



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, BENCH-VI
C.P. (IB) No. 356/PB/2019**

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

IN THE MATTER OF:

TUF METALLURGICAL PRIVATE LIMITED

Through Its Authorized Representative

Shri Vikas Jain

Chief Finance Officer,

Having Its Registered Office At

TUF House, LSC No.3,

Shreshta Vihar, Post Box No. 923,

East Delhi, Delhi-110092.

...Petitioner/Financial Creditor

VERSUS

WADHWA GLASS PROCESSORS PRIVATE LIMITED

Having Its Registered Office At

Plot No.21/47, Giram – Kara

Bana Road, Tehsil – Dharsiwa,

Raipur – 493221, Chattisgarh.

...Respondent/ Corporate Debtor

CORAM:

SHRI. MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

SHRI. ATUL CHATURVEDI (TECHNICAL)



Appearance -

Counsel for Petitioner:

Adv. Bishwajit Dubey, Adv. Radhika
Bishwajit Dubey, Adv. Kaustubh
Rai, Adv. Bandita

Counsel for Respondent:

Adv. Saswat Kumar Acharya,
Adv. Subham Agrawal

ORDER

PER: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

ORDER DELIVERED ON: 04.04.2025

1. This petition has been filed by Tuf Metallurgical Private Limited through Authorised Signatory, Shri Vikas Jain, Chief Finance Officer, to initiate Corporate Insolvency Resolution Process ("CIRP") against M/s. Wadhwa Glass Processors Private Limited (hereinafter referred to as "Corporate Debtor") under Section 7 of the Insolvency and Bankruptcy Code 2016 (hereinafter referred to as "the Code") for the alleged default on the part of the Respondent in repayment of debt of Rs. 1,31,66,125/- as on 04.02.2019 inclusive of Interest with respect to Share Pledge Agreement dated 04.04.2017 and Corporate Guarantee dated 31.08.2017.

The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

- I. The Corporate Debtor in the current petition is a guarantor to the Principal borrower, Albus India Private Limited.
- II. The Principal Borrower through a Board Resolution dated 24.03.2017, consented to the sanction of a loan borrowing



amounting to ₹ 5 crore, following which it entered into a Share Pledge Agreement with the Financial creditor dated 04.04.2017 to borrow the aforesaid amount to be repaid at an interest rate of 2% per month.

- III. In order to secure repayment under the Credit Facility three directors of the Principal Debtor executed a personal guarantee in form of a Promissory Note dated 18.04.2017 in favour of the F.C. The Corporate Debtor i.e. Wadhwa Glass Processors Private Limited (formerly Albus Conserves Private Limited) extended a Corporate Guarantee in favour of the F.C. for the said credit facility vide Board Resolution dated 31.08.2017 and by creation of equitable mortgage over two properties of the C.D (Located at 10/10 and 24/7, Village Kara, Band Road, Tehsil - Dharsiva, Raipur, Chhattisgarh).
- IV. The Financial Creditor recalled the loan via the loan recall notice dated 28.05.2018. Upon dishonor of cheques issued by the principal borrower and the directors as guarantee a notice was issued by F.C to the Principal borrower and individual directors U/s 138 of Negotiable Instruments Act, 1881.
- V. A guarantee invocation notice titled '*Demand Notice for Payment on Surety under Contract of Guarantee*' was sent to the Corporate Debtor on 23.11.2018. CIRP was later initiated against the Principal Borrower in C.P. IB No. 1089/ND/2018 – *TUF Metallurgical Private Limited Vs. Albus India Limited*, admitted on 02.01.2019. As the guarantor, the Corporate Debtor became



subject to the present petition filed by the Financial Creditor on 04.02.2019.

- VI. By order dated 05.11.2019 the Resolution Plan of the principal borrower was approved by the Bench No. II of this Adjudicating Authority, the F.C was able to recover an amount of Rs. 1,61,00,000/-.
- VII. The principal borrower's total debt was Rs. 6,87,64,499/-, comprising Rs. 5,00,00,000/- as principal and Rs. 1,87,64,499/- as interest. As four guarantors secured the debt, the Corporate Debtor's share was one-fourth, i.e., Rs. 1,71,91,125/-. After deducting Rs. 40,25,000/- (1/4 of the amount recovered from the Principal Debtor), the outstanding liability of the Corporate Debtor is Rs. 1,31,66,125/-.
2. This application was previously dismissed by the Adjudicating Authority vide order dated 27.03.2019 on the ground on non-maintainability. Subsequently, the order of the Adjudicating Authority dated 27.03.2019 dismissing Petitioner's application against the Corporate Guarantor, respondent herein was challenged by the petitioner before Hon'ble NCLAT. The Hon'ble NCLAT vide order dated 21.07.2022 allowed the appeal of petitioner relying on **Lalit Kumar Jain V. Union of India & Ors (2021)** whereby it was held that approval of Resolution plan doesn't discharge the Guarantor of its liability. A Restoration Application was filed by the Applicant bearing RA No. 68 of 2022 which was allowed by this Adjudicating Authority, hence the present petition.



3. The petitioner made the following averment in the Written Submissions dated 05.07.2023 to support the maintainability of the present application; The guarantee provided by the Respondent remains valid even after the approval of the Resolution Plan for the Principal Borrower, as the guarantor is not discharged from its obligation merely because the Principal Debtor has been discharged. Therefore, the petitioner may initiate proceedings against the Respondent even after the conclusion of the CIRP against the Principal Debtor.
4. The respondent made the following submissions in their reply dated 17.07.2023:
 - I. The Financial Creditor has stated that the Respondent executed a Corporate Guarantee, but no document has been placed on record to show execution of any 'Corporate Guarantee'. Furthermore, an undated letter referred to as 'Corporate Guarantee' merely refers (albeit falsely) to mortgage of certain properties and does not constitute a Corporate Guarantee and merely a security by way of a mortgage over a land parcel.
 - II. The Respondent Company could not have furnished the corporate guarantee for the loan availed by the Principal Debtor due to violations of Sections 185, 186, and 180 of the Companies Act, 2013. Respondent's Board was not authorized to create charges on its immovable properties without



shareholder approval rendering the transactions unauthorized and in contravention of statutory provisions.

III. A civil suit (CS No. 361/2021) is pending before the District Court, Raipur, seeking a declaration of the corporate guarantee and minutes of the meeting as forged, void, and unenforceable. Additionally, the Chhattisgarh High Court, in Writ Petition COMA No. 1 of 2022 has granted interim relief restraining the creation of third-party interests in the Respondent's immovable properties, which are allegedly subject to the disputed mortgage

IV. In terms of Section 78 of the Companies Act, 2013, a creditor has to register the particulars of a charge. However, in the present case, neither the Respondent Company nor the Applicant has registered any charge on the immovable properties allegedly mortgaged.

5. In the reply of the Respondent the Petitioner made the following submissions dated 26.11.2024:

I. The guarantee-cum-security document comprises two parts, creating security over the land parcel and providing a guarantee in favor of the Financial Creditor. The relevant extract states: *"has resolved to additionally secure your Company as regards the timely repayment of the financial assistance mentioned / extended to Ms/ Albus India Ltd. (the "Borrower") and also as regards proper, due, effective and assured compliance by the Borrower to the terms and conditions*



contained in the Agreement exactly as per the obligations of the Borrower.”

The above language used in the guarantee-cum-security document makes it clear that the Corporate Guarantor is guaranteeing the debt of the Principal Borrower.

- II. The claim of contravention of Sections 185, 186, and 180 of the Companies Act, 2013 by the Respondent is of no merit. Any procedural deficiencies, such as the lack of shareholder approval or exceeding financial limits under the cited provisions, attract penalties for the management but do not affect the legality of the guarantee.
- III. The pendency of a civil suit before the District Court, Raipur, or the interim relief granted by the Chhattisgarh High Court in COMA No. 1 of 2022, does not impact the maintainability of the Section 7 petition, as these proceedings are distinct and do not affect the validity or enforceability of the guarantee. Moreover the proceedings before Hon’ble Chhattisgarh High Court in COMA No. 01 of 2022 have been stayed by the order of the Hon’ble Supreme Court in SLP No. 35705 of 2023 dated 22.09.2023.
- IV. Non-registration of a charge under Sections 77 and 78 of the Companies Act, 2013, does not affect the validity of the charge or the enforceability of the Corporate Guarantee. It emphasizes that Section 78 allows creditors to register a charge, and any



procedural lapse in registration does not extinguish the substantive rights created under the guarantee

Analysis and Findings

6. We have heard the Ld. Counsel appearing for the Petitioner and the Respondent and perused the averments and documents placed on record by the petitioner.

7. Prior to adjudication of the present application, it is pertinent to refer to **Section 5(8)(h)** and **5(8)(i)** of the IBC, 2016, wherein it has been stated that liability in the form of a guarantee is deemed to be a financial debt the relevant provision has been reiterated as under –

“(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-clauses (a) to (h) of this clause;”

8. At the outset, it is imperative to determine whether the Corporate Debtor in the present case qualifies as a guarantor to the Principal Debtor. The Petitioner has relied upon a document alleged to be a Guarantee Deed. However, it is necessary to examine the true nature



of the said document. The Hon'ble High Court of Kerala in **A.V. Ravi v. M.M. Abdulkhadar [2020 SCC OnLine Ker 8185]** has held, *“for finding out the true character of the instrument, one has to read the instrument as a whole and then find out the dominant purpose. The test is not what the document calls itself or what form it adopts but what is the true meaning and effect of the terms contained therein”*.

9. The document annexed as **Annexure A-8** to the petition, which the Petitioner claims to be a Letter of Guarantee, does not, at any place, state that its purpose is to serve as a corporate guarantee for the loan agreement between the Financial Creditor and the Principal Debtor. On the contrary, as expressly indicated in its subject line, the document's sole purpose is to deposit title deeds as collateral security for the loan facility. Furthermore, the document explicitly states:

“Also, in the event the Borrower Company commits any default in the repayment of financial assistance or breaches any terms of the Agreement, your Company shall be entitled, without any notice to us/our Company, to proceed with the invocation of your/its rights to get the title transferred in its favour to the extent of the quantum of financial assistance remaining unsettled/unpaid/unadjusted/unsatisfied. Our Company shall, without any demur, cooperate with you and execute and deliver to you such documents at our cost as may be required to perfect your title.”

The foregoing clause clearly stipulates that, in the event of default, the remedy available to the Financial Creditor is the transfer of title of the



mortgaged land in its favour. This reinforces the fact that the document merely creates a security interest and does not constitute a guarantee obligating the Corporate Debtor to discharge the liability of the Principal Debtor.

10. As per **Section 126** of the Indian Contract Act, 1872, a contract of guarantee is an undertaking to perform the promise or discharge the liability of a third person in case of default. An essential element of such a guarantee is an unequivocal and unconditional undertaking to pay, creating an obligation on the guarantor, the germane provision has been reproduced as under –

“A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written”.

11. The document nowhere contains an express provision where the company unconditionally guarantees the repayment of the loan in case of default. Instead, it merely gives the lender (TUF Metallurgical Pvt. Ltd.) the right to invoke its security interest over the property if the borrower defaults. A corporate guarantee must include an explicit clause stating that the guarantor shall be responsible for repayment in case of default. We aren't moved by the argument of the Petitioner alleging the document to be a Corporate Guarantee as the essentials of a Corporate Guarantee aren't met.



12. In order to establish whether the document is a mortgage deed or not a reference to the **Section 58(f)** of the Transfer of Property Act, 1882 is much warranted, which has been reproduced below:

“Mortgage by deposit of title deeds.—Where a person in any of the following towns, namely, the towns of Calcutta, Madras, [and Bombay], and in any other town which the [State Government concerned] may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.”

13. Hence, upon perusal of the document relied upon by the Petitioner and the relevant provisions i.e. **Section 58(f)** of the Transfer of Property Act, 1882, **Section 126** of the Indian Contract Act, 1872, **Section 5(8)(h)** and **Section 5(8)(i)** of the code it is evident that the document does not constitute a Guarantee Deed but is merely a Mortgage Deed creating a security interest over the property of the Corporate Debtor. A security interest alone does not confer upon the Petitioner the status of a Financial Creditor under **Section 5(7)** read with **Section 5(8)** of the IBC.

14. The Hon’ble Supreme Court in **Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited** [(2020) 8 S.C.R. 291] has categorically held that a person having only



a security interest over the assets of the Corporate Debtor, without any financial commitment towards its revival or growth, cannot be treated as a Financial Creditor. A mortgage debt, though falling within the definition of 'debt' under Section 3(10) of the IBC, does not amount to a 'financial debt' under Section 5(8). The relevant excerpt from the aforesaid precedent has been reiterated as under –

“47.1. Keeping the objectives of the Code in view, the position and role of a person having only security interest over the assets of the corporate debtor could easily be contrasted with the role of a financial creditor because the former shall have only the interest of realising the value of its security (there being no other stakes involved and least any stake in the corporate debtor’s growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, would also and simultaneously be interested in rejuvenation, revival and growth of the corporate debtor. Thus understood, it is clear that if the former i.e., a person having only security interest over the assets of the corporate debtor is also included as a financial creditor and thereby allowed to have its say in the processes contemplated by Part II of the Code, the growth and revival of the corporate debtor may be the casualty. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution.

47.2. Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third party securities), even if falling within the description of ‘secured creditor’ by virtue of collateral security



extended by the corporate debtor, would nevertheless stand outside the sect of 'financial creditors' as per the definitions contained in sub- sections (7) and (8) of Section 5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of 'debt' under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a 'financial debt' within the meaning of Section 5(8) of the Code”.

15. Similarly the Hon'ble Supreme Court in the case of **Phoenix Arc Pvt Ltd vs. Ketulbhai Ramubhai Patel** [AIRONLINE 2021 SC 46] further solidified the stance taken by the Supreme Court in **Jaypee Infratech Limited**, where it was stated, “36. A person having only security interest over the assets of corporate debtor, even if falling within the description of 'secured creditor' by virtue of collateral security extended by the corporate debtor, would not be covered by the financial creditors as per definitions contained in sub-section (7) and (8) of Section 5”.

16. In light of the foregoing, it is evident that the Respondent does not qualify as a guarantor to the Principal Debtor. Consequently, the Petitioner has no right to initiate CIRP against the Corporate Debtor under Section 7 of the IBC. The Petitioner, at best, may realize its security interest in accordance with the applicable legal provisions.

17. Additionally, it has been opined by the Hon'ble Supreme Court that the role of the Adjudicating Authority is confined to establishing that



a Financial Debt exists and there has been a default against the corresponding debt in ***E S Krishnamurthy & Ors. Versus M/s Bharath Hi Tech Builders Pvt. Ltd.*** [Civil Appeal No 3325 of 2020]. The germane excerpt from the said precedent has been reiterated as under –

“The Adjudicating Authority is empowered only to verify whether a default has occurred or if a default has not occurred. Based upon its decision, the Adjudicating Authority must then either admit or reject an application respectively. These are the only two courses of action which are open to the Adjudicating Authority in accordance with Section 7(5).”

18. This Adjudicating Authority, being limited to the determination of debt and default within the framework of a summary trial, finds that the other submissions advanced by the Applicant and the Respondent fall beyond its jurisdiction. Consequently, this Authority refrains from delving into them. However, liberty is granted to the concerned parties to approach the appropriate forum for redressal.

19. In the light of the above discussion, we come to the unambiguous conclusion that the Appellant has not been able to make out a clear-cut case in his favor. The application filed by the petitioner under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) is not maintainable, as the essential conditions of "debt" and "default" prescribed under the provision are not satisfied. As per Section 7(1) of the IBC, a financial creditor may initiate the corporate insolvency resolution process (CIRP) against a corporate debtor only upon



establishing the existence of a "financial debt" and a "default" in its repayment. In the present case, the petitioner has failed to demonstrate, with cogent evidence, the existence of a legally enforceable financial debt as defined under Section 5(8) of the IBC, and correspondingly, has not substantiated the occurrence of a default as per Section 3(12) of the Code.

20. In view of the observations made herein above, the instant application bearing CP (IB) No. 356/PB/2019 filed by, M/s Tuf Metallurgical Private Limited, (Financial Creditor), under section 7 of the Code read with rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Wadhwa Glass Processors Private Limited (Corporate Debtor) is liable to be dismissed and accordingly, the same stands dismissed.

21. Let copy of the order be served to the parties.

-SD/-

(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

-SD/-

(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)