IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA

Company Petition (IB) No. 218/KB/2023

An Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

MILLER TRADERS PRIVATE LIMITED
(CIN: U51909WB1994PTC065187)

… Applicant/ Financial Creditor.

Verses

JAI GOKUL TOWERS PRIVATE LIMITED
(CIN: U70200WB1999PTC089894)

… Respondent/ Corporate Debtor.

Date of Pronouncement: January 01, 2024.

CORAM:
SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)
SHRI D. ARVIND, MEMBER (TECHNICAL)

Appearance:
For the Applicant: Mr. Patita Paban Biswal, Adv.
For Respondent: Mr. Rishav Banerjee, Adv.

ORDER

Per Bidisha Banerjee, Member (Judicial):

1. This Court is congregated through hybrid mode.

2. Heard the Learned Counsels for both parties.

Factual Matrix:

3. This instant application is filed under Section 7 of the Insolvency and Bankruptcy Code, 2016, for brevity "I&B Code" by Miller Traders Private Limited, hereinafter referred to as the "Financial Creditor"/ "Applicant" against Jai Gokul Towers Pvt Ltd., hereinafter referred to as "Corporate Debtor"/ "Respondent" seeking direction from this Adjudicating Authority to initiate the Corporate

Insolvency Resolution Process, for brevity "CIR Process" in respect of the Corporate Debtor, herein.

4. The total amount of debt due as claimed is of Rs. 8,43,25,953/-, in which the principal amount is of Rs. 6,00,00,000/-. Interest, due and default, is of Rs. 2,43,25,953/- (at the rate of 18% interest compounded monthly calculated from October 21, 2021, to September 15, 2023.

5. The Date of Default is claimed as on November 24, 2021.

Applicant's contentions:

6. Learned Counsel for the Applicant submits that the Financial Creditor is a Non-Banking Financial Company, for brevity "NBFC" who disbursed an amount in terms of a loan of Rs. 6 Crore to the Accurate Traders Private Limited, hereinafter referred to as the "Principal Borrower" as per of the agreement between the parties. The Corporate Debtor and the Principal Borrower assured the Financial Creditor to repay the loan within a period of one year. The disbursement of the loan amount of Rs. 6 Crore was executed by several bank transfers in favour of the Principal Borrower on October 21, 2021, and the statement of account evincing the disbursement of the amount is annexed as Annexure "E" at Pages 19-22 to the Application.

7. Further, it is submitted that an Irrevocable Deed of Guarantee dated October 21, 2021, inter-alia executed between the Financial Creditor and Corporate Debtor herein, which is annexed at Pages 26-34 as Annexure "H" to this Application.

8. Further, it is contended that the Financial Creditor issued a letter, annexed as Annexure "I", on November 24, 2021, to the Principal Borrower requesting to repay the loan along with interest within 7 days. However, no payment was made.

9. Further, it is stated that the Financial Creditor issued a letter, annexed as Annexure "J", on September 15, 2023, to the Corporate Debtor invoking the deed of guarantee and called upon the Corporate Debtor to repay immediately the outstanding amount of Rs. 8,43,25,953/- to the Financial Creditor. However, the Corporate Debtor failed to make any payment till date.

10. Further, it is submitted that the Corporate Debtor has acknowledged it liability towards the Applicant from time to time and the same would be evident from the Balance Sheet of the Corporate Debtor as of March 31, 2023, annexed as Annexure "K" to this Application and the claim of the Financial Creditor is not barred by the law of limitation, as the Corporate Debtor has time to time acknowledged its liability towards the Financial Creditor.

Respondent's Submissions per contra:

11. The Learned Counsel for the Respondent claims that the Date of Default, as claimed in the application is wrongly determined. It is stated that the date of default at best could have been 7 days from the receipt of the letter for repayment issued by the Financial Creditor either on November 24, 2021, or in September 2023.

12. Further, it is claimed that it is the case of the Principal Borrower, wherein the Corporate Debtor was never provided with a chance to repay the said loan as the Corporate Debtor has not received the invocation letter. It is further alleged that the Adjudicating Authority is not a debt recovery forum and the Financial Creditor is trying to use the forum to recover its debt.

13. Further, the Learned Counsel for the Respondent by referring to the financial statement of the Corporate Debtor, claims that the business of the Corporate Debtor has been affected due to the pandemic as well as other ensuing conditions.

Analysis and Findings of this Adjudicating Authority:

14. It is evident that in the Irrevocable Deed of Guarantee, dated October 21, 2021, executed between the Financial Creditor and Corporate Debtor, the Respondent, being one of the Guarantors of Accurate Traders Private Limited (Principal Borrower) in respect of the loan of Rs. 6 Crore provided by the Financial Creditor.

15. Further, it is evident that in the said Deed of Guarantee (annexed at Pages 26-34 to the Application), the guarantors unconditionally, absolutely and irrevocably guarantee to and with the Lender that:

> "*2. In the event of any default on the part of the Borrower in payment/repayment of any of the moneys referred to above or in the event of any default on the part of the borrower to company with or perform any of the terms, conditions and convents contained in the Loan Agreement, the Guarantors shall, upon demand, forthwith pay to the Lender without demure all the amounts payable by the Borrower under the Loan Agreement*."

16. We would refer the statutory provisions as under:

> ***Section 126: "Contract of guarantee", "surety", "principal debtor" and "creditor". —***
> *"A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written."*
> ***Section 127: Consideration for guarantee. —***
> "*Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee*."
> ***Section 128. Surety's liability. —***
> "*The liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract*."

17. Further, we would refer to the observation of the **Insolvency Law Committee in its Report, dated February 20, 2020,** at Pages 30-31 in Para 7 that:

> **"*7. ISSUES RELATED TO GUARANTORS*'**
> **"*7.1.*** *Under Section 128 of the Indian Contract Act, 1872, the liability of a surety towards a creditor is coextensive with that of the principal borrower. When a default is committed, the principal borrower and the surety are jointly and severally liable to the creditor, and the creditor has the right to recover its dues from either of them or from both of them simultaneously*. (Pollock and Mulla, *Indian Contract and Specific Relief Acts* vol. II (12th edn., LexisNexis Butterworks 2006) p. 1814-

1816) *The Committee discussed whether in light of this rule of co-extensive liability of the surety and the principal borrower, a creditor should be permitted to initiate CIRP against both the principal borrower and its surety and whether it should be permitted to file its claims in the CIRPs of both the principal borrower and its surety.***"**

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"*7.8.* *However, as discussed above,* ***the principal borrower and the surety being jointly and severally liable to the creditor is a key feature of a contract of guarantee. Therefore, the very object of a contract of guarantee would be prejudiced if the creditor is prohibited from filing claims in the CIRP of both the principal borrower and the surety****.* (*Bank of Bihar Ltd v Damodar Prasad & Another* AIR 1969 SC 297) *Even in the First ILC Report, this Committee, while discussing the scope of moratorium under Section 14 vis-à-vis the assets of a surety of the corporate debtor, had observed that the "characteristic of such contracts i.e. of having remedy against both the surety and the corporate debtor, without the obligation to exhaust the remedy against one of the parties before proceeding against the other, is of utmost important for the creditor and is the hallmark of a guarantee contract, and the availability of such remedy is in most cases the basis on which the loan may have been extended."* (Ministry of Corporate Affairs, Report of the Insolvency Law Committee (2018) para 5.9, <www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf> accessed 26 November 2019) *If a creditor is denied the contractual right to proceed simultaneously against the corporate debtor and the surety, the ability of the creditor to recover its debt may be seriously impaired***."**

18. We rely upon the judgment passed by the Hon'ble Supreme Court of India in ***Laxmi Pat Surana* v. *Union Bank of India*** reported in **(2021) 8 SCC 481: MANU/SC/0221/2021** at Para 37 held as under:

"*Further,* ***the expression "default" has been defined in Section 3(12) to mean non-payment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor****, as the case may be.* ***In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the***

***moment the principal borrower commits default due to non-payment of debt*."**

(Emphasis Added)

19. Thus, in terms of foregoing discussion, we are of the view that the date of default is the date of non-payment of debt due and payable. It evident that the loan was disbursed on October 21, 2021, through an agreement to repay the loan within one year and on November 24, 2021, the Financial Creditor has issued demand notice to repay the loan with interest. Thus, we find no discrepancies in claiming the date of default as on November 24, 2021. Further, we are of the view that the CIR Process can be initiated and continued against both the Principal Borrower as well as the Corporate Guarantor.

20. In the light of the facts stated in this application bearing **Company Petition (IB) No. 218/KB/2023**, and the evidence placed on record and the discussion hereinabove, we **ALLOW** the application filed under **Section 7 of the I&B Code**, and accordingly, we order the initiation of **Corporate Insolvency Resolution Process (CIRP)** in respect of the Corporate Debtor by the following **Orders**:

i. The Application filed by **Miller Traders Private Limited (Financial Creditors),** under Section 7 of the Insolvency & Bankruptcy Code, 2016, is hereby, **ADMITTED** for initiating the **Corporate Insolvency Resolution Process** in respect of **Jai Gokul Towers Pvt Ltd. (Corporate Debtor).**

ii. As a consequence of this Application being admitted in terms of Section 7 of the I&B Code, moratorium as envisaged under the provisions of Section 14(1) of the Code, shall follow in relation to the Respondent/(CD) as per clauses (a) to (d) of Section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come into force.

iii. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016, prohibits the following, as:

a) *The institution of suits or continuation of pending suits 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;*

b) *Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its asset or any legal right or beneficial interest therein;*

c) *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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*

d) *The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.*

[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 license, permit, registration, quota, concession, clearances 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, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

iv. 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.

v. The provisions of sub-section (1) of the Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

vi. The Applicant has proposed the name of **"Seikh Abdul Salam" Address: 64J, Linton Street, Kolkata – 700 014, Registration No. IBBI/IPA-003/IP-N00250/2019-2020/12966, Email ID: salam10695@gmail.com,** as the "IRP". We have perused that there is a written communication, annexed as **Annexure -D at Page 18-18B,** to this Application as per the requirement of Rule 9(l) of the Insolvency and Bankruptcy (Application to Adjudicating

Authority) Rules, 2016. There is a declaration made by him that there are no disciplinary proceedings pending against him with the Board or the Institute of Insolvency Professionals of ICMAI. In addition, further necessary disclosures have been made by **"Seikh Abdul Salam"** as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7(3)(b) of the code. Hence, we appoint **"Seikh Abdul Salam"** as the **Interim Resolution Professional** (IRP) of the Corporate Debtor to carry out the functions as per the I&B 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 I&B Code.

vii. In pursuance of Section 13 (2) of the Code, we direct the IRP or the RP, as the case shall cause a public announcement immediately with regard to the admission of this application under Section 7 of the Code and **call for the submission of claims** under Section 15 of the Code. The public announcement referred to in Clause (b) of sub-section (1) of Section 15 of the Insolvency & Bankruptcy Code, 2016, shall be made immediately. The expression immediately means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

viii. During the CIR Process period, the management of affairs of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of Section 17 of the I&B Code. 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.

ix. The Interim Resolution Professional is also free to take police assistance to take full charge of the Corporate Debtor, its assets and its documents without any delay, and this Court hereby directs the concerned **Police Authorities** and/or the **Officer-in-Charge** of Local Police Station(s) to render all assistance as may be required by the Interim Resolution Professional in this regard.

x. The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIR Process in respect of the Corporate Debtor.

xi. The Financial Creditors shall be liable to pay to IRP a sum of **Rs. 3,00,000/-** (Rupees Three Lakh Only) as payment of his fees as advance, as per Regulation 33(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which amount shall be adjusted at the time of final payment. The expenses relating to the CIRP are subject to the approval of the Committee of Creditors (CoC).

xii. In terms of sections 7(5) and 7(7) of the Code, the **Registry of this Adjudicating Authority** is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional by Speed Post and through email immediately, and in any case, not later than two days from the date of this Order.

xiii. Additionally, the **Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (RoC), 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.

- **xiv.** The Resolution Professional shall conduct CIRP in a time-bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.
- **xv.** The IRP/RP shall be liable to submit the periodical report including the minutes of the CoC of the Corporate Debtor, with regard to the progress of the CIR Process in respect of the Corporate Debtor to this Adjudicating Authority from time to time.
- **xvi.** The order of moratorium shall cease to have effect as per Section 14(4) of the I&B Code.

21. Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

22. Post the Company Petition **06 / 02/ 2024** for filing the Periodical Progress Report by the IRP/RP as appointed herein.

D. Arvind	**Bidisha Banerjee**
Member (Technical)	**Member (Judicial)**

This Order is signed on the 01st Day of January, 2024.

Bose, R. K. [LRA]