor. This loan in fact has been taken to acquire shares of one of the Corporate Debtor group companies. By analysing the totality of the situation, no other inference could be drawn except saying that this Corporate Debtor stood as Guarantor to the loan obtained by RPML from the Creditor Bank.

9. Likewise, there is ample material to prove that this debtor company has given Corporate Guarantee on its subsidiary's behalf to the creditor, therefore the defence of the debtor company saying that corporate guarantee has not been given by it does not infuse any belief in the mind of this Bench to turn down the case of the applicant, therefore, this Bench hereby believes that the creditor placed enough material proving that this Corporate Debtor executed Corporate Guarantee to the loan of USD 30 million taken by RPML from the Creditor Bank. Usually, the loan procured by a subsidiary overseas is secured by a guarantee provided by the Indian parent entity, the same is the thing happened here.

10. As to second objection that Corporate Guarantee is not valid for want of RBI approval is concerned, the Corporate Debtor submits even by

assuming this Agreement has been executed by the Corporate Debtor, this agreement has to fail on two counts, one – no post facto approval in principle from RBI is not present, two – the guarantee given by the Corporate Debtor is for 150 crores which is more than 400% to the net worth of corporate debtor company as on the date of Corporate Guarantee given, which is not permissible under RBI circular, because RBI Circular envisages that no Indian company should give a guarantee to FDI investment exceeding four times to the net worth of the Guarantor company. Since this Corporate Debtor net worth as on the date of execution of agreement, it was only 15 crores therefore, this company could not give guarantee for more than 60 crores, but here the guarantee was given for a loan of USD 30 million equivalent to 150 crores in Indian Currency.

11. The basic thing that one should not get lost sight of the fact is that a wrong doer should not take advantage of its own wrong, here this corporate Debtor is indeed under obligation to make post facto intimation to RBI, not only this, it appears that this corporate debtor knowingly has given guarantee to the loan obligation more than 400% of its net worth, fact of the matter is, this loan money has not been utilised for investing in its subsidiary RPML located in Mauritius, but clawed out to one of its group company situated in India through the route of equity. After all these mischievous acts of the debtor, can today this debtor back out from the promise of guarantee given to a loan availed by its wholly owned subsidiary of it? Hundred percent subsidiary means what, the acts of subsidiary are nothing but acts based on the wish of the holding company. Where this loan money has gone? It has gone to one of its group companies. If at all this approval from RBI has to be obtained prior to obtaining loan or execution of Corporate Guarantee, then it may be said that the guarantee de hors intimation is bad, in this case, it is only a post facto intimation, not making such intimation will not vitiate or frustrate the

agreement or rights of the creditor. Why it has not gone to RBI, we can't make any guess work on it, but it is a fact that this debtor sent a letter on 29.3.2009 to the creditor Bank stating that corporate debtor already sent post facto intimation to the RBI by sending a letter addressed to Bank of Baroda to the creditor Bank to make them believe that execution of guarantee agreement to this loan has been intimated to the RBI. May be the debtor has not put its efforts to see it reached to the RBI because guarantee is more than its limits. Since this duty is cast upon the Corporate Debtor to intimate to RBI about giving guarantee, the person, done wrong by not ensuring intimation reached to the RBI, today cannot come out with a defence stating since intimation has not reached to the RBI, the liability arising under this agreement is not enforceable against the corporate debtor. Therefore, we have not found any merit saying that not sending intimation to RBI about execution of guarantee will make this transaction invalid. No law says a person made a gain out of a transaction can vilify the same saying by so and so glitch in the law he has become free from the obligation owed upon him. More so, even if any transaction is irregular in the teeth of any regulation, mere irregularity per se will not make an act illegal.

12. Another objection raised by the Corporate Debtor is that since the applicant obtained decree against the principal borrower and filed a civil suit against this Corporate Debtor before Mauritius Supreme Court claiming recovery of the same debt for RPML failed to discharge its obligations, this Applicant should not now elect to proceed before this Bench after having already tried its luck before Mauritius Court against the principal borrower, thereafter against this Corporate Debtor.

13. As to this objection, if we look into Section 5 sub Section 8 of the Insolvency & Bankruptcy Code, it is ascertainable that the clause (i) of Sub Section 8 says that the amount of any liability in respect of the guarantee

given for the credit facility availed by the principal borrower will fall within the definition of Financial Debt, therefore, this applicant is entitled to proceed against the guarantor because this Code mandated that the liability against the guarantee will also amount to financial debt. As to proceedings u/s 7 of the Code, the dispute pending in relation to the claim amount before any other forum will not become impediment or bar to initiate Insolvency Resolution Process u/s 7, therefore, obtaining a decree against RPML or pending of suit against this Corporate Debtor in relation to this claim cannot invalidate the proceeding u/s 7. Moreover, it is not the case of the Corporate Debtor that the decree passed against RPML has been satisfied by making payment either by RPML or by this Corporate Debtor; thereby pendency of proceedings cannot become an objection for admission of this case.

14. The Corporate Debtor has also raised another objection that the guarantee agreement being unstamped instrument, unless said instrument has been sent for impounding, this instrument cannot be looked into by any court of law therefore unless the document is impounded, the petition cannot be admitted. To which, by looking at the ratio placed by the petitioner and as well as the corporate debtor, it appears to us that case basing on an unstamped or insufficiently stamped instrument could be simultaneously admitted by ordering for impounding the instrument impugned herein. Since this Bench has already held that this Court has not believed the defence of the Corporate Debtor saying that no Corporate Guarantee Agreement has been executed in favour of the applicant, once such instrument has been sent for impounding it will automatically get impounded provided requisite stamp has been paid, moreover nothing is left to decide once this administrative act of impounding is done. It is a curable defect; therefore it will not become an impediment to initiate Insolvency Resolution Process. This Bench has not gone into as to whether a foreign instrument not chargeable in that respective country needs to be

stamped as envisaged under the Stamp Act, because both sides failed to assist this Bench on that perspective. Another intriguing point is this instrument has come into existence to give corporate guarantee in a foreign country.

15. To prove that the principal borrower availed loan facility and defaulted in making repayment, the applicant has shown loan facility agreement dated 02.12.2008 executed by the principal borrower (RPML), corporate agreement dated 26.03.2009 executed by the corporate debtor, then loan account of the principal borrower maintained by the applicant Bank from 10.02.2009 to 31.08.2010 to reflect disbursement of loan facility, copy of amended facility agreement, then demand notice dated 20.03.2015 to RPML informing the loan account has been in arrears from 30.8.2013, the total due outstanding as on 19th March 2015 was USD13, 730, 046.19 in principal and interests and to pay immediately or else legal action would follow.

16. To prove that the corporate debtor has also failed to discharge its obligation to clear the debt outstanding on default of repayment by the principal borrower, the applicant placed a notice dated 27.05.2016 to this corporate debtor informing RPML having failed to comply with its payment obligations, this debtor, being a guarantor, is liable and indebted towards the financial creditor for an amount of USD15,686,146 outstanding, unless the above amount mentioned is paid within 30 days, the Creditor would have no alternative than to initiate legal proceedings against this Corporate Debtor, then a decree against RPML from Mauritius Court and pendency of suit against this Corporate debtor before Mauritius Court, and other documents supporting execution of corporate guarantee and the consent letter from the Insolvency Resolution Professional, by looking at this material, we are of the view that it is more than sufficient to believe

that the applicant proved existence of debt, crystallisation of debt against the corporate debtor on default of repayment by the principal borrower, thereafter this corporate debtor also defaulting in paying off the said debt. The applicant filed the original Corporate Guarantee Agreement; hence the argument over presenting photo copy has no more relevance, accordingly that aspect has not been dealt with. It is not the case of this debtor that the principal borrower has not availed loan and has not defaulted in repayment, therefore nothing much have to say over availing loan and defaulting in repayment.

17. The applicant relied upon *Aditya Birla Finance Ltd v. Coastal Projects Ltd (Arbitration Petition (L) No 1603/2013 dated 29.10.2013 – Bombay High Court)* to say that guarantee deed in want of stamp duty can be relied upon for seeking interim relief, if deficiency of duty is there, court can impound it at evidence stage.

18. The applicant relied upon *SRM Exploration Pvt. Ltd. v. N&S&N Consultants S.R.O (2012) 129 DRJ 113 (Delhi HC)* to say that there is no absolute bar to act upon basis of unstamped document and it cannot be lost sight of the fact that the documents in the case supra i.e., Guarantee Declaration as well as Promissory Note were executed outside India.

19. The applicant relied upon *ICICI Bank Ltd. v. Classic Diamonds (India) Ltd (2015) SCC Online Bom 6555* to say that in respect to winding up matters, it must be seen as to whether the company is unable to pay debts or not, not otherwise. In the case supra, when an argument has been set out saying that the corporate guarantee executed outside Maharashtra when comes to State of Maharashtra, the requisite stamp duty shall be paid, on which, the Honourable High Court made an observation that

when the company court considers whether or not to wind up a company, it will not act on any particular document, because the court u/s 434 of the Act 1956 essentially considers whether the company is unable to pay its demands. Similar argument has been made relying on a case in between *L & T Finance Limited v. Damodar Bankar (Borrower) and Mr Barkelo Gaonkar (Guarantor)* MANU/MH/2266/2013 to say that the objection over deficiency of stamp duty cannot be raised within three months from the date document has come into the State, therefore the objection over want of stamp duty has been turned down.

20. The applicant relied upon *Hindustan Steel Ltd. v. Deleep Construction Co. (1969) 1SCC 597* to say that The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: it is not enacted to arm a litigant with a weapon of technicality to meet the case of the opponent.

21. The applicant counsel differentiated the case in between *Avinash Kumar Chauhan v. Vijay Kumar Mishra 2009 (2) SCC 532* saying that under section 33 of Maharashtra Stamp Act, court is required to impound a bilateral document, here the corporate debtor is a sole executant, unilateral execution, therefore even assuming this document requires to be stamped by the sole executant, i.e., the corporate debtor, not the creditor.

22. If at all this Bench has not admitted this company petition, then there is every likelihood diminution of the value of the corporate debtor company if initiation of Insolvency Resolution process is prevaricated. Since it is a known fact that unless and until the moratorium is declared, the corporate debtor company is at free to alienate the assets of the company or to dilute the assets of the company, since it is not in doubt that

the corporate debtor executed guarantee agreement, we don't believe the direction for impounding will cause any impediment for admitting this petition.

23. Therefore, this Bench hereby directs the creditor for impounding guarantee agreement as per law.

24. For the reasons above stated, this Bench being satisfied that the principal borrower drew down the loan facility given by the petitioner thereafter defaulted in making repayment for the principal borrower having defaulted the contingent liability against the guarantor has become crystallised into a definite liability falling within a definition given for financial debt for this corporate debtor has also not paid, this Bench hereby admit this Company Petition with the relief as follows:

- i. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

- ii. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
 - iii. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
 - iv. That the order of moratorium shall have effect from 30.6.2017 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
 - v. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
 - vi. That this Bench hereby appoints Mr. Prakash Karunashankar Pandya, 16, 1st Floor, Star Trade Centre, Sodawala Lane, Borivali West, Mumbai – 400 092, Registration No. IBBI/IPA-002/IP-00127/2016-17/1215as interim resolution professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.
25. The Registry is hereby directed to communicate this order to the Financial Creditor and the Corporate Debtor.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B. S.V. PRAKASH KUMAR
Member (Judicial)