IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH-I
KOLKATA

CP (IB) No. 1927/KB/2019

In the matter of:

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

In the matter of:

Punjab National Bank

...Financial Creditor

Versus

Damani Infracon Private Limited
[CIN: U70200WB2007PTC113899]

...Corporate Debtor

Order reserved on: 26 April, 2022

Order pronounced on: 25 May, 2022

Coram:

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

Appearances (through video conferencing):

For the Financial Creditor	: Mr. Ramesh Chandra Prusti, Advocate
	Mr. Akash Biswas, Advocate
	Ms. Smriti Das, Advocate
	Ms. Sukriti Dutta, Advocate
For the Corporate Debtor	: Mr. Joy Saha, Senior Advocate
	Mr. Rishav Banerjee, Advocate
	Mr. Patita Paban Bishwal. Advocate

ORDER

Rajasekhar V.K., Member (Judicial)

1. This Court convened through videoconferencing.

2. This is a Company Petition filed under section 7 of the insolvency and Bankruptcy Code, 2016 by Punjab National Bank, constituted under the provisions of the Banking Companies (Aquisition and Transfer fo Undertakings) Act, 1970, represented by Mr. Upal Saha, Senior Manager authorized through a letter of authorisation dated 04.11.2019, seeking to initiate Corporate Insolvency Resolution Process ("CIRP") against Damani Infracon Private Limited [CIN: U70200WB2007PTC113899] ("Corporate Debtor").

3. The Corporate Debtor was incorporated on 05.03.2007, having CIN: U70200WB2007PTC113899, under the Companies Act, 1956. It's registered office is P/32, Kasba Industrial Estate, Phase-I, D D House, 1st Floor, Kolkata- 700107. Therefore, this Bench has jurisdiction to deal with this petition.

4. The present petition was filed on 11 November 2019 before this Adjudicating Authority on the ground that the Corporate Debtor has defaulted to make a payment of a sum of Rs.10,70,80,864.04 (Rupees Ten Crore Seventy Lakh Eighty Thousand Eight Hundred and Sixty Four and Four Paise) as on 21 October 2019.

Submission of learned Counsel appearing for the Financial Creditor

5. A Cash Credit of Rs.9,00,00,000/- was disbursed on 24 February 2015. The account became a non-performing asset ("NPA") on 31.03.2018 and the Date of Default on 12 April 2018 and 09 May 2018.
6. The Corporate Debtor is the Corporate Guarantor of Aristo Texcon Private Limited ("Principal Borrower").
7. Credit facilities were given to the Principal Borrower in Cash Credit (Hypothecation) of Rs.9,00,00,000/- (Rupees Nine Crore only) and in respect of Inland Letter of Credit/Foreign Letter of Credit/BG

(Interchangeable with FB Limit) of Rs.9,00,00,000/- (Rupees Nine Crore only) on 24 February 2015.

8. Deed of Guarantee was executed in favour of the Financial Creditor by the Corporate Debtor on 03 March 2015.
9. The Financial Creditor issued recall notice on 27 March 2018 and 04 September 2018[1] invoking guarantee to the Corporate Debtor.
10. Notice under section 13(2) of the SARFAESI Act dated 08 May 2018[2] was issued to the Corporate Debtor.

11. The Principal Borrower filed a Petition under section 10 of the Insolvency and Bankruptcy code, 2016 before this Adjudicating Authority registered as CP (IB) NO. 570/KB/2018. This Adjudicating *vide* order dated 31 August 2018 admitted the principal borrower into CIRP and appointed Mr. R. R. Modi as the Interim Resolution Professional.

12. The Resolution Plan for the principal borrower was approved by this Adjudicating Authority *vide* order dated 20 August 2019.

13. Mr. Ramesh Prusti, learned Counsel for the Financial Creditor led us through section 128 of the Indian Contract Act, 1872 wherein it is stated that the liability of a guarantor is co-extensive with that of the Principal Borrower.

14. The Financial Creditor has received Rs.45,66,230/- (Rupees Forty-Five Lakh Sixty-Six Thousand and Two Hundred and Thirty only) upto 04 November 2019 from the Resolution Applicant of the principal borrower and a sum of Rs.32,06,921/- (Rupees Thirty-Two Lakh Six Thousand Nine Hundred and Twenty One only) from LIC of India towards LIC Policies of the personal guarantors of the Principal borrower and a sum of Rs. 16,27,360/- (Rupees Sixteen Lakh Twenty

[1] Annexure H of the CP
[2] Annexure I of the CP

Seven Thousand Three Hundred and Sixty only) was also adjusted in the loan accounts after maturity of LIC Policies of the personal guarantor of the Principal Borrower.

15. Hence, after receipt of sums paid by or received on behalf of the Principal Borrower as applicable to the loan account, there is a due of of Rs.10,70,80,864.04 (Rupees Ten Crore Seventy Lakh Eighty Thousand Eight Hundred and Sixty Four and Four Paise) including uncharged and accrued interest as calculated upto 31.10.2019.

16. The Financial Creditor has placed the following documents on record:

    a. Copy of Bank’s Certificate;

    b. Copy of Audited Financial Statement as on 31 March 2018.

    c. Copy of Certificate of Charge dated 08 April 2015.

    d. Copy of CIBIL Report

17. The Financial Creditor has proposed the name of Mr. Kanchan Dutta, registration number IBBI/IPA-001/IP-P00202/2017-18/10391, 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.

18. Court Notice had been served on the Corporate Debtor on 14 November 2019 and 03 December 2019 *via* email. The Corporate Debtor entered appearance on 21 February 2020.

19. Corporate Debtor filed its reply on 04 October 2021. The learned Senior Counsel appearing on behalf of the Corporate Debtor submitted that:

a. The Financial Creditor had filed a claim of Rs.10,14,27,144/- (Rupees Ten Crore Fourteen Lakh Twenty-Seven Thousand One Hundred and Forty-Four only) with the Resolution Professional of the Principal Borrower and has made substantial recovery and the Resolution Plan is binding on the Financial Creditor.

b. The Company Petition is not maintainable in the light of the settled principles of law as has been laid down in Vishnu Kumar Agarwal v. Piramal Enterprises Limited and State Bank of India v. Adhunik Steels Ltd.

c. Further, the authorisation to initiate CIRP is not specific and has been filed on the basis of joint Power of Attorney dated February 2016, which is prior to the enactment of the Code. Further, it is a well settled principle that General Power of Attorney Holder is not competent to file an application on behalf of the Financial Creditor. The Learned Senior Counsel placed reliance on the judgment passed by the Hon'ble NCLAT in Palogix Infrastructure Private Limited v. ICICI Bank Limited[3].

d. The Financial Creditor has already written off the debt in full and final on approval of the Resolution Plan and hence the entire debt of the Corporate Debtor towards the Financial Creditor stands discharged and nothing is due and payable.

Analysis and Findings

20. Heard the learned Counsel appearing for the Financial Creditor and the learned Senior Counsel appearing for the Corporate Debtor and perused the record.

[3] CA (AT) (Ins.) No. 30 of 2017, decided on 20 September 2017

21. The defences raised by the Corporate Debtor are:

    a. That the authorization is not valid;

    b. The debt of the Principal Borrower has been extinguished, as a result of approval of the Resolution Plan.

    c. Financial Creditor cannot claim the same debt twice.

22. On perusal of the Company Petition it is seen that the Company Petition has been filed by Mr. Upal Saha who has been authorised by a General Power of Attorney, but the same is supported by a Board resolution dated 29 February 2016, hence the Company Petition is maintainable.

23. Now, let us consider the second and third defense raised by the Corporate Debtor. The Corporate Debtor has contented that once the Financial Creditor has given his approval to the Resolution Plan and the Resolution Plan with respect to the Principal Borrower has been approved, the debt has been extinguished.

24. The Hon'ble NCLAT in ***Kanwar Raj Bhagat, Suspended Director of Gujarat Hydrocarbons and Power SEZ Ltd. and Ors. vs. Gujarat Hydrocarbons and Power SEZ Ltd. and Ors.***[4] held that a Creditor can claim the amount made in CIRP against the Principal Borrower and can claim against the Guarantor as well (paragraph 25).

25. The learned Senior Counsel that the debt of the Principal Borrower and the Guarantor has been extinguished once the Resolution Plan has been approved. We perused the Resolution Plan submitted by Jagannath Financial Private Limited and in paragraph 4.2.10 at page 40 of the Resolution Plan, it has been clearly stated that the approval

[4] MANU/NL/0176/2021 decided on 11.05.2021

of the Resolution Plan does not extinguish the liability of the Guarantors.

> *"4.2.10 The Resolution Applicant has submitted this plan only for takeover of the Corporate Debtor as a going concern and in no way it will infringe the right of the financial creditors on the corporate guarantee, personal guarantee or the collateral security provided by the Promotors in favour of COC members. The Financial Creditors will have right to invoke it's right to takeover and encash any Collateral Securities/Personal & Corporate Guarantees offered to them to secure the debt availed by the Corporate Debtor ither but not limited to by the Promoter/Directors/Any other third parties/Associate/Subsidiary/Group/Related Concern or from any other entities for the balance claim amount but not from the Corporate Debtor or Resolution Applicant and all the discharge certificates to be issued by the creditors to that extent on implementation of the plan."*

26. It is clear from the reading of the above paragraph that the debt towards the Principal Borrower has been extinguished but the guarantee given by the Corporate Debtor has not been waived. The Corporate Debtor, thus has a debt which is due and payable to the Financial Creditor.

27. 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

28. In the light of the above facts and circumstances, it is, hereby ordered as follows:-

a. The application bearing ***CP (IB) No. 1927/KB/2019*** filed by 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 ***Damani Infracon Private 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. Kanchan Dutta,*** registration number ***IBBI/IPA-001/IP-P00202/2017-18/10391***, email: ***kdutta.ip@gmail.com***, 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 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 5,00,000/- (Rupees Five 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, Kolkata 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.

29. **CP (IB) No. 1927/KB/2019** to come up on **26 July 2022** for filing the periodical report.
30. 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: 2022.05.25 23:38:29 +05'30'

Rajasekhar V K Digitally signed by Rajasekhar V K DN: c=IN, o=Personal, title=0605, pseudonym=490a45134c9adf68ed2365dbf55b7504ee43a6491c9e489ac8d67bacffde65cc, postalCode=600018, st=Tamil Nadu, serialNumber=f05120aee9b7978ef74f18a3ac75eb59d05e036c92d850593b5c6edc8a8c7396, cn=Rajasekhar V K Date: 2022.05.26 15:49:42 +05'30' Adobe Acrobat Reader version: 2022.001.20117

Balraj Joshi
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

This order is pronounced on 25th day of May, 2022

GGRB_LRA