IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

CP(IB)/82/CHE/2021

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

In the matter of ***Kaveri Gas Power Private Limited***

ASREC (INDIA) LTD.
Solitaire Corporate Park,
Building No. 2, Unit No. 201-202-A & 200-202B,
Ground Floor, Andheri Ghatkopar Link Road,
Mumbai-400093.

... Financial Creditor

-Vs-

KAVERI GAS POWER PRIVATE LIMITED
No. 3 Ranganathan Gardens,
Anna Nagar,
Chennai – 600 040.

... Corporate Debtor

Order pronounced on 4th February 2022

CORAM :

R. SUCHARITHA, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)

For Applicant: *Mr. Satish Parasaran, Senior Advocate*
Mr. Kumarpal R. Chopra, Advocate

For Respondent :- Mr. Ravi Rajgopalan, Advocate

ORDER

Per: **R. SUCHARITHA, MEMBER (JUDICIAL)**

This is an Application filed by ASREC (India) Ltd. (hereinafter referred to as **"the Financial Creditor"**) against **Kaveri Gas Power Private Limited** (hereinafter referred to as **"the Corporate**

Debtor") under Section 7 of the Insolvency & Bankruptcy Code, 2016, seeking thereof to initiate the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. From Part-I of the Application, it is seen that the Financial Creditor is an Asset Reconstruction Company. From Part-II of the Application, it is seen that the Corporate Debtor is a Private Limited Company incorporated on 29.06.2000 bearing CIN: U40101TN2000PTC045283. The registered office address of the Corporate Debtor as per the Application is stated to be situated at No 3 Ranganathan Street, Anna Nagar, Chennai- 600 040. From Part-III of the Application, it is seen that the Financia! Creditor has proposed the name of the Interim Resolution Professional (IRP) viz., Mr. L Bhadri, Reg. No. IBBI/IPA-001/IP-P-02059/2020-2021/13245; to act as the IRP.

3. From Part-IV of the Application, it is seen that the Financial Creditor has claimed a sum of Rs.50.48 Crores which is due and payable by the Corporate Debtor. Part V of the application describes the particulars of Financial Debt, documents, records and evidence of default as described below:

i. MCA Master Data

ii. Guarantee Agreement

iii. Dates of Disbursement

iv. Notice invoking the Corporate Guarantee

v. Copy of Order of CIRP against the Principal borrower / Corporate Debtor M/s. Cauvery Power Generation Private Limited dated 18.10.2019

vi. Assignment Agreement

vii. Security Trustee Agreement

viii. Balance Sheet

ix. Annual Return

x. Interest calculated as on 31.12.2020

xi. Form No. MGT – 7

xii. Consent Affidavit of the IRP

4. The Learned Senior Counsel for the Financial Creditor submitted that on the request of Cauvery Power Generation Chennai Private Limited (Principal Borrower), during the year 2013, working capital facilities were sanctioned to the principal borrower and for which the Corporate Debtor has extended Corporate Guarantee vide guarantee agreement dated 19th July, 2018. Financial Creditor has since acquired the loans vide assignment agreement dated 30th December, 2020 and has stepped into the shoes of the principal lenders.

5. It is admitted fact that Principal Borrower was admitted to insolvency vide order dated 18/10/2019 in CP/756/2019 and the

proceedings of which are pending on file of this Adjudicating Authority.

6. The Learned Counsel for the Financial Creditor submitted that notice invoking the Corporate Guarantee was sent to the Corporate Debtor on 12.02.2021. Both sides admit that no amount has since been paid against the said demand notice. During the hearing Ld. Advocate appearing on behalf of the Respondent brought to the notice of this Adjudicating Authority that the notice demanding the payment stated a higher amount than that mentioned in the document of personal guarantee. In reply to the question posed by the Bench, the Ld. Advocate replied that the said notice was never replied by the Respondent.

7. The Respondent / Corporate Debtor has filed counter. The objections were mainly limited to raising the issue of limitation, delivery of the notice at incorrect address, date of default, incorrect calculation and restrictions as to amount payable to Rs. 50.48 Crores.

8. Heard the submissions made by the Learned Counsel for the parties. In the present case, the principal borrower viz. Cauvery Power Generation Chennai Pvt. Ltd. availed working capital assistance not exceeding Rs.50.48 Crore in accordance with the

terms contained in the working capital consortium agreement dated 31.10.2013. In accordance with the terms contained in the working capital agreement and the security trustee agreement, the Corporate Debtor herein executed a Guarantee Agreement in favour of the Security Trustee, vide Agreement dated 19.07.2018. Thereafter, the said 'debt' was assigned by State Bank of India, to the FC herein vide an Assignment Agreement dated 30.12.2020.

9. After assignment of loan to the Financial Creditor herein, the Financial Creditor issued a notice invoking the Corporate Guarantee to the Corporate Debtor on 12.02.2021. It is the contention of the Learned Counsel for the Corporate Debtor that a Demand of Rs.150 Crore was made by the Financial Creditor, however the Corporate Debtor is liable only for the debt of the principal borrower to the extent of Rs.50.48 Crore. As already adumbrated *supra,* the Corporate Debtor has neither replied to the said letter nor paid any amount thereafter. However, in order to countenance the said argument, it is significant to refer to the decision of the Hon'ble Supreme Court in the matter of **Innoventive Industries Ltd. –Vs- ICICI Bank and another** *(2018) 1 SCC 407* as well as **Mobilox Innovations Pvt. Ltd.. –Vs- Kirusa Software Pvt. Ltd.** *(2018) 1 SCC 353* after going through the Scheme of IBC, 2016 in depth in relation to an Application under Section 7 filed by a Financial Creditor

as compared to the one filed under Section 9 by an Operational Creditor, in relation to a Section 7 Application where there is an existence of a 'financial debt' and its default in excess of Rs.1,00,000/-, *(now increased to Rs.1 Crore on and from 24.03.2020)* this Tribunal is bound to admit the Application and as a consequence trigger the Corporate Insolvency Resolution Process (CIRP) and in relation to a Section 7 Application defence or set off or counter claim put forth by the Corporate Debtor cannot be considered as a dispute in relation to the Financial debt and default in relation to it. Thus, it is clear that there is a default on the part of the Corporate Debtor for a sum exceeding Rs.1 Crore.

10. Further, in relation to the aspect of Corporate Guarantee it is apt to refer to the decision of the Hon'ble Supreme Court in the matter of **Laxmi Pat Surana –Vs- Union Bank of India & Anr.** in Civil Appeal No. 2734 of 2020 wherein it was held that the liability of the Corporate Guarantor is co extensive with that of the Principal Borrower and that acknowledgment given by the Principal Borrower also binds the Corporate guarantor;

> 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.

28. A priori, we find no substance in the argument advanced before us that since the loan was offered to a proprietary firm (not a corporate person), action under Section 7 of the Code cannot be initiated against the corporate person even though it had offered guarantee in respect of that transaction. Whereas, upon default committed by the principal borrower, the liability of the company (corporate person), being the guarantor, instantly triggers the right of the financial creditor to proceed against the corporate person (being a corporate debtor). Hence, the first question stands answered against the appellant.

38. In the present case, the NCLT as well as the NCLAT have adverted to the acknowledgments by the principal borrower as well as the corporate guarantor corporate debtor after declaration of NPA from time to time and lastly on 08.12.2018. The fact that acknowledgment within the limitation period was only by the principal borrower and not the guarantor, would not absolve the guarantor of its liability flowing from the letter of guarantee and memorandum of mortgage. The liability of the guarantor being coextensive with the principal borrower under Section 128 of the Contract Act, it triggers the moment principal borrower commits default in paying the acknowledged debt. This is a legal fiction. Such liability of the guarantor would flow from the guarantee deed and memorandum of mortgage, unless it expressly provides to the contrary.

41. The appellant was at pains to persuade us that the intention behind the communication dated 08.12.2018 sent to the financial creditor by the corporate guarantor (corporate debtor) is a triable matter, as it was sent without prejudice. We are not impressed by this submission. The fact that the principal borrower had availed of credit/loan and committed default and that the (corporate) guarantor/corporate debtor had offered guarantee in respect of the loan account is not disputed. What is urged by the appellant is that the acknowledgment of liability to pay the amount in question was by the principal borrower and that acknowledgment cannot be the basis to proceed against the corporate guarantor (corporate debtor). Section 18 of the Limitation Act, however, posits that a fresh period of limitation shall be computed from the time when the party against whom the right is claimed acknowledges its liability. The financial creditor has not only the right to recover the outstanding dues by filing a suit, but also has a right to initiate resolution process against the corporate person (being a corporate debtor) whose liability is coextensive with that of the principal borrower and more so when it activates from the written acknowledgment of liability and failure of both to discharge that liability.

> 42. Suffice it to conclude that there is no substance even in the second ground urged by the appellant regarding the maintainability of the application filed by the respondent financial creditor under Section 7 of the Code on the ground of being barred by limitation. Instead, we affirm the view taken by the NCLT and which commended to the NCLAT — that a fresh period of limitation is required to be computed from the date of acknowledgment of debt by the principal borrower from time to time and in particular the (corporate) guarantor/corporate debtor vide last communication dated 08.12.2018. Thus, the application under Section 7 of the Code filed on 13.02.2019 is within limitation.

11. Thus, from the facts which are borne on record, as narrated above, would show that the 'debt' is not barred by limitation and the submissions made by the Learned Counsel for the Corporate Debtor on the aspect of limitation, delivery of the notice at incorrect address, date of default, are all required to be eschewed and are not sustainable. Hence, in all respects the 'debt' as claimed by the Financial Creditor is well within the period of limitation and the Corporate Debtor has committed 'default' in repayment of the said 'financial debt'.

12. Also, the default arising in the present Application is much prior to the advent of the Covid-19 pandemic and hence the Corporate Debtor cannot seek shelter also under Section 10A of IBC, 2016

13. In view of the facts as stated *supra* and also in view of the 'financial debt' which is proved by the Financial Creditor and the 'default' being committed on the part of the Corporate Debtor, this Tribunal is left with no other option than to proceed with the present case and initiate the Corporate Insolvency Resolution Process in relation to the Corporate Debtor.

14. The Financial Creditor has proposed the name of **Mr. L Bhadri,** *Reg. No. IBBI/IPA-001/IP-P-02059/2020-2021/13245 (email id:- l.bhadri@gmail.com)* as the Interim Resolution Professional (IRP) who has also filed his written consent in Form 2 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016. The proposed IRP who is appointed shall take forward the process of Corporate Insolvency Resolution of the Corporate Debtor. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Section 15,17,18 of the Code and file his report within 20 days before this Bench. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIRP in relation to the Corporate Debtor in terms of the provisions of IBC, 2016.

15. As a consequence of the Application being admitted in terms of Section 7 of the Code, moratorium as envisaged under provisions

of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor;

a. The institution of suits or continuation of pending suits or proceedings against the respondent including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

b. Transferring, encumbering, alienating or disposing of by the respondent any of its assets or any legal right or beneficial interest therein;

c. Any action to foreclose, recover or enforce any security interest created by the respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the respondent.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

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

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

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

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

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

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

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

> (4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:
>
> Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the Resolution Plan under sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or Liquidation Order, as the case may be.

18. Based on the above terms, the Petition stands **admitted** in terms of Section 7 of the Code and the Moratorium shall come into effect as of this date. A copy of the Order shall be communicated to the Financial Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named shall also be furnished with copy of this Order forthwith by the Registry, who will communicate the initiation

of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned

-Sd-
SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-
R. SUCHARITHA
MEMBER (JUDICIAL)

Raymond