

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – II, CHENNAI**

CP(IB)/140(CHE)2022

*(filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w
Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016)*

In the matter of **FOSSIL LOGISTICS PRIVATE LIMITED**

STATE BANK OF INDIA,
Stressed Asset Management Branch,
Red Cross Building,
Monteith Road, Egmore,
Chennai - 600 008

... Applicant / Financial Creditor

-Vs-

FOSSIL LOGISTICS PRIVATE LIMITED,
CIN: U63012TN2001PTC46851
No.8, Subba Rao Avenue,
3rd Street, Nunbambakkam,
Chennai - 600 006

... Respondent / Corporate Debtor

Order Pronounced on 15th June 2023

CORAM:

**SANJIV JAIN, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)**

*For Financial Creditor: Mr.Pranava Charan, Advocate
For Corporate Debtor: Mr.Anand Merathia, Advocate*

ORDER

(Hearing Conducted Through VC)

Per: SAMEER KAKAR, MEMBER (TECHNICAL)

This application has been filed by the Financial Creditor, State Bank of India seeking commencement of CIRP against the Respondent/Corporate Debtor i.e. **M/s. Fossil Logistics Private Limited.**





2. Part I of the application, discloses the details of the Financial Creditor / Applicant herein. The application has been signed by Mr.Rupalingappa, the Assistant General Manager. Copy of the authorisation along with the SBI General Regulation, 1955 is as **Exhibit 1.**

3. Part II of the application discloses that **M/s. Fossil Logistics Private Limited (CD)**, was incorporated on 26.03.2001 under CIN: U63012TN2001PTC46851, having registered office at Second Floor, Anema Sheriff Centre, No.538, Anna Salai Teynampet, Chennai – 600018 within the jurisdiction of this Tribunal.

4. In Part III of the application the Financial Creditor has proposed the name of Mr.R.Dharmarajan as IRP who is having Registration No.IBBI.IPA-001/IP-P00508/2017-18/10909.

5. In Part IV of the application, it has been alleged that the Financial Creditor along with consortium lenders had originally sanctioned various assistance to Coastal Energen Private Limited (CIPL), for setting up a Coal based Thermal Power Plant of 1200 MW at Tuticorin in the State of Tamilnadu and also for working capital facilities after commissioning of the plant. The financial assistance was enhanced from time to time and the Financial Creditor, State Bank of India (SBI, erstwhile State Bank of Patiala (SBIOP), State Bank of Mysore (SBM), State Bank of Hyderabad (SBH) sanctioned the following facilities to the CIPL under the consortium by executing



"Third amended and restated Common Loan Agreement" on 05.07.2016. The various facilities sanctioned as per the application are as under:-

	Term Loan	Sub Debt	Working Capital	Additional WC	Total (in crores)
SBI	1147	50	300	290	1787.00
SBM	164.16	8.34	25		197.5
SBOP	281.50	50	48.20		379.70
SBH	231		33		264.00
BG			465.20		465.20
Derivative			38		38.00
Total	1823.66	108.34	909.40	290	3131.40

The total amount of disbursement by the Financial Creditor as on 01st September 2018 was Rs.3131.40 crores.

6. The Financial Creditor claims that the amount in default on 20.09.2018 is Rs.2,932,69,53,916.57. The account of the CIPL was classified as Non-Performing Asset (NPA) on 31.03.2017. Subsequent to which, Recall Notice was issued on 20.09.2018 which is attached as **Exhibit 2**. The Financial Creditor claims that the date of default is 27.09.2018.

7. The Financial Creditor has attached the following documents with the application: -



S.No.	Date	Description
1.	05.07.2016	Third Amended and Restated Common Loan Agreement executed by the Corporate Debtor in favour of the Consortium Lenders
2.	05.07.2016	Third Amended and Restated Subordinate Loan Agreement executed by the Corporate Debtor in favour of the Consortium Lenders
3.	18.12.2015	Working Capital Facility Agreement executed by the Corporate Debtor in favour of the Working Capital Consortium Lenders
4.	23.02.2017	Working Capital Facility Agreement executed by the Corporate Debtor in favour of the Working Capital Consortium Lenders
5.	05.07.2016	Deed of Guarantee executed by the Corporate Guarantor Fossil Logistics Private Limited.
6.	03.03.2017	Personal Guarantee of Mr.Ahmed Buhari.
7.	08.03.2018	Copy of Revival Letter in favour of SBICAP Trustee Company Ltd
8.		A record of default as available with any credit information company.
9.		Copies of entries in a Bankers Book in accordance with the Bankers Book Evidence Act, 1891 (18 of 1891) under section 2A(a) & (b) under The Bankers Books Evidence Act, 1891 is filed herewith as Statement of Accounts of the CIPL maintained by the Financial Creditors along with certificate under Bankers Book Evidence Act, 1891.

8. At page no.16, the Financial Creditor has attached the Demand Notice which is dated 20.09.2018, demanding payment of Rs.2,932,69,53,916.57. The said notice was received by the CIPL and also by the CD. The evidence of the same is attached at page No.21.



9. The Counter was filed by the Respondent under SR No.5816 dated 27.10.2022. The objections raised by the CD are summarised below: -

A. CIRP cannot be initiated against the Guarantor if CIRP against the Principal Borrower has already been initiated by the same Financial Creditor for the same set of claim/default.

B. The amount claimed to be in default by the Applicant/Corporate Debtor in Section 7 Applicant is incorrect.

C. Effect of Restructuring of Coastal Energen / Principal Borrower.


D. Contribution of the Respondent/ Financial Creditor and the Consortium of Lenders that led to the default of Coastal Energen.

E. Respondent / Corporate Debtor has not committed any default of its own.

10. The reliance was placed by the Corporate Debtor on the decision of the Hon'ble NCLAT, in the matter of *Dr.Vishnu Kumar Agarwal Vs. M/s Piramal Enterprises Ltd., in the Company Appeal (AT) (Insolvency) No.346 of 2018 dated 08.01.2019*. The said order is under challenge before the Hon'ble Supreme Court.

11. Besides this, the Corporate Debtor has also relied upon the following Judgements / Orders: -

a. *SEW Infrastructure Limited Vs. Mahendra Investment (CP (IB) No.193/7/HDB/2019) vide its order dated 24.10.2019.*



*b. Bijay Kumar Agarwal Vs. State Bank of India in Company
Appeal (AT) (Insolvency) No.993 of 2019.*

12. Rejoinder was filed under SR.No.526 dated 01.02.2023. It is stated that as on December 2022, CIPL is liable to pay a total sum of Rs.4101.28 crore to the Applicant herein.

13. The Financial Creditor strongly relied upon the Judgement of Hon'ble NCLAT, in the matter of *State Bank of India Vs. Athena Energy Ventures Private Limited Com. Appeal (AT) (Ins) No.633 of 2020 decided on 24.11.2020*. It is submitted that the above decision of Hon'ble NCLAT overruled the decision in the case of *Dr.Vishnu Kumar Agarwal Vs. M/s Piramal Enterprises Ltd supra*.

14. We have heard Ld. Counsels for the parties and perused documents.

15. It is not in dispute that the loans were given by the Financial Creditor to Coastal Energen Private Limited (CIPL) and the Corporate Debtor, herein had given a guarantee. It is also not a dispute that the account of the Borrower had become NPA.

16. On a perusal of record we find that Coastal Energen Private Limited (CIPL) was admitted to CIRP, vide order dated 04.02.2022 in IBA/757/2019. The admission order was later on challenged by the share-holder-cum Investor under Company Appeal (AT)(CH) Ins. No.89 of 2022, before the Hon'ble NCLAT. Vide Order dated 06.01.2023, the appeal was dismissed by the Hon'ble NCLAT.



17. Admittedly the CIRP was initiated against the Principal Borrower i.e. Coastal Energen Private Limited (CIPL) but this would not bar this Tribunal from initiating the CIRP against the Corporate Debtor/Guarantor on the same set of facts and claims.

18. In the case of **State Bank of India Vs. Athena Energy Ventures Private Limited** - Com. Appeal (AT) (Ins) No.633 of 2020 decided on 24.11.2020 the Hon'ble NCLAT held as under

"19. It is clear that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as Guarantor. The law as laid down by the Hon'ble High Courts for the respective jurisdictions, and law as laid down by the Hon'ble Supreme Court for the whole country is binding. In the matter of Piramal, the Bench of this Appellate Tribunal "interpreted" the law. Ordinarily, we would respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner it was interpreted in the matter of Piramal. For such reasons, we are unable to uphold the Judgement as passed by the Adjudicating Authority."

In the case of Athena Energy supra, the Borrower had committed that default and the Appellant filed the application under IBC. The application was admitted by the Adjudicating Authority by order dated 15.05.2009. The Appellant also filed an application under Section 7 of IBC to seek initiation of CIRP against the Respondent/ Corporate Guarantor. The Respondent in its reply had opposed the application claiming that the application was arising out of the very same direction relying upon the judgment in the case of Piramal Enterprises supra. The Tribunal discussed the judgement of Piramal supra in para 4, Section 128 of the Indian Contract Act, 1872,



Section 60(2) of IBC, 2016 and the report of Insolvency Law Committee February 2020, judgement in the case of *State Bank of Vs. Ramakrishna & Anr (2018) 17 SCC 394, Innoventive Industries Ltd. Vs. ICICI Bank (2018) 1 SCC 407, IBC (Second Amendment) Act, 2018 Act 26 of 2018* and observed that in the matter of Piramal which was passed on 08.01.2019 did not notice the above amendment. If the above provisions of Section 60(2) and (3) are kept in view, it can be said that IBC has no aversion to simultaneously proceeding against the Corporate Debtor and Corporate Guarantor. If two Applications can be filed, for the same amount against Principal Borrower and Guarantor keeping in view the above provisions, the Applications can also be maintained. It is for such reason that Sub-Section (3) of Section 60 provides that if the insolvency resolution process or liquidation or bankruptcy proceedings of a Corporate Guarantor or Personal Guarantor as the case may be of the Corporate Debtor is pending in any Court or Tribunal, it shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such Corporate Debtor. Apparently and for obvious reasons, the law requires that both proceedings should be before the same Adjudicating Authority. The Adjudicating Authority was accordingly directed to admit the application of the Corporate Debtor and pass orders as per the provisions of the IBC, 2016.



19. This issue also came for discussion in the case of ***Emerald Realtors Pvt. Ltd. Vs. Suraksha Asset Reconstruction Ltd and Anr.*** In Com. Appeal (AT) (Ins) No.394 of 2021 decided on 09.07.2021 where the cases of Piramal supra and Athena supra was referred and discussed and it was held that the judgement in the matter of Athena energy was not *per incurriam*. Section 60(2) of IBC, 2016 was again discussed and it was held as under:-

"7. Section 60(2) itself makes it clear that if CIRP or liquidation proceeding of a Corporate Debtor is pending before a National Company Law Tribunal, an Application relating to Insolvency Resolution of a Corporate Guarantor or Personal Guarantor, as the case may be, of such Corporate Debtor is filed it shall be filed before such National Company Law Tribunal. This Section speaks for itself that the parallel proceedings against borrower and guarantor are maintainable."

20. Analysing the above decisions and their chronology, we are of the considered opinion that it is a fit case to admit the Corporate Debtor/Guarantor into CIRP under Section 7 of IBC, 2016. We do not find merit in the contention of the Respondent that CIRP cannot be initiated against the Guarantor if CIRP against the Principal Borrower has already been initiated by the same Financial Creditor for the same set of claim/default in view of the judgements in the case of Athena and Emerald Realtors Pvt. Ltd. *supra*.

21. We accordingly order for initiating CIRP against the Corporate Debtor admitting the application of the Financial Creditor under Section 7 of IBC, 2016.



22. As a consequence of the Application being admitted in terms of Section 7 of the Code, moratorium as envisaged under provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor;

- a. The institution of suits or continuation of pending suits or proceedings against the respondent including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b. Transferring, encumbering, alienating or disposing of by the respondent any of its assets or any legal right or beneficial interest therein;
- c. Any action to foreclose, recover or enforce any security interest created by the respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the respondent.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the



condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

23. However, during the pendency of the moratorium period in terms of Section 14(2) and 14(3) as extracted hereunder;

(2) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.



24. The duration of period of moratorium shall be as provided in Section 14(4) of the Code which is reproduced below for ready reference;

(4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the Resolution Plan under sub-Section (1) of Section 31 or passes an order for liquidation of the Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or Liquidation Order, as the case may be.

25. The Financial Creditor has proposed the name of **Mr.R.Dharmarajan, E-mail ID:- (dharma67@gmail.com), Reg. No. [IBBI/IPA-001/IP-P00508/2017-18/10909]** as the Interim Resolution Professional (IRP) who has also filed his consent in Form – 2 and also upon verification from the IBBI website, it is seen that the said person holds valid Authorization for Assignment till 30.11.2023.

26. **Mr.R. Dharmarajan** is appointed as the IRP. He is directed to take charge of the Corporate Debtor's management immediately. The IRP is also directed to cause public announcement as prescribed under Section 15 of the IBC, 2016 within three days from the date the copy of this Order is received, and call for submissions of a claim



by the creditors in the manner as prescribed under Regulation 6 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

27. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Sections 15, 17, and 18 of the IBC, 2016. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIRP in relation to the Corporate Debtor in terms of the provisions of IBC, 2016.

28. The IRP shall comply with the provisions of Sections 13 (2), 15, 17 & 18 of the Code. The Directors of the Corporate Debtor, its Promoters or any person associated with the management of the Corporate Debtor are directed to extend all assistance and cooperation to the IRP as stipulated under Section 19 of IBC, 2016 for the purpose of discharging his functions.

29. Based on the above terms, the Application stands **admitted** in terms of Section 7(5) of IBC, 2016 and the moratorium shall come into effect as of this date. A copy of the Order shall be communicated to the Financial Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named who is figuring in the list of



Resolution Professionals forwarded by IBBI be also furnished with a copy of this Order forthwith by the Registry, who will also communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

30. Accordingly, the present petition stands **admitted**.

- Sd -

SAMEER KAKAR
MEMBER (TECHNICAL)

- Sd -

SANJIV JAIN
MEMBER (JUDICIAL)