



S. No. 8

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1**

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
19-10-2022 AT 03:30 PM. THROUGH VIDEO CONFERENCE.

CP(IB) No.363/7/HDB/2020
U/s 7 of IBC, 2016

IN THE MATTER OF:

India Infrastructure Finance Company Ltd

...Financial Creditor

Vs

Ind-Barath Power Infra Ltd

...Corporate Debtor

C O R A M:-

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. VEERA BRAHMA RAO AREKAPUDI, HON'BLE MEMBER (TECHNICAL)

ORDER

Ld. Counsel Shri. Amir Bavani for the Financial Creditor present.

Order in Company Petition CP (IB) No.363/7/HDB/2020 pronounced. Recorded vide separate sheet. In the result Company Petition is admitted and Corporate Debtor is put under CIRP.

Sd/-

MEMBER (T)

Sd/-

MEMBER (J)



**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

CP (IB) No.363/7/HDB/2020

U/s 7 of I&B Code, 2016 read with Rule
4 of I & B (AAA) Rules, 2016.

In the matter between:

India Infrastructure Finance Company Limited (IIFCL)
5th Floor, Block-2, Plate A & B
NBCC Tower, East Kidwai Nagar
New Delhi – 110 023.

**.. Petitioner
Financial Creditor**

VERSUS

Ind-Barath Power Infra Limited (IBPIL)
New No.20 (Old No.129)
Chamiers Road, Nandanam
V. Tenyampet, Chennai – 600035.

**.. Respondent
Corporate Guarantor**

Date of order : 19.10.2022

Coram:

**HON'BLE DR. VENKATA RAMAKRISHNA BADARINATH
NANDULA, MEMBER (JUDICIAL)**

and

**HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)**



Parties / counsels present:

For the Petitioner/ FC: Shri D.V. Sitaram Murthy, Senior Counsel assisted by Shri Amir Bavani, Advocate.

For the Respondent : Shri Yogesh Jagia, Advocate assisted by Shri DVAS Ravi Prasad, Advocate

PER: BENCH

ORDER

The present application is filed by India Infrastructure Finance Company Limited/ Financial Creditor against Ind Barath Power Infra Limited/ Corporate Guarantor. Whereas, CIRP was initiated against principal borrower/ Ind Barath Power (Madras) Limited vide order dated 14.08.2017 (Annexure A-26) in CP (IB) No.150/9/HDB/ 2017, upon an application filed by Rohan Varma Constructions Private Limited/ Operational Creditor, under section 9 of the I&B Code, 2016 before NCLT, Hyderabad. Subsequently, liquidation has been ordered against the said borrower on 22.04.2019 (Annexure A-27).

2. The present application is filed by Financial Creditor against Ind Barath Power Infra Limited/ Corporate Guarantor, claiming default of financial debt of **Rs.151,70,30,186.25** (Rupees one hundred fifty one crores seventy lacs thirty thousand one hundred and eighty six and paise twenty five only). The said amount consists of the following:



	<u>Rupees</u>
• Principal outstanding ..	89,24,00,000.00
• Interest and penal overdue ..	62,46,30,186.25
• Aggregate amount claimed as default ..	151,70,30,186.25

Date of default is claimed to be **20.09.2017**, viz. the date on which Invocation Notice was issued, from which date payments for either principal amount or for interest.

3. Hence, this Petition is filed under Section 7 of Insolvency and Bankruptcy Code, 2016, read with Rule 4 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, seeking admission of the petition, initiation of Corporate Insolvency Resolution Process (CIRP), granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon. The events leading to the present application as stated by the Financial Creditor are briefly as under:

(i) It is stated in the application that the lenders as described in part-IV of the application have sanctioned the following financial assistance:

- Term Loan sanctioned vide .. Rs. 250 crore
Sanction Letter dated 12.03.2015.
(Annexure A-6)
- Amount disbursed on 21.05.2015 .. Rs.89.24 crore
And 30.09.2015.



(ii) The amount was repayable in 56 quarterly Instalments commencing from 01.01.2017. However, certain modifications were made in the terms of sanction vide letters dated 20.05.2015 and 30.09.2015 (Annexure A-6)

(iii) The Financial Creditor had countersigned Novation Notice dated 21.04.2015 and executed Lender's Deed of Accession to the Facility Agreement dated 21.04.2015 (Annexure A-7).

(iv) The Corporate Debtor executed Deed of Corporate Guarantee in favour of Security Agent and the Financial Creditor on 20.05.2015 (Annexure A-8), wherein the Corporate Debtor agreed to pay the lenders the amounts demanded by the lenders in case of default.

(v) Defaults occurred and the Financial Creditor brought the same to the notice of the Corporate Debtor vide letters dated 29.07.2016, 26.08.2016, 30.09.2016, 27.10.2017, 28.11.2016 and 28.12.2016 (Annexure A-9). Thereafter, the account of the Corporate Debtor has been classified as Non-Performing Asset (NPA) on 31.12.2016. Consequent on non-rectification of defaults the lenders' agent had issued Recall Notice dated 08.03.2017. The Corporate Debtor responded thereto vide letter dated 04.05.2017 (Annexure A-9) denying the claims of the Financial Creditor.

(vi) It is claimed that an amount of Rs.99,15,98,402.54 was outstanding as on 31.08.2017. In pursuance of the rights available under the Corporate



Guarantee, the Security Agent on behalf of the Financial Creditor had invoked the Corporate Guarantee demanding to pay the said amount of Rs.99,15,98,402.54 vide Invocation Notice dated 20.09.2017 (Annexure A-10). The date of Invocation Notice is claimed to be the **date of default** by the Financial Creditor, viz. **20.09.2017**.

(vii) CIRP of the borrower was initiated vide order dated 14.08.2017 (Annexure A-26) in CP (IB) No.150/9/HDB/ 2017, upon an application filed by Rohan Varma Constructions Private Limited/ Operational Creditor, under section 9 of the I&B Code, 2016 before NCLT, Hyderabad, wherein liquidation has been ordered on 22.04.2019 (Annexure A-27). Whereas, the present claim having been filed initially before NCLT, Chennai, the same was returned vide order dated 12.09.2019 (Annexure A-28) with a direction to the Financial Creditor to file the same before this Bench since liquidation proceedings were pending before this Bench.

4. It is pertinent to note that the Financial Creditor has enclosed copy of **RECORD OF DEFAULT dated 10.08.2020** submitted by the Financial Creditor to National E-Governance Services Limited (NeSL), Mumbai, as required under Notification dated 30.11.2016 of the Rules for Application to the Adjudicating Authority under CIRP, at **Annexure A-29** [Pages 1027-1034- VOLUME-6].

5. The Corporate Debtor has filed REPLY dated 27.01.2021, stating the present petition is required to be dismissed on the following grounds:



(i) The present application under section 7 of the I&B Code is filed invoking the Deed of Corporate Guarantee executed by the Corporate Debtor in favour of Security Agent and the Financial Creditor on 20.05.2015 (Annexure A-8).

(ii) Initially the Financial Creditor has filed Insolvency Petition before the NCLT, Chennai on 17.09.2018. The same was returned for lack of jurisdiction with a direction to approach the Tribunal having jurisdiction vide order dated 12.09.2019. The Financial Creditor has filed the present petition on 04.09.2020. Thus, the present petition is filed after about a year.

(iii) Principal borrower had filed application under section 9 of the I&B Code, 2016 against the Corporate Debtor on 20.09.2017 and this Tribunal vide order dated 14.08.2017 has admitted the same. Such order of admission into CIRP was passed before invocation of Deed of Corporate Guarantee. Insolvency having commenced against the principal borrower, the present petition seeking CIRP of the Corporate Guarantor is barred as held by the Hon'ble NCLAT in Bijay Kumar Agarwal Vs. State Bank of India, decided on 23.01.2020 in Company Appeal (AT) (Ins) No.993 of 2019. Hence the present petition is required to be dismissed.

(iv) Corporate Debtor has executed Corporate Guarantee for performance of three conditions stipulated in Guarantee Bond dated 20.05.2015. The same was modified multiple times. One of the conditions



being execution of Power Purchase Agreement could not be complied with giving rise to invocation of Corporate Guarantee. However, there was delay in doing so as explained hereunder:

- Corporate Guarantee was invoked on .. 20.09.2017
- Petition u/s 7 was filed before wrong forum on.. 17.09.2018
- The same was returned on .. 12.09.2019
- Present petition is filed on .. 04.09.2019

Thus, the present petition is barred by law of limitation and is required to be dismissed.

(v) What was executed by the Corporate Debtor was Limited Performance Guarantee in the form of Guarantee Bond dated 20.05.2015, not a continuing financial guarantee.

(vi) The Corporate Debtor is financial service provider under section 3(17) of the Code and deemed Non-Banking Finance Company under section 451A of the Reserve Bank of India Act, 1934. The petitioner has stated in para 1 of Part-IV of the petition that the petition is filed to recover outstanding dues of the Financial Creditor. Such a cause of action is contrary to the purpose of the I&B Code, 2016. Hence the petition is required to be dismissed.

(vii) The Record of Default filed by the petitioner under section 29A is not in accordance with law.



6. The Financial Creditor has filed REJOINDER dated 23.02.2021 controverting the submissions made by the Corporate Debtor as following:

- (i) As regards filing of the present petition on 04.09.2019 it was in accordance with order dated 12.09.2019 passed by the NCLT, Chennai for the reasons stated in the said order.
- (ii) An application for initiation of CIRP against Corporate Guarantor for the same claim and default for which CIRP was initiated against the principal borrower is maintainable and is not barred by law as was held by the Hon'ble NCLAT in State Bank of India Vs. Athena Energy Ventures Private Limited in Company Appeal (AT) (Ins) No.633 of 2020 vide order dated 24.11.2020. Relevant paras are reproduced hereunder:

“16. The ILC thus rightly observed that provisions are there in the form of [Section 60\(2\)](#) and (3) and no amendment or legal changes were required at the moment. We are also of the view that simultaneously remedy is central to a contract of guarantee and where Principal Borrower and surety are undergoing CIRP, the Creditor should be able to file claims in CIRP of both of them. The IBC does not prevent this. We are unable to agree with the arguments of Learned Counsel for Respondent that when for same debt Company Appeal (AT) (Ins) No.633 of 2020 claim is made in CIRP against Borrower, in the CIRP against Guarantor the amount must be said to be not due or not payable in law.”

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.”



- (iii) As regards guarantee provided by the respondent/ Corporate Debtor the Financial Creditor submits that the guarantee provided by the Corporate Debtor is continuing and relied on the following clauses of the Deed of Corporate Guarantee:

“15. This deed shall be irrevocable and the obligations of the Guarantor hereunder shall not be conditional on the receipt of any prior notice by the Guarantor or by the borrower and the demand or notice by IIFCL and the security agent, as provide in Clause 19 hereof shall be sufficient notice to or demand on the Guarantor.”

“17. This deed shall be a continuing one and shall remain in full force and effect till such time the borrower repays in full the obligations.”

- (iv) By virtue of the above clauses of the Deed of Corporate Guarantee the guarantee furnished by the respondent is continuing and the contrary claim made by the Corporate Debtor is baseless and is required to be rejected.
- (v) The Financial Creditor has rebutted the claim of the Corporate Debtor that it is either a Non-Banking Finance Company or a Financial Service Provider and demanded veracity and proof thereof.



(vi) In paras 3 and 7 of the Rejoinder the Financial Creditor has refuted the allegation that the present petition is barred by limitation, the Financial Creditor submits that the period of pendency of litigation before the NCLT, Chennai, viz. 17.09.2018 to 12.09.2019 is excluded from computation of limitation under section 14 of the Limitation Act, 1963. Even otherwise the present petition is within limitation having regard to the fact that date of invocation of guarantee was 20.09.2017 and date of filing of the present petition was 04.09.2020.

7. The Financial Creditor has relied on section 14(1) of the Limitation Act, 1963, which reads:

“14. Exclusion of time of proceeding bona fide in court without jurisdiction. —

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded,”

and contended that the period consumed before NCLT, Chennai is required to be excluded from computation of the period of limitation. Accordingly, the period from the date of filing of proceeding before NCLT, Chennai to the date when the NCLT, Chennai had returned the proceeding, viz. 17.09.2018 to 12.09.2019, is required to be excluded from computation of period of limitation. In this regard the Financial Creditor has relied on the following decisions of the Hon’ble Supreme Court:



- Order dated 28.03.2018 in Mohinder Singh Vs. Paramjit Singh & others, in Civil Appeal No.10222 of 2017; and
- Order In M.P. Steel Corporation Vs. Commissioner of Central Excise in Civil Appeal No.4367 of 2004.

8. It is therefore, submitted that in view of the above decisions of the Hon'ble Supreme Court the Corporate Debtor is entitled to exclusion of the period consumed before the NCLT, Chennai since the said proceedings suffered jurisdictional error and the NCLT, Chennai had returned the proceedings. The dates relevant for this purpose are as under:

- Guarantee was invoked on .. 20.09.2017
- Period spent before NCLT, Chennai .. 17.09.2018
to 12.09.2019
- Present application is filed on 04.09.2020

9. It is further submitted by the Financial Creditor that even if period spent before the NCLT, Chennai is not excluded still the present application is filed within the period of limitation.

10. The Corporate Debtor has filed ADDITIONAL AFFIDAVIT dated 16.07.2021, mainly contending that:

(i) Term loan of Rs.250 crores has been modified even before disbursement vide sanction letter dated 20.05.2015, by disbursing a part of the loan, viz. an amount of Rs.89.25 crores on 20.05.2015 in Trust



Retention Account maintained with Axis Bank. However, Deed of Accession to the Facility Agreement was executed on 21.05.2015. Loan disbursed was parked in fixed deposit. In 2015-16, the borrower/ Ind Barath Power (Madras) Ltd had created leverage on the fixed deposits and restated facility agreement dated 19.01.2015. The same has been communicated to all the Financial Creditors vide letter dated 04.05.2016 (Annexure-1).

(ii) The Corporate Debtor agreed to execute Corporate Guarantee in terms of Amended Sanction Letter dated 20.05.2015. However, it has never been furnished. The petitioner has invoked Corporate Guarantee, which is not in existence. Therefore, the Corporate Guarantor is filing application under Rule 131 of the NCLT Rules, 2016 seeking discovery of original Guarantee Bond dated 20.05.2015 alleged to have been furnished to the petitioner. It is submitted by the Corporate Debtor that in absence of original guarantee bond the present petition is required to be rejected at threshold.

(iii) The Corporate Debtor alleged that the present petition is barred by limitation and that benefit of section 14 of Limitation Act is not available to the Financial Creditor.

11. The Financial Creditor has filed WRITTEN SUBMISSIONS dated 01.04.2022 in compliance with directions contained in our order dated 25.03.2022. It is required to be noted that this Tribunal vide order dated 14.08.2017 (Annexure A-26) in CP (IB) No.150/9/HDB/ 2017, upon an application filed by Rohan Varma Constructions Private Limited/ Operational Creditor, under section 9 of the I&B Code, has admitted the



Corporate Debtor into CIRP. Subsequently Liquidation Order dated 22.04.2019 (Annexure A-27) has been passed against the Corporate Debtor by this Tribunal.

12. This gist of Written Submissions dated 01.04.2022 are as under:

(i) Simultaneous proceedings against principal borrower and Corporate Guarantor can be pursued and the same are maintainable as held by the Hon'ble NCLAT in the following cases:-

- Order dated 24.11.2020 in SBI Vs. Athena Energy Ventures Pvt Ltd., Company Appeal (AT) (Ins) No.633 of 2020. [paras 16 & 19]
- Order dated 08.03.2021 in SBI Vs. Animesh Mukhopadhyay in Company Appeal (AT) (Ins) No.186 of 2021. [paras 13 & 14]
- Order dated 09.07.2021 in Emerald Realtors Pvt Ltd Vs. Suraksha Asset Reconstruction Ltd. & another in Company Appeal (AT) (Ins) No.394 of 2021. [para 7].

(ii) NCLT, Chennai, while disposing of application under section 7 of the IBC vide order dated 12.09.2019 has directed the Financial Creditor to present the mentioned application before NCLT, Hyderabad under section 60(2) of the Code. In this regard the Financial Creditor has relied on decision of the Hon'ble Supreme Court in Laxmi Pat Surana Vs. Union Bank of India & another in Civil Appeal No.2734 of 2020. The Financial Creditor has clarified how jurisdictional error was committed earlier in approaching NCLT, Chennai and how it has been rectified by filing proceedings before NCLT, Hyderabad.

(iii) The Financial Creditor has reiterated what has been submitted in its Rejoinder with regard to this application being in time nonetheless benefit



of section 14 of Limitation Act is available to it while computing period of limitation.

(iv) It is submitted by the Financial Creditor that guarantor is liable to repay the outstanding amount if the principal borrower commits default. The Corporate Debtor by virtue of Deed of Guarantee dated 20.05.2015, in the capacity of Guarantor has unconditionally, has absolutely and irrevocably guaranteed to disbursements made by the Financial Creditor herein. In this context the Financial Creditor relied on Clauses 2, 3, 15 and 17 of Guarantee Deed dated 20.05.2015.

(v) The Corporate Debtor having signed the said Guarantee Deed is obligated to secure repayment of the loan disbursed by the Financial Creditor along with other monies on default of the principal borrower.

13. In view of the contest as afore stated, the points that emerge for consideration by this Adjudicating Authority are;

1. Whether the Petition is barred by limitation?

2. Whether a financial debt as claimed by the Petitioner exists, if so, whether the Corporate Debtor defaulted in payment of the same?

14. We have heard Shri D.V. Sitaram Murthy, Ld. Senior Counsel assisted by Shri Amir Bavani, Advocate for the Financial Creditor and Shri Yogesh Jagia, Advocate along with Shri DVAS Ravi Prasad, Ld. Counsel for the Corporate Debtor at length and also perused the record and rulings relied by both sides.

Point.1.

Whether the Petition is barred by limitation?



15(a) The Applicant / Financial Creditor, filed the present petition under Section 7 of IBC, 2016 after invoking the Corporate Guarantee dated 20.05.2015, executed by the Corporate Debtor in favour of the Financial Creditor, where under the Corporate Debtor guaranteed the due repayment of the amounts borrowed by M/s Ind-Bharat Power (Madras) Ltd.

15(b) Ld. Senior Counsel Shri. D.V. Sitaram Murthy for the Financial Creditor while strongly refuting the allegation that the present petition is barred by limitation, contended that the the period of pendency of this application before the NCLT, Chennai, from 17.09.2018 to 12.09.2019 needs to be excluded for the purpose of calculating the period of limitation if any, in terms of section 14 of the Limitation Act, 1963, in representing the present petition before this Tribunal, and even otherwise the present petition having been filed well within in three years from the date of invocation of the Corporate Guarantee, i.e. 20.09.2017, is well within limitation as the date of filing of the present petition was 04.09.2020.

16. In this regard the Ld. Sr. Counsel for the Financial Creditor relied on the following rulings and reiterated that application as filed is well within the prescribed period of limitation.

- Mohinder Singh Vs. Paramjit Singh & others, in Civil Appeal No.10222 of 2017; and
- M.P. Steel Corporation Vs. Commissioner of Central Excise in Civil Appeal No.4367 of 2004.



17. Shri Yogesh Jagia, Ld. Counsel for the Corporate Debtors placing reliance on the following dates, contended that the application is barred by limitation.

Guarantee was invoked on	..	20.09.2017
Period spent before NCLT, Chennai	..	17.09.2018
		to 12.09.2019
Present application is filed on		04.09.2020

18. Needless to say that Article 113 of limitation applies to the present case and the three years period of limitation which shall begin to run when the right to sue accrues. Therefore the dates relevant for this purpose of deciding the respective pleas as to limitation are as under:

Guarantee was invoked on	..	20.09.2017
Time spent before NCLT, Chennai	..	17.09.2018
		to 12.09.2019
Present application is filed on		04.09.2020

In **Raja Rao vs A.P. Industrial Development (Writ Petition No. 6842 of 2000 dated 21.08.2012)**, the Hon'ble High Court of Andhra Pradesh held that "continuing guarantee is different from ordinary guarantee. There is difference between a guarantee which stipulates that the guarantor is liable to pay only on a demand by the creditor, and a guarantee which does not contain such a condition. The liability to pay may arise, on the principal debtor and guarantor, at the same time or at different points of time. A claim may be even time-barred against the principal debtor, but still enforceable against the guarantor. The parties may agree that the



liability of a guarantor shall arise at a later point of time than that of the principal debtor. A claim may be time-barred against the principal debtor, but still enforceable against the guarantor. Limitation against a guarantor under a continuing guarantee (which specified that the liability of the guarantor is pay on demand) would not run from the date of each advance, but only run from the time when the balance was constituted and a demand was made for payment thereof. In a case where the guarantor liable to pay on demand the limitation begins to run when the demand is made and the guarantor commits breach by not complying with the demand. When the demand is made by the creditor on the guarantor, under a guarantee which requires a demand as a condition precedent for the liability of the guarantor, such demand should be for payment of a sum which is legally due and recoverable from the principal debtor. If the debt had already become time-barred against the principal debtor, the question of creditor demanding payment thereafter, for the first time, against the guarantor would not arise. When the demand is made against the guarantor, if the claim is a live claim (that is a claim which is not barred) against the principal debtor, limitation in respect of the guarantor will run from the date of such demand and refusal/non-compliance. Where guarantor becomes liable in pursuance of a demand validly made in time the creditor can sue the guarantor within three years, even if the claim against the principal debtor gets subsequently time-barred. Ceasing of operation of accounts by the borrower for some reason or the other would amount to a demand by the bank on the guarantor to pay the amount due in the account or refusal by the principal debtor and guarantor to pay the amount due in the accounts.



Therefore the present application having been filed within 3 years from the date of invocation of Guarantee, even if the time spent before the NCLT, Chennai, is not excluded, the present application is within the prescribed period of limitation.

Point.1 is answered accordingly.

Point.2.

Whether a financial debt as claimed by the Petitioner exists, if so, whether the Corporate Debtor defaulted in payment of the same?

19. Ld. Senior Counsel for the Financial Creditor would contend that the execution of the Corporate Guarantee dated 20.05.2015 in favour of the Financial Creditor by the Corporate Debtor, besides its invocation consequent to the default committed by the Borrower in repayment of the debt guaranteed by the Corporate Debtor, since not in dispute, both the debt as well as the default stands admitted/established as such this is a fit case for admission and for ordering CIRP against the Corporate Debtor.

(b) In so far as the contention that the original Corporate Guarantee Deed dated 25.05.2015 shall be produced before the Adjudicating Authority as prayed by the Corporate Debtor in IA No.355/2022 is concerned, Ld. Senior Counsel would submit that the Financial Creditor has filed the attested true copy of the Corporate Guarantee Deed dated 20.05.2015 along with the application and since it is not the case of the Corporate Debtor that the said copy of the Corporate Guarantee filed along with Company Petition is not the “true copy of the original Corporate Guarantee Deed dated 20.05.2015”, there is neither any necessity nor it is not open to the Corporate Debtor to insist on filing the original Corporate Guarantee for the perusal of the Tribunal.



20. Ld. Senior Counsel would further contend that even in the backdrop of initiation of CIRP against the Principal Borrower of this Corporate Debtor pursuant to application filed under Section 9 of IBC, since the lender is entitled under law, to proceed against the Principal Borrower as well as Guarantor in equal measure in case of default as liability is joint and several, the question of non-maintainability of this application does not arise under law.

21. Ld. Senior Counsel in this regard placed reliance on the following rulings.

- (i) Laxmipat Surana Vs Union Bank of India and Anr (2021) 8 SCC 481.
- (ii) Order dated 24.11.2020 in SBI Vs. Athena Energy Ventures Pvt Ltd., Company Appeal (AT) (Ins) No.633 of 2020. [paras 16 & 19]
- (iii) Order dated 08.03.2021 in SBI Vs. Animesh Mukhopadhyay in Company Appeal (AT) (Ins) No.186 of 2021. [paras 13 & 14]
- (iv) Order dated 09.07.2021 in Emerald Realtors Pvt Ltd Vs. Suraksha Asset Reconstruction Ltd. & another in Company Appeal (AT) (Ins) No.394 of 2021. [para 7].

22. Per Contra, Ld. Counsel for the Corporate Debtor, while refuting the above submissions, contending that the Corporate Guarantee that was invoked, has been issued by the Corporate Debtor for the loans advanced to Ind-Barath Power (Madras) Limited dated 20.09.2017 and this Tribunal



vide order dated 14.08.2017 i.e. before invocation of the Corporate Bank Guarantee, passed an order ordering initiation of CIRP against the Principal Borrower/ Ind-Barath Power (Madras) Limited, as such the present petition is not maintainable.

23. In this regard the Ld. Counsel placed reliance in the ruling of Hon'ble NCLAT, New Delhi in CA (AT) (Ins) No. 993/2019 in the matter of *Bijay Kumar Agarwal Vs State Bank of India* which is as under:-

“There is no two opinion of a prime fact that there is no fetter in ‘I&B’ for projecting simultaneously two applications u/s 7 of IBC against (i) the Principal Borrower as well as (ii) the Corporate Guarantor(s) or against both the Guarantors but if, for the same set of claim, when an Application filed by the ‘Financial Creditor’ is admitted against one of the ‘Corporate Debtor’/”Principal Borrower” or Corporate Guarantor, the second application filed by the same ‘Financial Creditor’ for the same set of claim and default is not to be admitted against the other ‘Corporate Debtor’ (The Corporate Guarantor(s) or the Principal Borrower”.

24. Ld. Counsel for the Corporate Debtor raised another plea by filing IA 355/2021 contending that the Tribunal shall direct the Financial Creditor to produce the original Corporate Guarantee dated 20.05.2015, as according to the Corporate Debtor though the Corporate Debtor had executed the Corporate Guarantee, the same was not delivered to the Financial Creditor, and this Tribunal vide order dated 26.09.2022 dismissed the application, however by observing as follows, dismissed the said IA:-

Para 16. Therefore in the light of our discussion above and taking into consideration the facts and circumstance of the case besides the submissions of the Ld. Counsel for both sides, we do not find any merit or substance in the Application and the same therefore deserves to be dismissed. However, with an observation that if before passing the order in the Company Petition this Adjudicating Authority comes to the



conclusion that the original of the Corporate Guarantee is essential for the disposal of this application, the Adjudicating Authority will not hesitate to invoke its power under Section 43 of NCLT Rules.

25. Ld. Counsel further submitted that the order of this Tribunal in IA 355/2021 has been assailed before the Hon'ble NCLAT, Chennai and the same is pending. Thus, submitting the Ld. Counsel prayed this Tribunal not to pass any order in the company petition, pending disposal of the appeal before NCLAT.

26. Needless to say that an application under Section 7 of IBC though the admission of which is held to be not mandatory, once existence of debt and its default is established to the satisfaction of the Adjudicating Authority, the Adjudicating Authority shall have to admit such a Petition. As already stated the execution of Corporate Guarantee by the Corporate Debtor and default on the part of the Borrower are not in dispute.

27. In so far as the plea that in view of the ruling in *re* Bijay Kumar Agarwal wherein para 22 it has been held as follows:-

22. There is no two opinion of a prime fact that there is no fetter in 'I&B' for projecting simultaneously two applications u/s 7 of IBC against (i) the Principal Borrower as well as (ii) the Corporate Guarantor(s) or against both the Guarantors but if, for the same set of claim, when an Application filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor'/'Principal Borrower' or Corporate Guarantor, the second application filed by the same 'Financial Creditor' for the same set of claim and default is not to be admitted against the other 'Corporate Debtor' (The Corporate Guarantor(s) or the Principal Borrower.

the present application is not maintainable, we are of the view that the said submissions is unsustainable and unacceptable. A bare perusal of the afore-stated ruling discloses that the said ruling is not at all helpful in the



case of the Corporate Debtor. The facts as narrated in the said order discloses that, it was a case where the application filed by the Financial Creditor was admitted against one of the Corporate Debtors/Principal Borrowers or Corporate Guarantor and the second application has been filed by the same Financial Creditor for the same set of claim and default and under the said set of facts it was held to be not maintainable.

28. In so far as the facts of this case on hand is concerned, the case which the Corporate Debtor referred in the counter was admittedly one under Section 9 of IBC filed by the operational creditor against the Principal Borrower and not against the present Corporate Debtor. Thus, on facts the said ruling is not applicable to the case on hand.

29. Nextly, we may state that the status of the Corporate Debtor herein is nothing but of a Guarantor. It is trite law that the liability of Guarantor is co-existent with that of the Principal Borrower. It is also well settled law that the lender is at liberty to proceed against the Principal Borrower as well as the Guarantor in equal measure in case of default in repayment of the amount of debt. This legal position can be traced in several rulings of Hon'ble High Courts and Hon'ble Supreme Court

30. In *Laxmi Pat Surana vs UOI* (2021) 8 SCC 481 which was held as follows:-

Upon harmonious and purposive construction of the governing provisions, it is not possible to extricate the corporate person from the liability (of being a corporate debtor) arising on account of the guarantee given by it in respect of loan given to a person other than corporate person. The liability of the guarantor is co-extensive with that of the principal borrower. The remedy under [Section 7](#) is not for recovery of the amount, but is for reorganisation and insolvency resolution of the corporate debtor who is not in a position to pay its debt and commits default in that regard. It is open to the corporate debtor to pay off the debt, which had become due and



payable and is not paid by the principal borrower, to avoid the rigours of Chapter II of the Code in general and [Section 7](#) in particular.

27. In law, the status of the guarantor, who is a corporate person, metamorphoses into corporate debtor, the moment principal borrower (regardless of not being a corporate person) commits default in payment of debt which had become due and payable. Thus, action under Section 7 of the Code could be legitimately invoked even against a (corporate) guarantor being a corporate debtor. The definition of “corporate guarantor” in Section 5(5A) of the Code needs to be so understood.

31. In so far as the case on hand, the present Corporate Debtor offered corporate guarantee for the due repayment of the debt of the Principal Borrower, which debt has admittedly been defaulted by the Borrower. Therefore, in view of the above ruling, the question of non-maintainability of present application even does not arise.

32. Before we part with, we may state that the Ld. Counsel for the Corporate Debtor prayed this Tribunal in IA 355/2021, not to pass the final order, pending disposal of the appeal that the Corporate Debtor stated to have filed before the Hon’ble NCLAT. Needless to say that mere filing of an Appeal or its pendency by itself does not amount to stay of proceedings before the court whose order is under appeal. The Corporate Debtor had not placed any order of stay by the Hon’ble NCLAT despite getting passing of orders deferred by nearly a month. Be that as it may, an application filed under Section 7 of IBC needs to be expeditiously disposed. We therefore refused the request made for deferring the final order and take up the matter for passing the final order admitting this Petition under Section 7 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions:-

(A) Therefore, for the reasons stated above, the Corporate Debtor, M/s Ind Barath Power Infra Limited is admitted in Corporate Insolvency



Resolution Process under section 7 of the Insolvency & Bankruptcy Code, 2016, consequently,

(B) The 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;

(C) 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.

(D) 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, concessions, clearances or a similar grant or right during the moratorium period.



(E) 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.

(F) That the order of moratorium shall have effect from the date 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, whichever is earlier.

(G) That the public announcement of the initiation of Corporate Insolvency Resolution Process shall be made immediately as prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.

(H) That this Bench hereby appoints Mr. Huzefa Fakhri Sitabkhan, having Registration No. IBBI/IPA-001/IP-P00031/2017-18/10115, as Interim Resolution Professional, whose contact details are:

e-mail ID: huzefa.sitabkhan@gmail.com

Address: 1012, Dalamal Tower, Free Press Journal Road,
211, Nariman Point, Mumbai,
Maharashtra, 400021

as Interim Resolution Professional to carry the functions as mentioned under the Insolvency & Bankruptcy Code.

(I) Proposed IRP filed Form-2. His Authorisation for Assignment is valid till 09.01.2023. This information is also available in IBBI Website. Thus, there is compliance of Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016, as amended. Therefore, the proposed



IRP is fit to be appointed as IRP since the relevant provision is complied with.

(J) The Registry is directed to furnish certified copy of this order to the parties as per Rule 50 of the NCLT Rules, 2016.

(K) The petitioner is directed to communicate this order to the proposed Interim Resolution Professional.

(L) Registry of this Tribunal is directed to send a copy of this order to the Registrar of Companies, Hyderabad for marking appropriate remarks against the Corporate Debtor on website of Ministry of Corporate Affairs as being under CIRP.

Accordingly, this Petition is admitted.

Sd/-

VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)

Sd/-

DR. N.V. RAMAKRISHNA BADARINATH
MEMBER (JUDICIAL)

Karim/ Binnu