

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

CP (IB) No. 3143/MB/2019

*[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:

PUNJAB NATIONAL BANK

[PAN- AAACP0165G]

Registered Office: Plot No-4, Sector 10

Dwarka, New Delhi-110075.

...Financial Creditor

V/s

ARSHIYA LIMITED

[CIN: L93000MH1981PLC024747]

Registered Office: 205 & 206 (Part), 2nd Floor, Ceejay House

Shiv Sagar Estate, F-Block

Dr. Annie Besant Road, Worli

Mumbai-400018, Maharashtra.

...Corporate Debtor

Pronounced: 23.04.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Hearing: Hybrid

Appearances:

Operational Creditor: Adv. Shyamadhar Upadhyay i/b Intralegal

Corporate Debtor: Adv. Nausher Kohli a/w Adv. Shivam Bhagwati,

Adv. Prerna Wagh and Adv. Hunaut Singh i/b

M/s. Crawford Bayley & Co.

ORDER

[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. BACKGROUND

1.1 This Company Petition bearing C.P. (IB) No. 3143/MB/2019 (Application) was filed on 20.08.2019 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (AA Rules) by Punjab National Bank, the Financial Creditor (FC), through Mr. Dinesh Solanki, its Chief Manager and signatory, authorised *vide* Authorisation Letter dated 13.08.2019 for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Arshiya Limited, the Corporate Debtor (CD).

1.2 The total amount of default alleged is Rs.193,24,35,349.59/- (One Hundred Ninety-Three Crore Twenty-Four Lakh Thirty-Five Thousand Three Hundred Forty-Nine Rupees and Fifty-nine Paise) as on 13.08.2019 including the consolidated principal amount of Rs. 103,26,02,926/- (One Hundred and Three Crore Twenty-Six Lakh Two Thousand Nine Hundred and Twenty-Six Rupees) and interest and other charges forming part of the alleged financial debt.

1.3 The CD is the holding company of Arshiya Northern FTWZ Limited (ANFL) and is a Free Trade Warehousing Zone (FTWZ) developer with pan-India operations. In order to construct the FTWZ at Khurja, Uttar Pradesh, the ANFL availed of loans from the FC in the following manner,

which were later restructured *vide* Master Restructuring Agreement dated 28.09.2013:

Sl. No.	Particulars	Amount (In Rupees)
1.	Sanction Letter dated 15.10.2009 and 27.11.2010	Term Loan of Rs. 100 Crore
		ILC sub-limit of Rs. 20 Crore within Term Loan
2.	Sanction Letter dated 26.11.2012	Working Capital limits of Rs. 20 Crore
		NFB of Rs. 5 Crore

1.4 The date of default is not mentioned clearly in Part IV of the Application. However, the accounts of ANFL became Non-Performing Asset (NPA) on 30.09.2014. The CD, being the corporate guarantor of ANFL, which committed the default in loan repayment, the FC prays that CIRP may be initiated in respect of the CD under Section 7 of the IBC.

2 CONTENTIONS OF FC

2.1 The FC has provided the following documents on record:

- a) Copy of Common Loan Agreement and Hypothecation Deed dated 07.05.2010;
- b) Deed of Guarantee dated 07.05.2010;
- c) Pledge of Shares Agreement dated 09.09.2010;
- d) Trust and Retention Account Agreement dated 07.05.2010;
- e) Working Capital Agreement dated 19.12.2012;
- f) Addendum to the Security Trustee Agreement dated 28.09.2013;

g) Guarantee Agreement dated 28.09.2013; and

h) Memorandum of Entry dated 02.04.2014.

2.2 It is submitted that the FC disbursed loan amount to ANFL and it defaulted in making the repayments for a long time. Due to the continuous defaults, the FC declared the account of ANFL as NPA on 30.09.2014, as well as issued the notice dated 14.10.2015, under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Notice) to ANFL and also to the CD seeking repayment of the outstanding debt amounting to Rs.322,23,46,819/- as on 31.07.2015 along with interest.

2.3 The Ld. Counsel for the FC disclosed that apart from issuing SARFAESI Notice, on behalf of the Consortium, it also initiated proceedings against the CD and ANFL for recovery of the outstanding debt before the Debt Recovery Tribunal-II Delhi, on 22.12.2017 in Original Application No. 123 of 2018 (Now TA 114 of 2022, before DRT-III Delhi).

3 CONTENTIONS OF CD

3.1 In its reply dated 13.03.2020, the CD has contested the maintainability of the Application on the following grounds:

a) The Application is defective since there is absence of proper authorisation for Mr. Dinesh Solanki, Chief Manager, who has filed the Application on behalf of the FC. Merely because the FC provided the authority letter dated 13.08.2019 and the General Power of Attorney (GPA) dated 29.10.1999, the appointment of Mr. Solanki as authorised representative of the FC under Rule 2(6) of the National Company Law

Tribunal Rules, 2016 (NCLT Rules) does not become valid. A power of attorney holder cannot be considered to be authorised to file an application under the IBC and only authorised representatives, having specific Board resolution, are eligible to file application under Section 7 of the IBC under the notification dated 27.02.2019 of the Ministry of Corporate Affairs (MCA);

- b) The date of NPA as mentioned is 30.09.2014, while the Application is filed on 20.08.2019. The Application has been instituted beyond the limitation period of three years as per the Limitation Act, 1963, from the purported date of default;
- c) Being the corporate guarantor of AFNL, the CD's liability depends upon the terms of the guarantee. However, the FC neither invoked the Guarantee Agreement dated 28.09.2013, as per Clause 4 of the Guarantee Agreement, nor ever made any valid demand or formal notice regarding the same. Therefore, in the absence of valid invocation of the Corporate Guarantee, the CD is not liable to pay any financial debt to the FC, in terms of the decision of Hon'ble Supreme Court in *Syndicate Bank Vs. Channaveerappa Belari & Ors*, [(2006) 11 SCC 506];
- d) AFNL, the principal borrower of the credit facilities, is under CIRP *vide* Order dated 14.11.2022 in CP No.1245/(IB)-MB-V/2021 by Bench V of NCLT, Mumbai. Pursuant to this, resolution plans have been invited, and, as the promoter of the principal borrower, the CD also submitted a resolution plan, which is pending approval. The said plan also deals

with the debt of AFNL (principal borrower) including the debt of the CD (corporate guarantor) herein;

- e) SARFAESI Notice to the CD does not amount to guarantee invocation since at the time of issuing the same, the liability of the CD as the corporate guarantor had not accrued, while Section 13(2) of SARFAESI Act clearly states that, for issuing such notice, the borrower, including the guarantor must be under a liability to a secured creditor, which is not the case with the CD herein. Moreover, the Balance and Security Confirmation Letter dated 12.09.2016, does not indicate admission of default by the CD. Admission of Section 7 application against the principal borrower (AFNL) regarding the same debt does not yield any result, as liability of the corporate guarantor (CD) is based on the distinct agreement, viz., the Guarantee Agreement between the FC and the CD;
- f) Some of the documents relied upon by the FC such as Deeds of Guarantees dated 07.05.2010 and 28.09.2013; Deed of Hypothecation dated 09.09.2010; and Agreement of Pledge of Shares dated 09.09.2010, are insufficiently stamped as per the Maharashtra Stamp Act, 1958, and, therefore, these documents are neither enforceable nor valid contract in the eye of law;
- g) Initiation of CIRP against the CD is counter-productive since it is a going concern and is the sole FTWZ developer in the country. Admitting the Application would result in adverse effects upon the CD as well as other stakeholders including its employees, subsidiary companies, foreign investors, etc;

h) The FC has abused the process of law and filed the Application solely for arm-twisting the CD and thereby abusing the process of law. It is using the IBC as a tool for extorting illegal, non-maintainable and time-barred claims with intent to cause recovery of its demands. Action under Section 65 of the IBC is to be pressed into service, for initiating fraudulent and malicious proceedings against the FC.

4 ANALYSIS AND FINDINGS

4.1 We have perused all the documents and pleadings and heard both the Ld. Counsel for the FC and the CD.

4.2 One of the main contentions of the CD is that CIRP against the principal borrower has been admitted in CP No.1245/(IB)-MB-V/2021 by Bench V of NCLT, Mumbai and resolution plans have been invited, and further that the CD herein, being the promoter, has also submitted a plan. According to the CD, admitting it into CIRP would serve no purpose, and, therefore, the present Application must fail. However, the law on this count is already settled that CIRP against both principal borrower and corporate guarantor can be initiated. Liability of the corporate guarantor is co-terminus with the principal borrower, joint and several, in terms of Section 128 of the Indian Contract Act, 1872. It has also been further held that even CIRP can be simultaneously initiated against both principal borrower and corporate guarantor. There is no provision in the IBC that prevents a financial creditor from moving Section 7 application simultaneously against the principal borrower and the corporate guarantor for the same default. The Hon'ble Supreme Court in *SBI Vs. Ramakrishna & Anr.* [(2018) 17 SCC 394] has

settled the law that moratorium under Section 14 of the IBC does not extend to a proceeding against the guarantor of a corporate debtor. In *Mr. Babumanoharan Jai Kumar Christhuran Vs. Indian Bank and Ors.* [(2022) ibclaw.in 260], the Hon'ble NCLAT Chennai Bench, by applying the ratio laid down by the Hon'ble Supreme Court, held that simultaneous proceedings by the creditor against the principal borrower and the corporate guarantor can be initiated. Further, Section 60(2) of the IBC provides that when a CIRP against a corporate debtor is pending before an NCLT, CIRP against a corporate guarantor of that corporate debtor should also be initiated before that NCLT. In view of the above, the law is clear and simultaneous CIRP can be initiated in respect of both the principal borrower and the corporate guarantor. The contention of the CD on this count does not, thus sustain.

4.3 It is seen from the records that the ANFL (principal borrower now under CIRP *vide* Order dated 14.11.2022, *supra*), had entered into a loan agreement with the FC for the development of FWTZ at Khurja, Uttar Pradesh and the FC granted various credit facilities to ANFL since 2013, with the CD herein as the corporate guarantor of the ANFL. Upon perusal of records, it is found that the ANFL had availed of the loan facilities from the consortium of banks including the FC and had subsequently committed default in repaying the same. We note that both the ANFL and the CD admitted their liability to repay the outstanding debt in the Balance and Security Confirmation Letter dated 12.09.2016, as under:

“We hereby confirm the correctness of the balances of the consortium banks (PNB, State Bank of India & Axis Bank) as under as borrower/ guarantor as on 12.09.2016 with further unapplied/recorded interest for the rest period from 01.04.2014 onward as mentioned from PNB...

We acknowledge our liability for the same and future unapplied/recorded interest after the date up to which interest has been charged.”

This Letter has been signed by the authorised signatories of both AFNL and the CD. In *Laxmi Pat Surana Vs. Union Bank of India & Anr.* [(2021) 8 SCC 481], the Hon’ble Supreme Court in para 43 held that Section 18 of the Limitation Act, 1963, would come into play every time when the principal borrower and / or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Here is a case where the both the principal borrower (ANFL) and the corporate guarantor (CD) confirmed the correctness of the balances to the FC and acknowledged liability for the same and future unapplied / recorded interest *vide* their Balance and Security Confirmation Letter dated 12.09.2016. This balance confirmation and acknowledgment is before the expiration of the prescribed period of limitation and, thus, fresh period of limitation would be reckoned from 12.09.2016. In view of the above, the limitation period, in effect, was extended from that date i.e. from 12.09.2016 until 12.09.2019. Since this Application was filed on 20.08.2019, we find that the same is filed within the limitation period.

4.4 The Ld. Counsel for the CD argued that the FC has not invoked guarantee under Guarantee Agreement dated 28.10.2013 against the CD herein and

hence, the Application deserves to be dismissed. According to him, the SARFAESI Notice is not a notice of invocation of corporate guarantee of the entire outstanding amount along with interest as on 31.07.2015. On a perusal of Clause 4 of the Guarantee Agreement dated 28.09.2013 indicates that in the event of any default on the part of the borrower in payment / repayment, the guarantor shall, upon demand, forthwith pay the CDR lenders without demur all the amounts payable by the borrower under the Master Restructuring Agreement / Working Capital Facility Agreement, as the case may be. The SARFAESI Notice reveals that the FC had already called upon the principal borrower (ANFL) and the corporate guarantor (CD), for repayment. It is further mentioned that on account of default in payment of instalment / interest / principal debt, the consortium including the FC recalled the credit facilities, which were based on the corporate guarantee of the CD as well as personal guarantees of the directors of the CD, viz., Mr. Ajay S Mittal and Mrs. Archana Mittal. Regarding invocation of corporate guarantee, para 4 of the SARFESI Notice clearly mentions that *"Your Guarantee is hereby invoked."* This includes the personal guarantee of Mr. Ajay S Mittal and Mrs. Archana Mittal and the corporate guarantee of the CD. Therefore, it is clear that the FC duly invoked the guarantees, including the corporate guarantee, *vide* the SARFESI Notice, and, hence, no further invocation of guarantee is warranted. Thus, this issue is found against the CD.

4.5 It has been time and again held by the Adjudicating Authorities as well as Hon'ble NCLAT that the moment debt and default have been established, an application under the IBC must be admitted unless it is incomplete. As regards the contention of the CD that there was no authorisation for Mr.

Dinesh Solanki, Chief Manager of the FC, under authority letter dated 13.08.2019 to file this Application on its behalf, it is seen that GPA dated 29.10.1999 grants sufficient authority to him to file the Application. Further, it may be mentioned that under Rule 10 of the AA Rules, Part III of the NCLT Rules relating to institution of proceedings, petition, appeals, etc., have been made applicable to applications under Sections 7, 9 and 10 of the IBC, till such time separate rules of procedure for conduct of proceedings under the IBC are notified. That means, till dedicated rules of procedure for conducting CIRP under the IBC are notified by the Central Government, NCLT Rules will apply to every application under Sections 7 to 10 of the IBC. We observe that in terms of Rule 2(6) of the NCLT Rules, “authorised representative” is defined as a person authorised in writing by a party to present his case before the Tribunal as the representative of such party as provided under Section 432 of the Companies Act, 2013 (Act). Section 432 of the Act, which deals with ‘right to legal representation’ of a party to any proceeding, *inter alia*, states that a party to proceeding may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any other person to present his case before the Tribunal. Hence, it is seen that Section 432 of the Act only deals with persons authorised to appear and present a case before the Tribunal. That shows that persons authorised to file applications before the Tribunal are different from persons authorised to appear and present cases. A GPA holder is different from the authorised person referred to in Section 432 of the Act read with the definition of “authorised representative” under Rule 2(6)

of the NCLT Rules. As regards the authorisation of Mr. Solanki, the GPA in clear terms states as under:

*“To take criminal proceedings/action and take **insolvency and liquidation proceedings** against the debts of the said Bank, to appear and **act in a court of insolvency and Liquidation Judge** and before the Official Receiver and Liquidator, to file claims prove debts of the said Bank **in the insolvency and Liquidation courts** and before the Official Receiver or Liquidator, to oppose discharge of the insolvent and to collect/receive dividend declared by the insolvency or liquidation court in respect of any insolvency or liquidation case. ”.* (Emphasis supplied).

The above indicates that Mr. Solanki has valid authorisation to file the Application. Further, by statutory order No. S.O. 1091(E) dated 27.02.2019, issued in exercise of the powers conferred under Section 7(1) of the IBC, the MCA notified persons who may initiate CIRP against corporate debtors, on behalf of the financial creditors, viz., guardians, executors, trustees, etc., including a person duly authorised by the Board of Directors of a Company. Sub-section (1) of Section 7 of the IBC states as under:

*“(1) A financial creditor either **by itself** or jointly with other financial creditors, **or any other person on behalf of the financial creditor**, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the adjudicating Authority when a default has occurred.”* (Emphasis Supplied).

A joint reading of Section 7(1) of the IBC and S.O 1091(E) dated 27.02.2019 abundantly makes it clear that the instant Application is one which has been filed **by the FC itself** and not by any other person on behalf of the FC. The FC itself has filed the Application through its authorised officer, being the Chief Manager. Hence, it is concluded that the Chief Manager has sufficient authority to file the Application for and on behalf of the FC. This Bench has taken similar view in *Edelweiss Asset Reconstruction Company Ltd. Vs. NCR Rail Infrastructure Ltd.* [CP(IB) No. 1079/MB-VI/2022]. Hence, we hold that Mr. Solanki, Chief manager is adequately authorised by the FC to file the Application. This issue is also found in favour of the FC.

4.6 In the light of the foregoing discussions, we have no hesitation to hold that the FC has satisfactorily established the existence of debt of principal loan amount of Rs.103,26,02,926/- with interest and default of the outstanding dues aggregating Rs.193,24,35,349.59/-.

4.7 The FC has thus successfully demonstrated and proved the debt and default in this case. It is noted that the CD admits the said outstanding debt. Therefore, we are of the considered view that this Application is complete and satisfies all the necessary requirements for admission under Section 7 of the IBC.

4.8 The FC has proposed the name of Mr. Nitin Vishwanath Panchal, a registered Insolvency Professional having Registration Number-IBBI/IPA-001/IP-P00777/2017-2018/11350 as the Interim Resolution Professional (IRP), to carry out the functions as mentioned under the IBC. The proposed IRP has given its written consent and the same is placed on record.

ORDER

This Application being **C.P. (IB) No. 3143/MB/2019** filed under Section 7 of the IBC by the Punjab National Bank, FC for initiating CIRP in the case of Arshiya Limited, the CD, is **admitted**.

We further declare moratorium u/s 14 of the IBC, with consequential directions as follows:

- I. We prohibit-
 - a) the institution of suits or continuation of pending suits or proceedings against the CD 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 CD 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 CD in respect of its property including any action under the Securitisation 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 CD.
- II. That the supply of essential goods or services to the CD, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Bench approves the resolution plan

under section 31(1) of the IBC or passes an order for the liquidation of the CD under section 33 thereof, as the case may be.

- IV. That the public announcement of the CIRP shall be made in accordance with the provisions of the IBC, the Rules and Regulations made thereunder.
- V. That this Bench hereby appoints **Mr. Nitin Vishwanath Panchal**, a registered Insolvency Professional having Registration Number- IBBI/IPA-001/IP-P00777/2017-2018/11350 and **e-mail- nitin20768@gmail.com**, having valid Authorisation for Assignment up to 18.12.2024 as the Interim Resolution Professional (IRP) to carry out the functions under the IBC. The fee payable to IRP/RP shall be in accordance with the Regulations/Circulars issued by the IBBI.
- VI. During the CIRP Period, the management of the CD shall vest in the IRP or, as the case may be, the RP in terms of Section 17 or Section 25, as the case may be, of the IBC. The officers and managers of the CD shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- VII. In exercise of the powers under Rule 11 of the NCLT Rules, we order the FC to deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the FC on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC).

- VIII. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the CD.
- IX. The Registry is directed to immediately communicate this Order to the FC, the CD and the IRP by way of e-mail and WhatsApp, not later than two days from the date of this Order.
- X. The Registry is directed to communicate this order to the Insolvency and Bankruptcy Board of India forthwith for information and record.
- XI. **Compliance report of the order by Designated Registrar is to be submitted today.**

**Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)**

**Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)**

//Tanmay Jain//