

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 1

ITEM No 136
IA 513 of 2019 in CP(IB) 141 of 2019

Order under Section 65 IBC

IN THE MATTER OF:

Avantha Power & Infrastructure Ltd
V/s
Axis Bank Ltd

.....Applicant

.....Respondent

Order delivered on 16.08.2021

Coram:

Madan B. Gosavi, Hon'ble Member(J)
Virendra Kumar Gupta, Hon'ble Member(T)

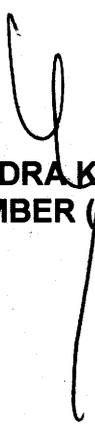
PRESENTS:

For the Applicant :
For the IRP/RP :
For the Respondent :

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.


(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)

Prakash


(MADAN B GOSAVI)
MEMBER (JUDICIAL)

**-IN THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1**

**CP (IB) No.141/7/NCLT/AHM/2019
With IA 513 of 2019**

CP (IB) No.141/7/NCLT/AHM/2019

An application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of :

Axis Bank Limited
Registered office at
Trishul, 3rd Floor, Opp: Samartheswar Temple,
Near Law Garden, Ellisbridge,
Ahmedabad-380006.

... Financial Creditor

Versus

M/s. Avantha Power & Infrastructure Limited
CIN:40101DL2005PLC138906
Registered Office at:
Thaper House, 124 Janpath,
New Delhi - 110001

.... Corporate Debtor

IA 513 of 2019

An application filed under Section 65 of the Insolvency and Bankruptcy Code, 2016 r.w Rule 16 of NCLT Rules, 2016

In the matter of :

M/s. Avantha Power & Infrastructure Limited
CIN:40101DL2005PLC138906
Registered Office at:
Thaper House, 124 Janpath,
New Delhi - 110001

... Applicant

(Orig. Respondent / Corporate Debtor)

Versus

Axis Bank Limited
Registered office at
Trishul, 3rd Floor, Opp: Samartheswar Temple,
Near Law Garden, Ellisbridge,
Ahmedabad-380006.

... Respondent
(Orig. Petitioner / Financial Creditor)

Date of Hearing: 03.08.2021

Date of Pronouncement of Order 16.08.2021

Coram: MADAN B. GOSAVI, MEMBER(J)
VIRENDRA KUMAR GUPTA, MEMBER (T)

Appearance :

Learned Counsel Mr. Ankit Lohia a.w. Learned Counsel Mr. Vikram Trivedi and Learned Counsel Mr. Anip Gandhi for the Financial Creditor.

Learned Counsel Mr. Diwakar Maheshwari a.w Learned Counsel Mr. Moiz Rafique and Learned Counsel Mr. Shreyas Edupuganti for the Corporate Debtor.

ORDER

[Per: VIRENDRA KUMAR GUPTA, MEMBER (T)]

1. CP(IB) 141 of 2019 has been filed on 01.02.2019. Since beginning, this matter (most of the times) was adjourned at the request of the Learned Counsel appearing on behalf of the Corporate Debtor. Once, this matter adjourned at the request of Learned Counsel for Corporate Debtor vide order dated 28.01.2020 to provide the copy of the resolution plan to the to the Corporate Debtor in respect of whom the Corporate guarantee had been provided. Thereafter, this matter was fixed for physical hearing on 03.07.2020, however, the matter was adjourned. Again, matter was fixed for physical haring on 18.08.2020, the matter could not be heard and was adjourned to 07.10.2020. On 07.10.2020, Corporate Debtor was directed to file affidavit in reply which had not

been filed even after expiry of one and half years from the date of filing of application. It was also held that contentions raised by the Corporate Debtor in IA 513 of 2019 shall be considered along with main application. On 23.11.2020, it was observed in the daily proceeding order that Corporate Debtor in spite of granting of ample opportunities to file reply, did not do so and one last opportunity was given. On 09.12.2020, during the course of hearing, the voice of the Learned Counsel for the Corporate Debtor was not audible. On 10.12.2020, both were heard in part. On 11.01.2021, at the request of the Corporate Debtor, the matter was adjourned to 03.02.2021. On 03.02.2021, pleadings were held to be completed. Again, the matter was adjourned for 12.04.2021 for physical hearing. However, due to COVID issues, the matter could not be heard. The matter was again adjourned to 21.06.2021. On that day, the matter was adjourned to 26.07.2021 and parties were directed to upload the pleadings on E-portal. On 26.07.2021, matter was fixed for hearing on 03.08.2021. On this date of hearing, again proxy counsel appeared on behalf of Corporate Debtor and sought passover of the matter. The Bench was not inclined as it was of the view that this was delaying tactic on the part of the Corporate Debtor. However, at the request of Learned arguing counsel for the Corporate Debtor, the matter was kept for hearing at the end of the Board. The arguments of the Learned Counsel for the Financial Creditor were completed. While Learned Counsel for the Corporate Debtor was arguing, after some time, technical snag at his end again occurred. The matter is very old, hence, the matter was reserved for order considering the fact that written submissions of Corporate Debtor were already on record. Corporate Debtor filed pursis narrating the situation which happened on 03.08.2021. We are of the view that it is most convenient way to delay the hearing. Even otherwise, this Bench does not have any control to prevent misuse of such mechanism being adopted by any of the parties. Considering these aspects and facts that both affidavit in reply as well as written submission of the Corporate Debtor (again filed now after the hearing) are on record, we hereby proceed to dispose of this matter on merits.

2. The facts, in brief, are that the Corporate Debtor is a corporate guarantor in respect of loan given by Financial Creditor to the principal borrower i.e. M/s Korba West Power Company Limited in respect of facility extended by the Financial Creditor to such borrower for setting up a thermal power project. The Corporate Debtor executed corporate guarantees. Due to default by the principal borrower, the Financial Creditor initiated proceeding against the principal borrower as well as invoked corporate guarantees. The corporate guarantee given by the Corporate Debtor was invoked on 05.06.2018 to the extent of the liability of the corporate guarantor. In the meanwhile, the principal borrower, who had been admitted into CIRP found the resolution and resolution plan was approved. Now, the proceedings filed under Section 7 of IBC, 2016 against the corporate guarantor are being perused.

3. Learned Counsel for the Financial Creditor submitted that corporate guarantee extended by the Corporate Debtor was not affected or extinguished on approval of the resolution plan. For this purpose, he referred to various clauses of the guarantees as well as terms of resolution plan wherein it was stated that approval of resolution plan would not result into extinguishment of liability of the Corporate Debtor as corporate guarantor. Learned Counsel further placed strong reliance on the decision of the Hon'ble Supreme Court in Lalit Kumar Jain vs Union of India vide order dated 21 May, 2021 wherein it was held that approval of resolution plan does not ifso-facto discharge guarantor or surety of his liability which arises out of independent contract. Thereafter, Learned Counsel placed reliance on the decision of the Hon'ble NCLAT in the case of State Bank of India vs Athena Energy Ventures Pvt Ltd in Company Appeal (AT) (Ins) No.633 of 2020 wherein it was held that application against the principal borrower and guarantor could be filed and pursued simultaneously. It was also pleaded that in the present case, there is no question of double dip or unjust enrichment by the Applicant as the financial creditor is seeking

recovery of the balance amount only after approval of the resolution plan.

4. In the written submission filed by the Corporate Debtor, it has been pleaded that the alleged amount of default has already formed part of the CIRP proceedings initiated and concluded against the principal borrower. Another plea which has been made that the resolution plan was not shared with the Corporate Debtor, hence, malafide intention of the Applicant was apparent. It is also claimed that in the present petition, the Applicant is pursuing for the identical default amount which already stands resolved / restructured qua the principal borrower and since such resolution plan is binding on all stakeholders including the guarantors, no amount whatsoever is payable by the Respondent to the Petitioner. It has also been stated that the Applicant has misled this Adjudicating Authority on the basis of various judicial decisions to canvass arguments that even upon approval of the resolution plan, this Adjudicating Authority can admit subsequent petition filed under Section 7 of IBC,2016 against the corporate guarantor. Alternatively, it has been pleaded that without prejudice to the legal pleas made by the Corporate Debtor, nature and extent of liability of the Corporate Debtor is limited to the terms of deed of guarantee.

5. In rejoinder, Learned Counsel for the Applicant has reproduced relevant extracts of the resolution plan and based upon the provisions of the approved resolution plan, it has been stated that it is only balanced financial creditor's debt which is being the subject matter of the present application. It has again reiterated that in the resolution plan itself, it has been provided with the approval of the resolution plan will not in any way and resolve into extinguishment of any claims which the Financial Creditor may have been against the Respondent in the present application in respect of guarantee. It has also been claimed that guarantee becomes debt as soon as guarantee is invoked and corporate guarantor becomes Corporate Debtor in terms of the

provisions of the CODE. On default, right to take recourse under Section 7 of IBC, 2016 arises. It has further been claimed that discharge or release of the principal borrower under resolution plan would not affect independent obligation of the Respondent / Corporate Debtor under guarantee. It has also been claimed that guarantee issued by the corporate guarantor does not cease to exist on the approval of the resolution plan of the principal borrower. For this proposition, reliance has been placed in the decision of the Hon'ble Supreme Court in the case of State Bank of India Vs. Ramakrishnan & Anr. (2018) 17 SCC 394 and few other judicial decisions. It has also been reiterated that it is not in dispute that there exist debtor outstanding amount payable by the Respondent. It has also been stated that there is no truth or any basis to say that record of default provided by Information Utility is incorrect. It has also been stated that section 60(2) of IBC, 2016 clearly provides for proceeding to be initiated against the guarantor even without proceeding against the Corporate Debtor or also if any proceeding pending against Corporate Debtor under the provisions of IBC, 2016. The Applicant has also countered various arguments of the Corporate Debtor as well as placed reliance on various judicial decisions to support its claim.

6. We have considered the submissions made by the Applicant / Financial Creditor, affidavit in reply, rejoinder and submissions made by both sides. After considering the facts and circumstances of the case before us, it is evident that there is a debt which is due and payable, both in law and in fact, and default has occurred, hence, prima-facie, the application filed by the Applicant / Financial Creditor appears to be maintainable.
7. As far as various legal aspects relating to the liability of corporate guarantor, being independent of default by the principal borrower and recovery from corporate guarantor either simultaneously or independently, are concerned the principles as settled now state that approval of resolution plan per se does not extinguish the liability of

corporate guarantor. The only requirement which is to be seen that the amount recovered under resolution plan should not be recovered again from the corporate guarantor. It has specifically been stated by the Applicant / Financial Creditor that in the present case, the Financial Creditor is not seeking the recovery of the amount which has already been recovered under resolution plan and this fact has remained uncontroverted. Even the Corporate Debtor has pleaded that in case application is admitted, the liability of the Corporate Debtor should be restricted to recover the balance amount only. In any case, this aspect can be resolved during the course of CIRP.

8. The Financial Creditor has suggested the name of one Mr. Srikanth Dwarkanath, having Registration No. IBBI/IPA-001-IP-P00057/2017-2018/10135, Email: srikanth.dwarkanath@gmail.com for appointment as Interim Resolution Professional against whom no disciplinary proceeding is pending. The application is defect free. Hence, we admit the Corporate Debtors in CIRP and pass following order:
9. IA 513 of 2019, We have considered the submission made by both sides and material on record and we do not find any merit in any of the allegations made by the Corporate Debtor as regard to malicious initiation of CIRP against the Corporate Debtor in filing of application under Section 7 of IBC, 2016. Accordingly, IA 513 of 2019 stands dismissed.

ORDER

1. Corporate Debtor M/s Avantha Power & Infrastructure Limited is admitted in Corporate Insolvency Resolution Process under Section 7 of Insolvency and Bankruptcy Code, 2016.
2. We appoint one Mr. Srikanth Dwarkanath, having Registration No. IBBI/IPA-001-IP-P00057/2017-2018/10135, Email:

srikanth.dwarkanath@gmail.com under Section 12(1)(c) of the IB Code as IRP.

3. That the Moratorium under Section 14 of the Code shall come to effect from 16.08.2021 till the completion of 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.
4. That the Bench hereby prohibits the institution of suits or continuation of pending suit 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(s), 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 SARFAESI 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.
5. Further, litigation or any application, if any, is pending before any competent Court of law under the provisions of the SARFAESI Act and RDB Act, prior to pronouncement of this order such proceedings are expected to be dealt with in accordance with law r.w. Section 14 and Section 238 of the Insolvency & Bankruptcy Code, 2016.
6. That the supply of essential goods or services to Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the Moratorium, period. The Corporate Debtor

to provide effective assistance to the IRP as and when he takes charge of the Corporate Debtor.

7. The IRP so appointed shall make Public announcement of Corporate Insolvency Resolution Process (CIRP) be made immediately as specified under Section 13 of the Code and by calling for submissions of claim under Section 15 of the Code.
8. The IRP shall perform all his functions as contemplated, *inter-alia*, by Sections 17,18,20 & 21 of the Code. It is further made clear that all personnel connected with Corporate Debtor, its Promoter or any other person associated with management of the Corporate Debtor are under legal obligation under Section 19 of the Code extend every assistance and co-operation to the Interim Resolution Professional. Where any personnel of the Corporate Debtor, its Promoter or any other person required to assist or co-operate with IRP, do not assist or Co-operate, IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.
9. The IRP shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor Company' and manage the operations of the Corporate Debtor Company as a going concern as a part of obligation imposed by Section 20 of the Insolvency & Bankruptcy Code, 2016.
10. We direct the Financial Creditor / Applicant to pay the IRP a sum of Rs. 50,000/- (Rs. Fifty Thousand) as advance against fees & expenses till the COC decides about his fees / expenses.
11. The Registry is directed to communicate a copy of this order to the Petitioner-Financial Creditor, Corporate Debtor and to the Interim Resolution Professional and the concerned Registrar of

Companies, after completion of necessary formalities, within three working days and upload the same on website immediately after pronouncement of the order.

12. The commencement of Corporate Insolvency Resolution Process (CIRP) shall be effective from the date of this order.
13. CP(IB) No. 141/7/NCLT/AHM/2019 is allowed and stands disposed of. IA 513 of 2019 stands dismissed.



**(Virendra Kumar Gupta)]
Member (Technical)**



**(Madan Gosavi)
Member (Judicial)**

Prakash