

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
COURT-II
KOLKATA**

CP (IB) No. 2030/KB/2019

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

Punjab National Bank

...Financial Creditor

Versus

Prithvi Energy Limited
[CIN: U40105WB2005PLC104912]

...Corporate Debtor

Order reserved on: 07 September, 2022

Order pronounced on: 01 November, 2022

Coram:

Shri Rohit Kapoor : **Member (Judicial)**

Shri Balraj Joshi : **Member (Technical)**

Appearances (through hybrid mode):

For the Financial Creditor : Ms. A. Rao, Advocate

For the Corporate Debtor : Mr. D.N. Sharma, Advocate

Mr. Aasish Choudhury, Advocate

Mr. Ritoban Sarkar, Advocate

ORDER

Per Rohit Kapoor, Member (Judicial)

1. This Court convened through hybrid mode.
2. This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (“Code”) by Punjab National Bank represented by Mr. Tarun Lal Gupta , seeking to initiate Corporate Insolvency

Resolution Process (“CIRP”) against Prithvi Energy Limited (“Corporate Debtor”).

3. The Corporate Debtor was incorporated on 24 August 2005, having CIN: U40105WB2005PLC104912, under the Companies Act, 1956. It’s registered office is CF-361, Salt Lake City, Sector-I, Kolkata-700064. Therefore, this Bench has jurisdiction to deal with this petition.
4. The present petition was filed on 26 September 2019 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make a payment of a sum of Rs.71,40,41,278.90/- (Rupees Seventy One Crore Forty Lakh Forty One Thousand Two Hundred and Seventy Eight and Ninety Paise only) as on 08 August 2019 as debt for which the Corporate Debtor had executed guarantee. The date of default is 30 November 2016.

Submission of learned Counsel appearing for the Financial Creditor

5. A loan was given to the Principal Borrower viz. Prithvi Ferro Alloys Private Limited. The Principal Borrower was admitted into Corporate Insolvency Resolution Process.
6. The learned Counsel has placed reliance on clause 3(a) the Guarantee Agreement dated 13 September 2011 which was executed on 13 September 2011 between the Financial Creditor and the Corporate Debtor¹ wherein it has been stated that in the event of any default of payment by the borrower, the Guarantor shall upon demand forthwith pay to the Financial Creditor notwithstanding any difference or dispute between the Financial Creditor and the Principal Borrower.
7. The learned Counsel further placed reliance on clause 14² of the said agreement which provides that notices issued and the manner in which notice is issued. Hence, the limitation period begins once the notice has been posted.

¹ Page 81 of the C.P.

² Page 92 of the C.P.

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8. Notice under section 13(2) of the SARFAESI Act dated 30 January 2018 was issued on the Corporate Debtor to make payment of the dues wherein it is stated that the guarantee stands invoked and there is dispute by the Corporate Debtor about the receipt of the notice.
 9. The Financial Creditor has placed the following documents on record:
 - a. Copies of Sanction Letter dated 30 June 2015;
 - b. Copy of Guarantee Agreement;
 - c. Copy of notice dated 30 January 2018;
 10. The Financial Creditor has proposed the name of **Mr. Pinaki Sircar**, registration number IBBI/IPA-002/IP-N00063/2017-18/10141, as the Interim Resolution Professional of the Corporate Debtor. The proposed Interim Resolution Professional has given his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy [Application to Adjudicating Authority] Rules, 2016.
 11. Corporate Debtor filed its reply on 30 January 2020. The learned Counsel appearing on behalf of the Corporate Debtor submitted that:
 - a. the guarantee has not been invoked by the Financial Creditor. Mr. Sharma led us through clause 2 of the Agreement of Guarantee which contains that the Bank has to make a demand in writing upon the guarantor for the principal and interest and any other amount that may become due from the borrower.
 - b. The learned Counsel submitted that in the present case there is no valid demand made in writing to the Corporate Debtor in terms of clause 2 of the Agreement of Guarantee. No formal notice was sent mentioning the specific terms of the agreement. The notice sent by the Financial Creditor is a notice under section 13(2) of the SARFAESI Act. A notice under section 13(2) and section 13(4) of the SARFAESI Act is generally issued for

enforcement of security interests. Hence, the said notice under section 13(2) cannot be construed as a notice for invocation of guarantee. Further, the notices that were sent were for enforcing the securities belonging to the principal borrower and cannot be construed as notice invoking the guarantee as per the terms stipulated in the contract. In support of this contention, the learned Counsel placed reliance on

- i. Esspee Sarees (P) Limited v. Skipper Textiles (P) Ltd., CA(IB) No. 1328/KB/2019 in C.P> (IB) No. 1702/KB/2019;
 - ii. Edelweiss Asset Reconstruction Company v. OMML; (2019) SCCOnline NCLAT 764;
 - iii. Intec Capital v. Arvind Gaudana, IRP of Vrundavan Ceramic Pvt. Ltd. (2021)SCCOnline NCLT 166;
 - iv. Export Import Bank of India v. CHL Limited, (2019)SCCOnline NCLAT 25;
 - v. IDBI Trusteeship Services Limited v. Abhinav Mukherjee & Ors., MANU/NL/0438/2022
- c. Hence, there is no valid invocation of guarantee by the Financial Creditor before proceeding to file the section 7 petition. The statutory notice which was issued by the Financial Creditor under section 13(2) of the SARFAESI Act cannot be relied upon as the alleged invocation of the guarantee.
- d. The guarantor in this case has not given any security interest in favour of the lender which can be enforced under the SARFAESI Act.

- e. The learned Counsel submitted that there is an anomaly with regard to the date of default mentioned in respect to the guarantee. In part IV of the Section 7 petition at page 5, the date of default has been mentioned as 30 November 2016 whereas at page 10 of the Company Petition the date of default has been mentioned as 31 December 2016.
- f. The date of default of the guarantee is even before the date of default of the principle borrower the date of default of the principal borrow has been prescribed as 31st December 2018 while in the petition the NBA date is 01 December 2016 therefore the date of default being 31 December 2016 in the instant petition is barred by the laws of limitation.

Analysis and Findings

12. Heard the learned Counsel appearing for the Financial Creditor and the learned Counsel appearing for the Corporate Debtor and perused the record.
13. It has been contended on behalf of Corporate Debtor that CIRP has already been initiated against principal borrower for the principal amount and therefore present petition could not be filed against the corporate debtor for the same amount. But on perusal of the record we find that the petition against the principal borrower has attained finality as the resolution plan has been approved with regard to the principal borrower by this Adjudicating Authority on 03 May 2021.
14. Hence, CIRP can be initiated for the remaining amount which was not received in the resolution plan of the principal borrower can be claimed by the financial creditor against the guarantors.
15. While considering this plea of corporate debtor we seek to rely on the following judgments:

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- i. *Ferro Alloys Corporation Limited v. Rural Electrification Corporation Limited, MANU/NL/0004/2019.*
 - ii. *Edelweiss Asset Reconstruction Co. Ltd. v. Sachet Infrastructure Limited, MANU/NL/0457/2019.*
 - iii. *State Bank of India v. Athena Energy Ventures Private Limited, MANU/NL/0436/2020.*

16. In all the above judgments, the Hon'ble NCLAT has held that a creditor can file simultaneous proceedings against the Principal Borrower and the Guarantor. Therefore, in view of the law laid on by the Hon'ble NCLAT we are of the view that contention raised by the applicant is not correct and therefore the same is rejected. We find that there is no bar as such as contended by corporate debtor in filing the instant petition by the financial creditor against the corporate debtor in this petition.

17. It is the stand taken by the corporate debtor that the financial creditor has not invoked the corporate guaranty given by the corporate debtor and letter dated 5 May 2018 is not a letter of invocation of the corporate guarantee. In the absence of invocation of corporate guarantee by the financial creditor this application is not maintainable as being premature. This plea has been taken at page 10 grounds iv of the reply affidavit it is further stated at page 12 of reply affidavit. It is argued, the notice dated May 5th, the said notice has not been issued for the purpose of invoking the guarantees executed by the guarantors.

18. While considering this plea our attention has been drawn to letter one document dated 30th January 2018 placed on record by the financial creditor at page 145. A perusal of this which is a notice under Section 13(2) of SARFAESI Act issued by Punjab National Bank Large Corporate Branch Park St., Kolkata addressed these persons and entities include the name Corporate Debtor.

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19. A perusal of this notice reveals that the financial creditor had called upon for payment of entire outstanding together with interest and other charges vide letter dated 2nd January 2017. It is further mentioned in this notice as despite follow-up the amount due has not been paid by the borrower *the guarantees given are also hereby invoked*. Therefore, it is clear that the guarantees were duly invoked by the financial creditor on 30 January 2018 and therefore the contention of the corporate debtor is found to be incorrect and therefore the same is rejected.
20. The other issue raised by the corporate debtor is there is no valid authorization to Mr. Tarun Lal Gupta for filing this petition on behalf of the financial creditor. This plea of corporate debtor is found to be completely incorrect and rejected in view of the fact that a general power of attorney which has been placed on record at page 16 of instant petition reflects the name of Sh. Tarun Lal Gupta who was duly authorized by virtue of a Board resolution and as the lawful attorney of the financial creditor to do various acts including suits action or any other proceedings on behalf of the financial creditor. For resolution in this regard has been placed on record in the instant application at page 20 . therefore we have no hesitation to conclude that the instant application has been filed by a person duly authorized. It may be pertinent to mention here subsequently, an affidavit has been filed by assistant general manager of the financial creditor affirmed on 03 September 2022, re-verifying the contents of the petition and also mentioning that Tarun Lal Gupta has since retired on 13 December 2021.
21. In view of initiation of process or proceedings under SARFESI act 2002, there is no bar for filing of any petition under the Code before this Adjudicating Authority which has been settled by the Hon'ble NCLAT in *Punjab National Bank v. Vindhya Cereals Private Limited, MANU/NL/0147/2020*.

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22. The present petition made by the Financial Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time
23. In the light of the above facts and circumstances, it is, hereby ordered as follows:-
- a. The application bearing *CP (IB) No. 2030/KB/2019* filed Punjab National Bank, the Financial Creditor, under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against *Prithvi Energy Limited*, the Corporate Debtor, is *admitted*.
 - b. There shall be a moratorium under section 14 of the IBC.
 - c. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
 - d. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
 - e. *Mr. Pinaki Sircar*, registration number *IBBI/IPA-002/IP-N00063/2017-18/10141*, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency

Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

- f. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow. There shall be no future opportunities in this regard.
- g. The Interim Resolution Professional is expected to take full charge of the Corporate Debtor, its assets and its documents without any delay whatsoever. He is also free to take police assistance in this regard, and this Court hereby directs the concerned Police Authorities to render all assistance as may be required by the Interim Resolution Professional in this regard.
- h. The IRP/RP shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- i. The Financial Creditor shall deposit a sum of **Rs 3,00,000/- (Rupees Three Lakh only)** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

- j. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.
- k. Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
24. **CP (IB) No. 2030/KB/2019** to come up on **15.12.2022** for filing the periodical report.
25. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

This order is pronounced on 01st day of November, 2022