

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

Company Petition (IB) No. 18/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 the Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

STATE BANK OF INDIA

... Financial Creditor/Applicant.

Verses

ANUPRIYA MANAGEMENT PRIVATE LIMITED

[CIN: U51109WB1995PTC072184]

... Corporate Guarantor/Respondent.

Date of Pronouncement: January 01, 2024.

CORAM:

SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)

SHRI. D. ARVIND, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:

For Financial Creditor: Mr. Soumya Roy, Adv. and Mr. Sanosh Mahato, Adv.

For Corporate Debtor: Mr. Mainak Bose, Adv. and Mrs. Kapita Paul, Adv.

ORDER

Per: D. Arvind, Member (Technical):

1. This Court is congregated through hybrid mode.
2. Heard the Learned Counsels for both parties.
3. This instant application is filed under Section 7 of the Insolvency and Bankruptcy Code, for brevity I&B Code, read with Rule 4 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, by “**State Bank of India**”, registered office Madame Cama Road Nariman Point, Mumbai, Maharashtra-400021, hereinafter referred to as (“**Financial Creditor**” “**Applicant**”/ “**FC**”) against “**Anupriya Management Private Limited**”, registered office at Avani Heights, 59A, Chowringhee Road, Kolkata – 700020,

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hereinafter referred to as “**Corporate Guarantor**” (“**Respondent**”/ “**CG**”) seeking direction to initiate Corporate Insolvency Resolution Process (for brevity “**CIRP**”) in respect of the Corporate Guarantor.

4. The Corporate Debtor was incorporated on June 19, 1995, having the Authorized Share Capital of Rs. 10,00,00,000/- only the Paid-up Capital of Rs.2,04,00,000/- only.
5. It is claimed that the **Total Amount of Debt default and due is Rs. 40,90,77,041.00/- as on 30.11.2022 and the Date of Default is claimed as November 30, 2022.**

Brief Facts of the case:

6. Financial Creditor herein has provided cash credit facilities to one M/s Avani Projects Infrastructure Ltd (hereinafter referred to as “**Corporate Debtor/CD**”), to the tune of Rs. 67 Crore.
7. The Corporate Debtor who is now under the Corporate Insolvency Resolution Process (CIRP) had entered into a Joint venture agreement with the respondent for the development of real estate projects and the Financial Creditor has granted various credit facilities to the Corporate Debtor since 2013, where the respondent was the Corporate Guarantor for the Corporate Debtor.
8. The Corporate Debtor started defaulting in making payments towards the loan availed leading to the classification of his Account as “**Non-Performing Assets**” (**NPA**) **on October 28, 2015.**
9. One Devi Trading & Holding Ltd., a Financial Creditor of the Corporate Debtor initiated the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor, by obtaining an order **on March 13, 2019**, from NCLT in **C.P. (IB)No. 370/KB/2018.**
10. As the respondent herein is the Corporate Guarantor of the Corporate Debtor and Financial Creditor has preferred this application to initiate the Corporate Insolvency Resolution Process of the Corporate Guarantor under Section 7 of the Insolvency and Bankruptcy Code, 2016.

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Submissions of the Ld. Counsel for the Applicant:

11. The Learned Counsel submits that the default of the Corporate Debtor is mainly payment to several Financial Creditors including the FC herein, has been established in the order of NCLT dated 13.03.2019 passed in C.P. (IB) No. 370/KB/2018, where NCLT admitted the Corporate Debtor into CIRP under Section 7 of the I&B Code.
12. The Respondent being Corporate Guarantor of Corporate Debtor in respect of loans availed from Financial Creditor, this application has been made. He further submits that there is no dispute about the credit facilities availed by the Corporate Debtor from the Financial Creditor, with regard to amount, tenure, terms and conditions of the Facilities etc.
13. It is submitted that a demand notice was sent to the Corporate Guarantor on 25th May 2016 (**annexed at Page 208 to the Application**) asking the Corporate Guarantor to pay up to Rs. 51,08,41,808/- for the default committed by the Corporate Debtor.
14. It is further submitted that the proceedings under the SAFAESI Act was also initiated for recovery on **08/11/2019**, in this regard, proof of which is annexed at Pages 210-213 to the application.
15. The Learned Counsel has further relied on the Balance Sheet of the Corporate Guarantor as on **31/03/2021** to substantiate that the debt has been acknowledged as: “The company has issued Corporate Guarantee in favor of SBI, Commercial Branch, Kolkata against capital loan the Kona Project (Avani Aspire) taken by Avani Projects & Infrastructure Ltd (Borrower Company) for as **Rs. 67 Crore** from the bank. All Land title deeds have been kept in lien with Bank in respect of said Loan”.

*“Due to failure to pay the dues of the bank by the borrower company, the State Bank of India has taken symbolic possession of the entire land under **section 13 (4) of the SARFAESI Act 2002**”.*

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16. Thus, the Learned Counsel submits that the application has been filed on time within the time limit prescribed under the I&B Code and the application merits admission.

Submissions of the Ld. Counsel for the Respondent, per contra:

17. The Learned Counsel submits that there has been non-compliance with the provisions of Rule 20 (1A) of IBBI (Information Utilities) Regulation 2017 in as much as, before filing an application under Section 7 of the I&B Code, it is mandatory for the Financial Creditor to file the “information of default” Information utilities and the same has not done by the applicant.
18. It is further submitted that Corporate Guarantor is the owner of the land measuring 7.38 acres at Howrah and Corporate Debtor had some development on a portion of land. Some multi-storied buildings have already been constructed on the land by Corporate Debtor in terms of the JV. If that project is allowed to be completed by the Corporate Guarantor, the home buyers can be given their flats and the bank liabilities of the Corporate Debtor can be met and consequently Corporate Guarantor’s liability can be extinguished.
19. It is submitted that this Adjudicating Authority may exercise discretion by not admitting the application.

Analysis and Finding:

20. We have duly considered the submissions made by both parties and perused the documents and records placed before us carefully.
21. We find that there is no dispute about default, default amount being in excess of threshold limit and application having been filed within the time limit prescribed.
22. The only relevant issue that has been taken is on the non-compliance of Rule 20 (1A) of IBBI (Information Utilities) Regulations 2017, about non-filing of “default information” with information utility.
23. We find that it is not mandatory compliance. Financial Creditor can also prove default with own records as provided in Sec 7 (3) of the I&B Code which says that

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the Financial Creditor shall, along with the application furnish the record of the default recorded with the information utility or such other record or evidence of default as may be specified. In terms of Regulation 2A of IBBI (Insolvency Resolution for Corporate Persons) Regulation, 2016. The Financial Creditor can produce certified copies of the entries in the relevant account in the banker's book as defined in clause (3) of Section 2 of the Bankers Book Evidence Act 1891, in this Financial Creditor has furnished the same and thus no fault can be attributed.

24. Further, it is evident that the Corporate Debtor, Avani Projects & Infrastructure Limited (now under CIRP vide an order dated March 19, 2013, in C.P. (IB) NO. 370/KB/2018), had entered into a joint venture agreement with the Respondent for the development of real estate and the Financial Creditor, SBI has granted a loan and various credit facilities to the Corporate Debtor since 2013, where the Respondent herein was the Corporate Guarantor of the Corporate Debtor.
25. Now the issue is whether the simultaneous CIRP can be initiated against the Principal Borrower and its Corporate Guarantor. At this juncture, it would be appropriate to go through the proviso laid down under **Sections 127 and 128 of the Contract Act, 1872**, as well as **Section 60(2) of the I&B Code, 2016** which are reproduced in verbatim as below:

“Section 127 of the Contract Act, 1872: 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 of the Contract Act, 1872: 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.”*

“Section 60(2) of the I&B Code, 2016: *Without prejudice to subsection (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such*

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corporate debtor shall be filed before such National Company Law Tribunal.”

26. Further, before deciding the issue of this impugned order, at the ab ovo, we would refer to the settled law as laid down by the Hon’ble Apex Court and the Hon’ble, National Company Law Appellate Tribunal (NCLAT) as under:

(a) ***Laxmi Pat Surana v. Union Bank of India*** reported in (2021) 8 SCC 481: MANU/SC/0221/2021 at Para 37:

*“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)

(b) ***State Bank of India v. Athena Energy Ventures Private Limited*** reported in MANU/NL/0436/2020: (2020) ibclaw.in 344 NCLAT:

*“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 Judgment as passed by the Adjudicating Authority.”***

(Emphasis Added)

(c) ***Mohan Kumar Garg v. Omkara Assets Reconstruction Pvt. Ltd. Company Appeal (AT) (Insolvency) No.993 of 2023*** reported in (2023) ibclaw.in 547 NCLAT that:

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“8. Insofar as submission of the Appellant that simultaneous proceeding cannot be initiated against the Principal Borrower and the Corporate Guarantee, the Adjudicating Authority has adequately answered the said issue and referred to relevant judgments. Learned counsel for the Respondent has relied on subsequent judgment of this Tribunal in *“Edelweiss Asset Reconstruction Co. Ltd. vs. Gwalior Bypass Projects Ltd., Company Appeal (AT) (Ins.) No. 1186 of 2019”*, *“State Bank of India vs. Mr. Animesh Mukhopadhyay, Company Appeal (AT) (Ins.) No. 186 of 2021”* and *“Kanwar Raj Bhagat vs. Gujarat Hydrocarbons and Power SEZ Ltd. & Anr., Company Appeal (AT) (Ins.) No. 1096 of 2020”* taking the view that simultaneous proceedings against the Principal Borrower and the Corporate Guarantor can be initiated.”

“9. We are of the view that law is well settled that proceeding under Section 7 can be initiated against both the Principal Borrower and Corporate Guarantor and there is no inhibition in proceeding against the Corporate Guarantor although proceeding against Principal Borrower under Section 7 was admitted. We are of the view that no error has been committed by the Adjudicating Authority in admitting Section 7 application against the Corporate Guarantor. There is no merit in the Appeal. Appeal is dismissed.”

(Emphasis Added)

27. Further, we would refer to the decisions passed by this Adjudicating Authority as under:

- i. *Hi-Tech Designs Pvt. Ltd. v. Sri Sai Car Sales Pvt. Ltd.* in C.P. (IB) No. 278(KB)2022 reported in MANU/NC/4031/2023: (2023) ibclaw.in 338 NCLT, at Para 8.8.4:

“Further it is evident that ... the Corporate Debtor, had provided corporate guarantee in favour of the Financial Creditor No. 2, to secure the dues of Union Motors, the Petition filed under Section 7 of I&B Code, 2016 by the Financial Creditor No. 2 is maintainable against the Corporate Debtor. We rely upon the decision in the case of *K. Paramasivam v. The Karur Vysya Bank Ltd.* 2022 SCC Online SC 1163: MANU/SC/1108/2022, that:

“13. Under Section 7 of the IBC, CIRP can be initiated against a corporate entity who has given a guarantee to secure the dues of a non-corporate entity as a financial debt accrues to the corporate person, in respect of the guarantee given by it,

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once the borrower commits default. The quarantor is then, the Corporate Debtor.

(Emphasised Added)

- ii. *IFCI Limited v. NTCIL Infrastructure Private Limited* in C.P. (IB) No. 24/KB/2023, reported in MANU/NC/5353/2023: (2023) ibclaw.in 774 NCLT

“10.5.5. [...] It is therefore trite, axiomatic and settled law that simultaneous proceedings under Section 7 of the I&B Code, can be initiated and continued against both the Principal Borrower as well as the Corporate Guarantor.”

“11. In the light of the enumerations supra, having noted that the claim against the Principal Borrower and the Corporate Guarantor are different, and we have no hesitation to admit this petition filed under Section 7 of the I&B Code, 2016....”

(Emphasised Added)

28. 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.”*

29. Thus, in terms of the foregoing discussions and decisions, we find, no reason to dismiss the application on the other grounds concassed by Corporate Guarantor. We are of the considered view that the Corporate Debtor has built a few apartments on the very same land as a Joint venture Partner and is in the process of seeking Liquidation. When the Corporate Debtor himself could not seek any resolution

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plan as a builder, the question of the Corporate Guarantor getting Resolution Plan does not arise.

30. In the light of the facts stated in the application bearing **Company Petition (IB) No. 18/KB/2023**, and the evidence placed on record and the discussion hereinabove, we **allow** this application filed under **Section 7 of 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 the **State Bank of India (Financial Creditor)**, under **Section 7** of the Insolvency & Bankruptcy Code, 2016, is hereby, **admitted** for initiating the **Corporate Insolvency Resolution Process** in respect of **Anupriya Management Private Limited (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

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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 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 **“Sri Yogesh Gupta”**, Registration No. **IBBI/PA-001/IPP00349/2017-18/10650**, Address **Road: 256, Garden Towers, Picnic Garden Road, 8th Floor, Block A, Kolkata 700039**, Email ID: yogeshgupta31@rediffmail.com, as the “IRP”. We have perused that there is a written communication, annexed as **Annexure “V”** at **Page 257**, 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 Indian Institute of Insolvency Professional of Insolvency Professional Agency of Institute of Cost Accountants of India. In addition, further necessary disclosures have been made by **“Sri Yogesh Gupta”** as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of the Section 7(3)(b) of the code. Hence, we appoint **“Sri Yogesh Gupta”** 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

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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 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 CIRP 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 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.
- 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 CIRP 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

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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 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 CIRP in respect of the Corporate Debtor to this Adjudicating Authority time to time.
 - xvi.** The order of moratorium shall cease to have effect as per Section 14(4) of the I&B Code.
- 31.** This order is issued under Section 7 of I&B Code 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016.
- 32.** Urgent certified copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.

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33. Post the matter on 06/ 02/ 2024 for filing the Periodical Progress Report by the IRP/RP.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Technical)

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

Bose, R. K. [LRA]
Tiwari, V. [LRA]
AR_Steno