

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

C.P. No. 2312/IBC/MB/2019

Under Section 7 of the Insolvency and
Bankruptcy Code, 2016 read with
Rule 4 of the Insolvency and
Bankruptcy (Application to
Adjudication Authority) Rule 2016)

In the matter of

IL & FS Financial Services Limited
Registered office at: IL & FS Financial
Centre Plot No. C-22 G Block Bandra
Kurla Complex Bandra E Mumbai-
400051

.....**FINANCIAL CREDITOR**

Vs

G.C. Property Private Limited
CIN:U70103MH2007PTC173581
Bhupati Chambers, 5th Floor, 13,
Mathews Road, Charni Road,
Mumbai- 400004

.....Corporate Debtor

Order delivered on: 11.03.2022

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)
Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Applicant: Mr. Vishal Kanade, Advocate

For the Respondent: Mr. Amrut Joshi, Advocate

Per: Shri H.V. Subba Rao, Member (Judicial)

1. This Company petition is filed by IL & FS Financial Services Limited (hereinafter called “Financial Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against G.C. Property Private Limited (hereinafter called “Corporate Debtor”) by invoking the provisions of Section 7 Insolvency and Bankruptcy Code, 2016 (hereinafter called “Code”) read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for resolution of an unresolved Financial Debt of Rs. 36,36,16,503/- (Rupees Thirty-Six Crore, Thirty-Six Lakhs, Sixteen Thousand, Five Hundred and Three only).
2. The submissions of the Financial Creditor are as follows:
 - I. The Applicant vide its offer letter dated 27.12.2017 (Ref. MUM/2017/1221-00) (“**Offer Letter**”) offered to extend to Anupama Agarwal (“**the Borrower**”) a rupee term loan facility upto Rs. 30,00,00,000/- (Rupees Thirty Crores Only) on the terms and conditions more particularly described therein.
 - II. Pursuant to the aforesaid Offer Letter, a loan Agreement was executed between the Applicant and the Borrower, whereby the Applicant granted a rupee term loan facility to the Borrower to the extent of INR 30,00,00,000/- (Rupees Thirty Crores Only) (“**Loan Facility**”) on the terms and conditions as more particularly mentioned in the said Loan Agreement. Pursuant to the Loan Agreement the Applicant disbursed the Loan Amount of Rs. 29,00,00,000/- to the Borrower.
 - III. The Corporate Debtor in consideration of the Applicant having agreed to advance the said Loan Facility to the Borrower, executed Corporate Guarantee under which it irrevocably and unconditionally agreed for repayment on demand of the Loan Facility advanced to the Borrower by the Applicant along with interest and other monies, costs,

charges or expenses which may be incurred or suffered or become due and payable by the Borrower to the Applicant at any point of time.

- IV. The Financial Creditor submits that one Mr. Rishi Agarwal, provided personal guarantee to secure the repayment of the amounts by the Borrower pursuant to the Loan Agreement by the Applicant. Further, the Memorandum of Entry recording mortgage of immovable property of the Corporate Debtor by deposit original title deeds was prepared was provided to secure the Loan Facility granted by the Applicant to the Borrower.
- V. The Financial Creditor further submits that the Demand Promissory Note was executed by the Borrower in favour of the Applicant, whereby the Borrower promised to pay to the applicant on demand, a sum of Rs. 30,00,00,000/- (Rupees Thirty Crores Only) along with interest at the rate of 13.50% per annum i.e. 2.50% below IFIN Benchmark Rate (IBMR) then being 16% per annum. The Deed of Hypothecation of Receivables was executed in favour of the Applicant, by the Borrower, to secure the Loan Facility granted to the Borrower by the Applicant.
- VI. M/s. Shivris Ventures Pvt. Ltd. and M/s. Balan Investment and Trading Prv. Ltd. ("**Pledgors**"), by executing the Pledge Agreement ("**Pledge Agreement**") created pledge of 100% of the shares of the Corporate Debtor i.e. 10,000 number of equity shares of Corporate Debtor in favour of the Applicant. The Pledgors also executed respective Irrevocable Power of Attorneys in favour of the Applicant pursuant to the Pledge Agreement.
- VII. Upon failure of the Borrower to make payment according to the Loan Agreement, Event of Default had occurred in relation to the said Loan Facility with respect to non-payment of interest as per the terms of the said Loan Agreement.

- VIII. The Financial Creditor addressed the Demand Notice inter-alia to the Corporate Debtor, and reiterated and placed on record the default committed by the borrower in relation to payment of interest due on Jun 28, 2018, in relation to Loan Facility and also informed the Corporate Debtor, that on account of the said default, an Event of Default had occurred in relation to the said Loan Facility which was still continuing, and as a direct consequences of the Events of Default, called upon the Corporate Debtor to make payment of the entire outstanding amount under the loan agreement within 48 hours.
- IX. The Financial Creditor addressed inter-alia to the Corporate Debtor intimating the Corporate Debtor of the exercise of the Applicant's right under the Pledge Agreement, as well as under section 176 of the Indian Contract Act, 1872, i.e. to invoke, sell/appropriate or otherwise dispose of the pledged securities. The Financial Creditor further addressed letter inter-alia to the Corporate Debtor giving notice of the exercise of the Applicant's right under Clause 1.7 of the Pledge Agreement.
- X. The Financial Creditor issued follow up notice inter-alia to the corporate Debtor reiterating the Events of Defaults committed inter-alia by the Borrower and Corporate Debtor and their ongoing obligation to make payment of the then outstanding amount as per the terms of the Loan Agreement.
- XI. The Borrower and the Corporate Debtor, have failed to make repayment of the loan, as per the terms of the Loan Agreement or the Security Agreement, or the other security documents. Hence this Petition.

3. The Corporate Debtor filed affidavit in reply through Sandeep Kasare, Authorised Representative of the Corporate Debtor opposing the admission of the above Company Petition. The brief submissions of the Corporate Debtor are as follows:
- I. The Corporate Debtor submitted that he is neither a borrower nor a guarantor nor a mortgagor in respect of the alleged rupee term loan. The Corporate Debtor has not availed any loan from the Applicant. The Financial Creditor is a non-banking finance company engaged in the business of Financial Creditor is a non-banking finance company engaged in the business of Financial and advisory services.
 - II. The Corporate Debtor further submits that on 27.12.2017 the Applicant vide its letter (Ref: MUM/2017/1221-00) offered to extend to Mrs. Anupama Agarwal (“the borrower”) a Rupee Term Loan facility upto Rs. 30,00,00,000/- on the terms and conditions more particularly mentioned in the offer letter dated 27.12.2017.
 - III. The Corporate Debtor submits that as per the transaction between the borrower, the Applicant and one M/s Vadraj Cement Ltd there is no outstanding debts payable by the borrower to the Applicant.
 - IV. Further on 29.12.2017, a Loan Agreement was entered into between the borrower and M/s Vadraj Cement Ltd. (which is now under the liquidation pursuant to the winding up order dated 23.08.2018 was passed by the Hon’ble Bombay High Court) for an amount aggregating to Rs. 29,00,00,000/-.
 - V. The Corporate Debtor further submits that to facilitate requirements of M/s Vedraj Cement Ltd., the financial

creditor extended personal loan to the said Mrs. Anupama Agarwal who in turn transferred the said amount to the said M/s Vadraj Cement Ltd. immediately after the receipt of disbursement. To the best of our knowledge, Mrs. Anupama Agarwal lodged a claim against M/s Vadraj Cement Ltd. with the Official Liquidator. However, it is within the knowledge of the Financial Creditor that loan amount granted to Mrs. Anupama Agarwal also granted on behalf of M/s Vadraj Cement Ltd. as personal loan to the 29,00,00,00,000 is unheard and are given as her personal financial credentials do not support either sanctioning or disbursing such a huge personal loan.

- VI. The Corporate Debtor submits that as Mrs. Anupama Agarwal had transferred the loan received from the financial creditor to the said M/s Vadraj Cement Ltd. and financial creditor is the de-facto Promoter of the said Vadraj Cement Ltd., the financial creditor cannot seek recovery of the financial assistance of Mrs. Anupama Agarwal to the said M/s Vadraj Cement Ltd., as the loan was originally disbursed with a clear understanding that the end user would be M/s Vadraj Cement Ltd. By taking over majority stake holding in the said M/s Vadraj Cement Ltd., the financial creditor now shown its intentions. By taking over majority stake holding in the said M/s Vadraj Cement Ltd., the financial creditor now shown its intentions. Therefore, the financial creditor estopped from making any claim against Mrs Anupama Agarwal (the borrower). The Guarantor/ Corporate Debtor provided guarantee for the personal financial assistance without knowledge of

the understanding between the borrower and the lender behind the curtain. In that particular case, the Financial Creditor ought to have had the knowledge for the use of such huge loan availed by Mrs. Anupama Agarwal. Since the end us being a back to back loan to said M/s Vadraj Cement Ltd. and the Financial Creditor being the majority shareholder the proceedings taken out against the Corporate Debtor is abuse of process of law and liable to be dismissed with the costs.

- VII. The Corporate Debtor further states that the Financial Creditor although appropriate shares bearing the face value of 10 each against unilateral rate of Rs. 8 each failed to give credit for the shares appropriated them and proceeding to recover the amount concealing the fact of appropriate of security.
- VIII. Further, the borrower has filed a Proof of Debt before the Official Liquidator, Hon'ble Bombay High Court. Thereafter, in the notice that dated 26.12.2018 issued under Section 13(2) of the SARFAESI Act, 2002 the account of the borrower was classified as Non-Performing Asset. The Borrower was threatened by the Applicant that if the Amount as demanded by the Applicant if not amount as demanded by the Applicant would exercise its rights for recovering its alleged dues under the Act.
- IX. The Corporate Debtor submits that on 07.08.2019, the borrower through their Advocate replied to the notice dated 26.12.2018 and raised the objection under Section 13(3A) of the SARFESI Act, 2002. Further, on 30.09.2019 a possession notice was issued to the Applicant in respect of the said property and the

- borrower was informed that in case the demand of the Applicant is not complied with, the Applicant will restore to take physical possession of the property in question.
- X. The Corporate Debtor further submits that a Securitization Application bearing No. 328 of 2019 was preferred by the Applicant under Section 14 of the Act before the Additional Chief Metropolitan Magistrate 1st Court, Esplanade, Mumbai, which was disposed of vide impugned order dated 06.08.2019.
- XI. The Corporate Debtor lastly submits that the alleged default committed by the borrower in respect of the alleged loan documents/ agreement amounting to Rs. 30,00,00,000/-, a notice under Section 13(2) of the SARFAESI Act, 2002 was issued to the Corporate Debtor on the purported ground set out therein. It is pertinent to note that the fact remains that the Corporate Debtor never availed any alleged facility and the Corporate Debtor had never created any security interest in favour of the Financial Creditor.
- XII. Hence, this application is not maintainable as the amount claimed by the Applicant is disputed and has not approached this Hon'ble Tribunal with clean hands. Therefore, on this ground the Petition ought to be dismissed.

FINDINGS

1. Heard both sides and perused the record. Since the fate of the Company Petition is depending on the pleas raised by the Corporate Debtor, let us examine the pleas raised by the Corporate Debtor. The Corporate Debtor raised the following pleas in the reply as well as during the course of arguments.

- i. The purposed letter of guarantee executed by the Corporate Debtor is insufficiently stamped and therefore cannot be acted upon.
 - ii. The letter of guarantee does not fall under the definition of guarantee as defined under Section 126 of the Indian Stamp Act.
 - iii. The loan advanced by the Financial Creditor has been secured with various securities including pledge of certain shares and Financial Creditor is claiming the entire amount under the guarantee without deducting the value of securities.
2. The first issue with regard to stamp duty. Similar issue fell for consideration before the Division Bench of the Hon'ble Bombay High Court headed by Hon'ble Chief Justice, Manjula Chellur, and Hon'ble Justice M.S. Sonak, J. in Appeal (L) No. 911 of 2015 in Company Petition No. 317 of 2012 (*Classic Diamonds Vs. ICICI Bank*) while dealing with a winding up petition. The following are the observations of the said Division Bench in para 8 of the judgement with regard to the plea of deficit stamp duty payable on the documents raised by the appellant.

Para-8:- *In the State of Gujrat where the document of corporate guarantee was executed, it was based an adequate stamp duty payable on the instrument so far s that State. According to the appellant, when this document comes to the State of Maharashtra in the light of sections 18 and 19 of Bombay Stamp Act which are applicable in the State of Maharashtra, there is deficit of stamp duty required to be paid on the documents, in accordance with the laws applicable in the State within the stipulated period. If that stamp duty is not*

paid, according to the appellant, the document cannot be admitted in evidence, and cannot be acted upon. We fail to understand this stand of the appellant in the present Appeal, since we are not concerned with the insufficiency of stamp duty payable on documents of corporate guarantee, but we are concerned with the issue whether the appellant Company deserves to be wound up or not. The Company Court definitely is not required to act upon any particular document while considering whether or not to wind up a Company. It is necessarily considers whether the Company is unable to pay its debts.

With the above observation, the Division Bench of Hon'ble Bombay High Court in the above judgement dismissed the Writ Appeal.

Therefore, in the light of the above judgement, the issue of stamp duty raised by the Corporate Debtor is not legally sustainable and is liable to be rejected.

3. The next issue with regard to the validity of the letter of guarantee. It is the contention of the Corporate Debtor that a contract of guarantee requires three parties namely Surety, Principal Debtor and Creditor and the Guarantee deed shall be signed by all the three parties. It is the contention of the Corporate Debtor that the instant letter of guarantee dated 29.12.2017 is signed by the Guarantor alone and not signed by the borrower and the creditor and therefore, the above letter of guarantee is unenforceable.

In this connection, it is important to mention here that the said guarantee was obtained by means of a letter executed by the Corporate Debtor. The sanction letter dated 27.12.2017 issued by the Financial Creditor contains the name of Corporate Debtor as Corporate Guarantor and the

said sanction letter was duly signed by both the principal borrower and the Financial Creditor. Therefore, the contention of the Corporate Debtor to the effect that there was no consent of the principal borrower to the letter of guarantee executed by Corporate Debtor has no force of law. It is also appropriate to mention here that the Financial Creditor had issued a recall notice dated 30.07.2018 to the principal borrower as well as the Corporate Debtor and another personal guarantor Mr. Rishi Agarwal which was duly received by them. The Corporate Debtor having received the said notice did not raise any objection nor sent any reply disputing the liability and therefore the Corporate Debtor is stopped from raising all the above pleas in this Company Petition.

4. The next issue is with regard to the value of pledged shares and other securities. It is the contention of the Corporate Debtor that the Financial Creditor is claiming the entire amount from the Corporate Debtor without giving credit of the value of shares and other securities. It is not the case of the Corporate Debtor that the pledged shares have been sold by the Financial Creditor. The pledged shares are claimed to have been transferred in the name of Financial Creditor and the Financial Creditor is exercising certain voting rights under the transferred shares. It is settled proposition of law that the proceedings before the NCLAT are in the nature of “resolution” and not for “recovery.” It is not the case of the Corporate Debtor that the amount due and payable to the Financial Creditor is less than the threshold limit for admitting the Section 7 Application.
5. In view of the foregoing reasons, this Bench is of the considered opinion that none of the above please raised by

the Corporate Debtor pass the test of legal scrutiny and are liable to be rejected.

6. As stated above, the existence of “debt” and “default” in this case are proved beyond doubt and the above Company Petition being filed on 18.06.2019 is well within period of limitation from the date of sanction of the loan as well as the recall notice invoking the guarantee. The Financial Creditor has also suggested the name of proposed Interim Resolution Professional in part-3 of the Petition along with his consent letter in Form-2. Thus, the present Company Petition satisfies all the necessary legal requirements for admission. Accordingly, the above Company Petition is admitted by passing the following:

ORDER

- a. The above Company Petition No. (IB) -2312(MB)/2019 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against G.C. Property Private Limited.
- b. This Bench hereby appoints Mr. Rajesh Jhunjunwala Insolvency Professional, Registration No: IBBI/IPA/IP-001/IP00647/2017-2018/11102 as the Interim Resolution Professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Financial Creditor shall deposit an amount of Rs.5 Lakh towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- d. That this Bench hereby prohibits 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; 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest 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.

- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the 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.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

- j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-
CHANDRA BHAN SINGH
MEMBER (TECHNICAL)

Sd/-
H.V. SUBBA RAO
MEMBER (JUDICIAL)