IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH-I
KOLKATA

CP (IB) No. 1113/KB/2019

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

In the matter of:

Ashish Vincom Private Limited
[CIN:U51109WB2007PTC115199]

...Financial Creditor

Versus

Amolika Agro India Private Limited
[CIN:U01403JH2013PTC001628]

...Corporate Debtor

Order reserved on: 08 April 2022

Order pronounced on: 18 May 2022

Coram:

Shri Rajasekhar V.K.	**:**	**Member (Judicial)**
Shri Balraj Joshi	**:**	**Member (Technical)**

Appearances (through video conferencing):

For the Financial Creditor	: Mr. Rishav Banerjee, Advocate Mr. Ayan Dutta, Advocate Mr. Abhishek Sikdar, Advocate Ms. Pallavi Ray, Advocate
For the Corporate Debtor	: Ms. Aparijita Rao, Advocate Mr. Sanwal Tribrewal, Advocate

ORDER

Rajasekhar V.K., Member (Judicial)

1. This Court convened through video conferencing.
2. This is a Company Petition filed under section 7 of the insolvency and Bankruptcy Code, 2016 by **Ashish Vincom Private Limited**, incorporated on 17 April 2007 under the Companies Act, 2013, represented by Ms. Alka

Agarwal, Director of Ashish Vincom Private Limited, authorized through a Board Resolution dated 26 April 2019, seeking to initiate Corporate Insolvency Resolution Process ("CIRP") against **Amolika Agro India Private Limited** ("Corporate Debtor").

3. The Corporate Debtor is a Company limited by shares and was incorporated on 18 September 2013, having CIN: U01403JH2013PTC001628. Its registered office is Ranishwar, Sub-Division- Dumka, Dumka- 814148, Jharkhand. Therefore, this Bench has jurisdiction to deal with this petition.
4. The present petition was filed on 28 June 2019 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make a payment of a sum of Rs.89,10,432/- (Rupees Eighty-Nine Lakh Ten Thousand Four Hundred and Thirty-Two only) exclusive of interest of 10% p.a. from the date of investment, i.e. 21 January 2015 till 15 June 2019 amounting to Rs.39,23,031/- (Rupees Thirty-Nine Lakh Twenty-Three Thousand and thirty-One only). The total amount of default is Rs.1,28,33,463/- (Rupees One Crore Twenty-Eight Lakh Thirty-Three Thousand Four Sixty-Three only). The date of default has been stated as 19 November 2018.

Submission of Mr. Rishav Banerjee, learned Counsel appearing for the Financial Creditor

5. The Financial Creditor had pledged two fixed deposits of Rs,15,00,000/- each (Rupees Fifteen Lakh only) two fixed deposits of Rs.20,00,000/- each (Rupees Twenty Lakh only) with the State Bank of India in the year 2015 as collateral security for the cash credit limit given by State Bank of India to the Corporate Debtor.
6. The Corporate Debtor failed to repay the loan and the State Bank of India encashed the four fixed deposits of the Financial Creditor that were pledged with State Bank of India.
7. Mr. Rishav Banerjee submitted that the fixed deposits were given as collateral security for the cash credit facility extended by the State Bank of India to the Corporate Debtor, hence, the fixed deposits can be considered as guarantee as defined under section 126 of the Indian Contract Act, 1872.

8. The learned Counsel led us through section 140 of the Indian Contract Act, 1872 and submitted that the Financial Creditor is now invested with the rights of a Creditor and the Corporate Debtor is liable to repay the amount that was encashed by the State Bank of India.
9. The Financial Creditor has placed the following documents on record:
    a. Copy of Form No. CHG-1;
    b. Copies of Bank Statements;
10. During the course of the hearing, it was seen that Mr. Ashok Kumar Agarwal was a common Director for the Financial Creditor and the Corporate Debtor. The Financial Creditor filed a supplementary Affidavit on 11 Febuary 2020 wherein the Financial Creditor submitted that Mr. Ashok Kumar Agarwal had resigned from the post of Director in the Board of Management of the Corporate Debtor on 30 June 2015.
11. The Financial Creditor has proposed the name of Mr. Manish Jain, registration number IBBI/IPA-001/IP-P00582/2017-2018/11023, 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 along with a copy of registration.
12. Court Notice had been served on the Corporate Debtor on 22 July 2019 *via* Post and on 22 July 2019 *via* email. The Corporate Debtor entered appearance on 23 September 2019. Corporate Debtor filed its reply on 27 November 2019.

Submissions of Ms. Aparijita Rao, learned Counsel for the Corporate Debtor

13. Ms. Aparijita Rao submitted that the said petition is not maintainable as the Corporate Debtor did not enter into any agreement with the Financial Creditor nor did the Financial Creditor disburse any amount against consideration of time value of money. The claim cannot be considered as a financial debt under section 5(8) of the Code.
14. No money was disbursed to the Corporate Debtor by the Financial Creditor against consideration for the time value of money.

15. Further, the plea that the Corporate Debtor assured payment of additional interest of 10% per annum towards the fixed deposits in lien to the State Bank of India is misleading. The Financial Creditor has failed to produce any written contract reflecting that the Corporate Debtor had agreed to pay the interest.
16. The Company Petition has been filed as a tool for recovery of money and the Financial Creditor is using the Code as an arm twisting method.
17. The Corporate Guarantee was given on its own volition and one of the Directors of the Corporate Debtor *viz.* Mr. Ashok Kumar Agarwal is also the Director of the Financial Creditor. The present Company Petition is nothing but a gambit in the hand of Mr. Ashok Kumar Agarwal to settle personal scores.
18. Mr. Ashok Kumar Agarwal claims to have resigned for the Directorship of the Management of the Board on 30 June 2015, but no DIR 11 was filed with the Registrar of Companies to intimate his resignation. No such resignation letter was received by the Corporate Debtor.
19. Ms. Aparijita Rao placed reliance on ***Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel***[1] in support of her contention that guarantee does not amount to Financial Debt.
20. Reliance was placed *on* ***Lalit Kumar & Ors. v. Sharon Bio Medicine Ltd. and Ors***.[2] wherein the Hon'ble NCLAT held that the resolution under the Code is not a recovery suit and it was not the intention of the legislature to benefit the "Personal Guarantors' by excluding the exercise of legal remedies available in law by the creditors, to recover legitimate dues by enforcing the personal guarantees, which are independent contracts.
21. Ms. Aparijita Rao then placed reliance on the judgment passed by Hon'ble NCLAT in ***Neeraj Bhatia v. Davindar Ahluwalia & Ors***.[3] wherein it was held that a guarantor cannot claim to be a Financial Creditor as defined under section 5(7) read with section 5(8) of the Code, till it is shown that the payment made by the guarantor to the Financial Creditor pursuant to

[1] (2021) 2 SCC 799 decided on 03 February 2021
[2] CA(AT)(Ins.) No. 164/2018 decided on 19 December 2018
[3] 2018 SCC OnLine NCLAT 88 decided on 09 February 2018

contract of guarantee towards loan availed by the principal debtor from the Financial Creditor is a debt.

Submissions of Mr. Rishav Banerjee, in rejoinder to the reply of the Corporate Debtor.

22. Mr. Rishav Banerjee urged us to consider section 5(8)(h) of the Code wherein it envisaged a financial debt includes any counter-indemnity obligation in respect of guarantee etc. There is no need for a contract between the Guarantor and Corporate Debtor.
23. There is an implied promise on the part of the Corporate Debtor to indemnify the Financial Creditor as envisaged in section 145 of the Indian Contract Act, 1872.
24. Mr. Banerjee submitted that ***Phoenix ARC (supra.)*** can be distinguished on the ground that there is a pledge created in favour of an Asset Reconstruction Company.

Analysis and Findings

25. Heard the learned Counsel appearing for the Financial Creditor and the learned Counsel appearing for the Corporate Debtor and perused the record.
26. The main defense taken by the Corporate Debtor is that the debt does not fall within the meaning of financial debt as defined under the Code and hence this Company Petition is not maintainable.
27. The Hon'ble NCLAT in ***Ascot Realty Pvt. Ltd. v. Ajay Kumar Agarwal (IRP)***[4] held that Corporate Guarantee is a financial debt under section 5(8) of the Code, hence the present petition is maintainable.
28. Before entering into the merits of the Company Petition, let us consider the second defense taken by the Corporate Debtor, i.e. Mr. Ashok Kumar Agarwal being a common Director in the Board of Management of the Financial Creditor and the Corporate Debtor.
29. Mr. Rishav Banerjee submitted that the Mr. Ashok Kumar Agarwal had resigned from the Board of Management of the Corporate Debtor on 30 June 2015. On perusal of the master data of the Corporate Debtor, we find that Mr. Ashok Kumar Agarwal is still listed as the Director of Corporate

[4] C.A. (AT) (Ins.) No. 658/2020 decided on 15 October 2020

Debtor. If Mr. Ashok Kumar Agarwal had infact resigned from the post of Directorship on 30 June 2015, because he was kept in the dark by the other Directors of the Corporate Debtor, wouldn't he have pursued his resignation and filed the necessary documents with the Registrar of Companies, Jharkhand at the earliest.

30. The Financial Creditor did not place any document on record wherein the Financial Creditor sought to recall the amount that was invoked. No document has been filed to show that there has been any sort of communication between the Corporate Debtor and the Financial Creditor. Hence, there is a debt that is apparent on record and there was a default with respect to the State Bank of India, but once the guarantees were invoked, no notice was given to the Corporate Debtor.

31. We will not delve into the question as to the resignation of Mr. Ashok Kumar Agarwal from the post of Directorship at present. But the point that baffles us, at this point, is the last line in the letter of resignation which was annexed to the supplementary affidavit dated 10 February 2020, filed by the Financial Creditor, wherein it is stated:

    "*Further as discussed, I request you to get my personal guarantee released from SBI immediately for which henceforth, I would not be liable in any manner whatsoever.*"

32. We then perused the Form CHG-1[5], to crosscheck if any personal guarantee was given by Mr. Ashok Kumar Agarwal, but to our surprise there was no personal guarantee given by Mr. Ashok Kumar Agarwal. Collateral security has been given by Anipriya Infrastructure Pvt. Ltd., AVS Exim Pvt. Ltd., Ashish Vincom Pvt. Ltd., Subham Estates Pvt. Ltd., Abhinaash Housing Pvt. Ltd. and Linkpoint Sales Pvt. Ltd. but none given by Mr. Ashok Kumar Agarwal in his personal capacity.

33. The statement piqued our curiosity and made us question whether this Company Petition was filed in collusion with the Corporate Debtor. We examined the master data of a few of the Corporate Guarantors and found

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[5] Page 17 of the C.P.

that the two Directors of Shubham Estates Private Limited are common i.e Mr. Ashok Kumar Agarwal and Mr. Sanjay Kumar Chowdhury.

34. This appears to us to be a petition filed for the purposes other than for resolving the insolvency of the Corporate Debtor. Such purposes are to be frowned upon under the Code.
35. In view of the above observations **CP (IB) No. 1113/KB/2019** is hereby dismissed.
36. Parties are left to the remedies as may be available to them under any other law.
37. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

BALRAJ JOSHI
Digitally signed by BALRAJ JOSHI
Date: 2022.05.18 17:14:08 +05'30'

Balraj Joshi
Member (Technical)

Rajasekhar V K
Digitally signed by Rajasekhar V K
Date: 2022.05.18 18:49:16 +05'30'

Rajasekhar V.K.
Member (Judicial)

This order is pronounced on 18th day of May, 2022

GGRB_LRA