

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

**CP(IB)No.796/KB/2018**

**In the matter of:**

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

**And**

**In the matter of:**

**State Bank of India**, of Corporate Accounts Group Branch, 2<sup>nd</sup> Floor, Sribiddhi Bhavan (formerly name as Reliance House), 34 Jawaharlal Nehru Road, Kolkata-700071.

Corporate office- State Bank of Bhawan, Madame Cama Road, Nariman Point, Mumbai-400021.

**Applicant/Financial Creditor**

**Versus**

**Sungrowth Share & Stocks Limited**, a company, having its registered office at 14, N.S. Road 2<sup>nd</sup> Floor, Kolkata, West Bengal-700001.

**Respondent/Corporate Debtor**

**CORAM: 1. Shri M.B. Gosavi, Member (Judicial)**

**2. Shri Virendra Kumar Gupta, Member (Technical)**

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**Counsels on Record:**

For Financial Creditor

1. Ms. Suhani Dwivedi Advocate
2. Mr. Deepanjan Dutta Roy, Advocate

For Corporate Debtor

1. Mr. Abhrajit Mitra, Sr. Advocate
2. Mr. D.N. Sharma, Advocate
3. Mr. Nilay Sengupta, Advocate
4. Ms. Swati Agarwal, Advocate

**Date of pronouncement of Order: 4<sup>th</sup> September, 2019.**

**ORDER**

Per Shri Madan B. Gosavi, Member(J)

1. State Bank of India (Financial Creditor) filed this application under Section 7 of Insolvency and Bankruptcy Code, 2016 against M/s Sungrowth Share & Stock Limited- one of the Corporate Guarantors of M/s Adhunik Alloys & Power Limited - (the Corporate Debtor in CP(IB)No.387/KB/2017) to start Corporate Insolvency Resolution Process (in short "CIRP") of the Corporate Debtor as it committed default in paying financial debt of Rs. 63,04,53,226/- (Rupees Sixty Three Crore Four Lakh Fifty Three Thousand Two Hundred and Twenty Six Only). It is the debt amount which the Corporate Debtor, M/s Sungrowth Shares and Stocks Limited, is liable to pay the Bank as the Guarantor as per the deed of guarantee dated 23.09.2011.

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2. It is not in dispute that M/s Adhunik Alloys and Power Limited is already admitted in CIRP by this Adjudicating Authority vide order dated 23.07.2017. One M/s SVP Bhagwati Power Steel Limited – the resolution applicant in that proceeding has submitted the resolution plan for Adhunik Alloys & Power Limited. That plan was approved by the Adjudicating Authority (Bench-I). State Bank of India – the Financial Creditor herein was one of the members of the Committee of Creditors (in short "CoC"). In that proceeding, State Bank of India had submitted its claim of Rs. 324.23 Crore. It was considered in that plan. Now, State Bank of India has come out with this proceeding under Section 7 of Insolvency and Bankruptcy Code, 2016 against the guarantor of Adhunik Alloys and Power Limited to start CIRP of the guarantor M/s Sungrowth Share & Stock Limited stating that the Guarantor committed default in paying balance outstanding of M/s Adhunik Alloys and Power Limited which it is bound to clear as per deed of guarantee.
3. The Corporate Debtor did not dispute that it is the guarantor of the corporate loan of M/s Adhunik Alloys & Power Limited. The Corporate Debtor challenged maintainability of this proceeding only on the ground that since the resolution plan of the principal borrower, M/s Adhunik Alloys & Power Limited, is approved wherein State Bank of India accepted certain debt amount with usual hair cut, it being guarantor of Adhunik Alloys and Power Limited stands automatically discharged. It need not pay any outstanding as claimed by the Bank. This proceeding is not maintainable.
4. We heard, Ld. Senior Counsel for State Bank of India and Ld. Senior Counsel for the Corporate Debtor at length. We perused the record.
5. As noted above, only point arises for our consideration is as follows:-

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**"whether by virtue of approval of the resolution plan for Adhunik Alloys and Power Limited –(the Principal Debtor of State Bank of India) and State Bank of India has consented for approval of that plan, right to file this proceeding against Corporate Debtor who is the guarantor of Adhunik Alloys and Power Limited for any default?"**

Our findings to this point is in the affirmative for the following reasons:-

6. The Corporate Debtor is a guarantor of the loan that was disbursed to principal debtor - Adhunik Alloys and Power Limited. Deed of guarantee dated 23.09.2011 is on record. In fact the terms of deed of guarantee are so explicitly clear and as such there is no scope to record any other findings than the fact that the Corporate Debtor is bound to pay back balance outstanding irrespective of the fact whether the creditor, State Bank of India, gave discharge to the principal borrower or did not give such discharge. It will be convenient to note relevant terms in deed of guarantee dated 23.09.2011 (latter renewed on 23.08.2017)

***"Notwithstanding Lender' rights under any security which Lender may have obtained or may obtain, Lender shall have fullest liberty to call upon the Guarantor to pay the principal sum not exceeding Rs. 30.00 Crores (Rupees Thirty Crores only) including interest as well as the costs (as between advocate and client) charges and expenses, and/or other monies for the time being due to Lender in respect of or under the above mentioned credit facilities or any of them without requiring Lender to realise from the Borrower the amount due to Lender in respect of the above***

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**mentioned credit facilities and/or requiring Lender to enforce any remedies or securities available to Lender.**

**The Guarantee herein contained shall not be determined or in any way be prejudiced by any absorption of or by Lender or by any amalgamation thereof or therewith but shall ensure and be available for and by the absorbing or amalgamated Lender or concern.**

**The Guarantee shall be irrevocable and enforced against the Guarantor notwithstanding any dispute between Lender and the Borrower.**

**The Guarantor affirm, confirm and declare that any balance confirmation and/or acknowledgment of debt and /or admission or liability given or promise or part payment made by the Borrower or the authorised agent of the Borrower to Lender shall be deemed to have been made and / or given by or on behalf of the Guarantor themselves and shall be binding upon each of them."**

7. Further in terms of said guarantor's liability to pay the balance outstanding is further reiterated in the following words:-

**"The Guarantee hereby given is independent and distinct from any security that Lender has taken or may take in any manner whatsoever whether it be by way of hypothecation and/or mortgage and/or any other charge over goods, movables or other assets and/or any other property, movable or immovable, and that the Guarantor have not given this guarantee upon any understanding, faith or belief that Lender have taken and/or may hereafter taken any or belief that Lender have taken and/or may hereafter take any or other such security and that notwithstanding the provisions of Sections 140 and 141 of the Indian Contract Act, 1872 or other section of that Act or any other law, the Guarantor**

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***will not claim to be discharged to any extent because of Lender's failure to take any or other such security or in requiring or obtaining any or other such security or losing, for any reason whatsoever including reasons attributable to its defaults and negligence, benefit of any or other such security or any of rights to any or other such security that have been or could have been taken."***

8. Above all, if we peruse the relevant portion of the resolution plan for Adhunik Alloys and Power Limited, approved by this Adjudicating Authority, we certainly come to know that the guarantor is not exonerated or discharged from its liability of paying balance outstanding though SBI - one of the members of the CoC in that proceeding gave consent for the approval of the plan. It is made clear by the Bank while approving the plan that,

*"As the aforesaid credit facilities have been failure secured by hypothecation of the Borrower's movable properties and/or mortgage of the Borrower's immovable properties under separate security documents executed by the Borrower with Lender which security documents would contain stipulations as to insurance assignment and delivery of Insurance Policy to Lender, the margin or value of properties to be maintained and the periodical furnishing of different statements to Lender and other matters, the Guarantor agree that no failure in requiring or obtaining such security or in the observance or performance of any of the stipulations or terms of the said security documents and no default of Lender in requiring or enforcing the observance or performance of any of the said stipulations or terms shall have the effect of releasing or discharging of or in any manner affecting the liability of the Guarantor under these presents."*

9. In short the terms of the deed of guarantee and the above recitals in the resolution plan, saves the Financial Creditor's right to file and

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continue with any proceeding against the Guarantor for recovery balance loan amount.

10. Ld. Senior Counsel, Abhrajit Mitra for the Corporate Debtor submitted that in view of provisions of Section 135 of the Indian Contract Act, 1872, the Corporate Debtor/Guarantor stands automatically discharged because the Financial Creditor herein enter into compromise with principal debtor and gave promise not to sue for the outstanding balance by giving consent for the approval of the resolution plan submitted for the Principal Debtor. He also submitted that any agreement contrary to above provision of law becomes redundant.
11. We considered his submissions. Section 135 of the Indian Contract Act, 1872 states that, **"A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract."**
12. In fact similar controversy had felt for consideration of Hon'ble NCLAT in case of Lalit Mishra and Ors. Vs. Sharon Bio Medicine Ltd. (Company Appeal No. 164 of 2018). Hon'ble Appellate Tribunal considered judgment of the Hon'ble Apex Court in case of Bank of India Vs. V. Ramakrishna and held that, **"Guarantor could not exercise its right of subrogation under the Contract Act as proceedings under the IBC are not recovery proceedings. The object of the proceedings under the IBC is to revive the Company and focus on maximisation of value of its assets and not to ensure that credit is available to all stakeholders."**

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13. Considering provisions of law, we also held that under the I & B Code, 2016, the debtor is discharged on approval and implementation of the resolution plan. The resolution plan is approved when the Adjudicating Authority is satisfied that the resolution plan is approved by CoC and its contents are in accordance with the law. Therefore, the principal debtor discharged under I & B Code, 2016 not on the instance of a creditor but due to operation of law that is approval of the resolution plan. Hence, the Guarantor is not discharged of its liability towards the creditor on discharge of principal debtors liability under the I & B Code, 2016.
14. In view of the above and in our considered opinion, the law on above subject is clearly spelt out by Hon'ble NCLAT and Hon'ble Apex Court. The Guarantor (Corporate Debtor, herein) cannot get shield to protect him from being liable to clear outstanding only because the Bank consented resolution plan of the principal debtor, thereby, giving discharge from paying its debt. Hence, we answer the point in affirmative.
15. Coming back to the factual aspect of this case, there is no dispute to the fact that financial debt more than permissible limit stated under Section 4 of I & B Code, 2016 is due and payable by the Corporate Debtor to the State Bank of India. It has committed default in paying the debt. The Financial Creditor suggested name of one Mr. Kamal Nayan Jain, having registration no. IBBI/IPA-001/IP-P00029/2016-17/10065 for appointment as Interim Resolution Professional. There is nothing on record to show that he is facing any disciplinary proceeding. This application is defect free. We admit the same by following orders:-

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## ORDER

- i) The application filed by the Financial Creditor under section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, **M/s Sungrowth Share & Stocks Ltd.**, is hereby admitted.
- ii) We declare a moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.
- iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

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 (54 of 2002);

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

- v) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.
- vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii) 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.
- ix) Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- x) **Mr. Kamal Nayan Jain**, of 2, Lal Bazar Street 205, Todi Chamber, Kolkata, West Bengal- 700001, email id knjian@knjainco.com having registration no. IBBI/IPA-001/IP-P00029/2016-2017/10065 is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.

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xi) The Financial Creditor to pay sum of Rs. 50,000/- (Rupees Fifty Thousand Only) to IRP as advance fees as per Regulation 33(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 which shall be adjusted from final bill.

xii) The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

xiii) Registry is hereby directed under section 7(7) of the I.B.Code, 2016 to communicate the order to the Financial Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.

List the matter on **18.10.2019** for the filing of the progress report.

Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

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4/9/2019

**(Virendra Kr. Gupta)**  
**Member( T )**

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4/9/2019

**(M.B. Gosavi)**  
**Member ( J )**

Signed on this, the 4<sup>th</sup> day of September, 2019.

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