

**NATIONAL COMPANY LAW TRIBUNAL**  
**MUMBAI BENCH, COURT-II**

**CP (IB) 1106 (MB)2022**

Under section 7 of the Insolvency and  
Bankruptcy Code, 2016

**IN THE MATTER OF**

**STATE BANK OF INDIA**

Stressed Assets Management Branch – II,  
Raheja Chambers, Ground Floor, Wing B,  
Free Press Journal Marg, Nariman Point,  
Mumbai – 400021

**... Financial Creditor**

V/s.

**MMS INFRASTRUCTURE LIMITED**

Plot No. EL/63 TTC Industrial Area,  
Electronic Zone, Mahape, Navi Mumbai,  
Maharashtra - 400701

**... Corporate Debtor**

**Order delivered on :- 05.09.2023**

**Coram:**

**Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)**

**Hon'ble Shri Anil Raj Chellan, Member (Technical)**

***Appearances:***

For the Petitioner : Adv. Prapti Kedia

For the Corporate Debtor : PCS, P. S. Thakre

**ORDER**

***Per: - Kuldip Kumar Kareer, Member (Judicial)***

1. This Company petition is filed by State Bank of India (hereinafter called "**the Petitioner**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against MMS Infrastructure Limited (hereinafter called "**Corporate Debtor**") alleging that the Corporate

debtor committed default in making payment to the Petitioner. This petition has been filed by invoking the provisions of Section 7 Insolvency and bankruptcy code, 2016 (hereinafter called “**Code**”) on the ground that the Corporate Debtor had failed to make payment of a sum of Rs. 75,25,09,151.11/-.

**The Submissions by the Financial Creditor: -**

2. The Financial Creditor claims the certain loan facilities were granted to the Principal borrower namely Maestros Mediline Systems Limited as per the arrangement and supplemental agreement of loan cum hypothecation dated 16.01.2013. The said facilities included fund based facility of Rs. 2480.16 Lakhs and non-fund-based limits of Rs. 401 lakhs (aggregative Rs. 2881.16 Lakhs). As security for the repayment of the facility by the principal borrower, the Corporate Debtor along with certain other persons executed a guarantee agreement dated 16.01.2013 which is annexed as Exhibit. F with the petition guaranteeing a sum. By way of this guarantee of Rs. 28,81,16,000/- plus interest, enhanced interest fees commissive in the event of default committed by the principal borrower.
3. It is further stated in the petition that the principal borrower committed default in the repayments of the aforesaid credit facilities. As a result, the Financial Creditor issued notice under SARFAESI Act 2002 dated 18.09.2014 upon the principal borrower as well as the guarantors including the Corporate Debtor calling upon them to make the payment of the outstanding dues failing which appropriate recourse under the law would be taken.
4. It is further stated that subsequently a settlement was arrived at between the parties following which consent terms dated 17.10.2019 were reduced to writing and filed before the Debt Recovery Tribunal, Mumbai. As per the consent term, the principal borrower along with the guarantors including the Corporate Debtor agreed to pay a sum of Rs. 11.50 Crores towards full and final settlement of the dues of the Financial Creditors. It was further agreed that the amount of Rs.

11.50 Crore would be paid by way of four instalments as under:

- i. 57.55 Lacs by 30.03.2019
- ii. 517.50 Lacs by 31.03.2019
- iii. 250 Lacs by 30.09.2019
- iv. 335 Lacs by 31.12.2019

Out of the aforesaid a sum of Rs. 417.50 Lacs was repaid on 30.03.2019

5. Subsequently, the Corporate Debtor committed default and did not pay the remaining outstanding amount due as per the consent terms. As per clause 9 of the consent terms, it was stipulated that in case of default of payment amount mentioned in the OTS on or before 31.12.2019, the entire amount, as claimed in the OA, would become payable along with interest, cost etc. Accordingly, the applicant became entitled to recover the entire outstanding along with interest, as sought before the Debt Recovery Mumbai.
6. It is further stated in the application that in the meanwhile CIRP was initiated against the principal borrower namely Maestros Mediline Systems Limited by one Moditech International and presently the said principal borrower is under liquidation in pursuance of the order dated 03.11.2020. In the light of the default committed by the Corporate Debtor in respect of the consent terms, the applicant bank is entitled to recover a sum of Rs. 75,25,09,151.11/- Crores including interest, penal interest and other charges. It is further stated the default of the claim took place on 31.03.2019 when the Corporate Debtor along with the original borrower and other personal guarantors fail to pay the second tranche as per these consent terms.

**Reply filed by the Corporate Debtor: -**

7. The Corporate Debtor had filed their Affidavit in Reply (“**Reply**”) and denied each and every statement, contention and allegation made by the Petitioner.
8. In the reply, it has been submitted by the Corporate Debtor that the present application is nothing but an abuse of the process of the law. According to the Corporate Debtor, the principal borrower has already

made the entire payment of the actual due amount as per the consent terms executed between the parties before the DRT. During the pendency of the CIRP against the principal borrower, the applicant bank has recovered the entire remaining amount by selling its assets during the liquidation process. Even the liquidator has confirmed that all the assets of the principal borrower have been liquidated and paid to the Financial Creditors including the applicant bank.

9. It has further been submitted that as per the consent terms executed between the principal borrower and the applicant bank, a sum of only Rs. 11.50 Crore was payable along with the additional cost and charges of Rs.10 Lacs. The consent terms were taken on record by the DRT. As per the consent terms sum of Rs.4.75 Crores was made by the principal borrower to the applicant bank. However, the principal borrower was admitted into insolvency on 28.11.2019. As moratorium was imposed with effect from 28.11.2019, the principal borrower could not pay the remaining amount as per the consent terms. However, the bank has recovered a sum of Rs. 7,21,61,770 during the liquidation process of the principal borrower. That being so, the entire amount of Rs. 11.50 Crores, as per the consent terms, stands already paid. In case any default was committed by the principal borrower in respect of the consent terms, it was due to the imposition of moratorium and on that account neither the principal borrower nor the Corporate Debtor in the capacity of guarantor can be blamed.
10. The respondent Corporate Debtor has denied averments made in the application and in the end, has prayed for the dismissal of the same.

**Findings:**

11. We have heard the Counsel for the parties.
12. The Counsel for the Petitioner/Financial Creditor has argued vide letter dated 16.01.2013 Principal Borrower namely Mestro Mediline System Limited was granted different loan facilities amounting to Rs. 2881.16 lakhs. In order to restore the said credit facilities, the

Corporate Debtor along with certain others executed guarantee agreement dated 16.04.2013 under-taking to repay the amount of 28.81 crores along with interest and other charges. It has further been pointed out by the Counsel for the Financial Creditor that as default was committed by the Principal Borrower, demand notice dated 18.11.2014 under the Sarfaesi Act was issued to the Principal Borrower as well as the guarantors including the Corporate Debtor. Subsequent to the demand notice, proceedings were initiated before the Debt Recovery Tribunal-1, Mumbai against the Principal Borrowers. During the pendency of the said proceedings, consent terms were executed between the parties on 17.10.2019, whereby one-time settlement offer put forward by the principal borrower was accepted, hereby the Petitioner Bank agreed to accept a sum of Rs. 11.60 crores which was payable in four tranches up to 31.12.2019. According to the Counsel for the Financial Creditor, the Principal Borrower as well as the Corporate Debtor failed to adhere to the repayment scheduled set out in the consent terms dated 17.10.2019. Out of the agreed amount of 11.60 crores, only a part payment of Rs. 4.70 crores were paid. The Counsel for the Financial Creditor further submitted that from the circumstances, it is evident that default has been committed by the Principal Borrower as well as the Corporate Debtor/Guarantor. It has also been submitted by the Counsel for the Financial Creditor that the Principal Borrower has already been admitted in CIRP and presently Liquidation proceedings are pending as no Resolution Plan was approved by the CoC in the said CIRP. However, the Petitioner Bank is entitled to proceed against the Corporate Guarantor and, therefore, the Petition deserves to be admitted.

13. On the other hand the Counsel for the Corporate Debtor has argued that the present Petition against the Corporate Guarantor is not maintainable considering the fact that the Corporate Debtor has not been at fault in making the repayment to the Financial Creditor in accordance with the consent terms dated 17.08.2019. In this regard, it has been pointed out that the Principal Borrower was admitted into

CIRP vide order dated 28.11.2019, whereas the entire payment of 11.50 crores was to be paid to the Petitioner Bank by 31.12.2019 as per clause 9 of the consent terms. Owing to the fact that the moratorium against the Principal Borrower was imposed in November 2019 itself, no further payment could be made by the principal borrower. Therefore, it cannot be said to be a case of willful default on the part of the Corporate Debtor. The Counsel for the Corporate Debtor/Guarantor has relied upon **Shock Resort Limited V/s Unified and other Civil Appeal No. 89857 of 2022** whereby it has been held by the Supreme Court that if the appellant was not in a position to deposit the settlement amount at relevant time due to legal impediment and the bar to make the payment of settlement amount in view of the moratorium under the IBC, the appellant should not be made to suffer.

14. Counsel for the Corporate Debtor has further argued that in view of the consent terms dated 17.10.2019 the liability of the principal borrower as well as corporate guarantor was to the tune of Rs. 11.60 crores only out of which his part payment of Rs. 4.70 crores has already been made. As stated above the remaining payment could not be made due to the moratorium and, therefore, the claim of Rs. 75.25 crores lodged by way of the present Petition is not sustainable at all and the Petition deserves to be dismissed.
15. Counsel for the Respondent/Corporate Debtor has further argued that even otherwise the present Petition is barred by time considering the fact that the demand notice was issued 18.11.2014 and thereafter no notice invoking the guarantee was ever issued and, therefore, the guarantee was never invoked. Accordingly, the Petition as against the Corporate Guarantor/Respondent is liable to be dismissed on the ground of limitation also.
16. We have weighed the contentions raised by the counsel for the parties and have gone through the record.
17. It has been contended on behalf of the Corporate Debtor that the

present Petition is barred by time considering the fact after the demand notice dated 18.09.2014 was issued, no other notice was issued to invoke the guarantee. Therefore, the guarantee was never invoked and if the notice dated 18.09.2014 is to be taken into consideration, the present Application should have been filed within a reasonable period from the said notice. As a result, the Application is clearly barred by time.

18. We have thoughtfully considered the above contention. A perusal of the notice dated 18.09.2014 reveals that by way of this notice the Corporate Debtor along with the Principal Borrowers and other Personal Guarantors were called upon to pay the entire outstanding amount within a period of 21 days failing which the appropriate proceedings would be initiated. In the light of whatever has been mentioned in the notice dated 18.09.2014, it cannot be said that the guarantee was not formally invoked. Moreover, in the guarantee deed dated 16.01.2013, it is clearly stipulated that the guarantor shall pay unconditionally to the Bank merely on demand by the Bank the whole of such Principal sum together with interest, costs, charges, expenses etc. The guarantee deed does not provide that a separate or specific invocation notice was required to be given before proceeding against the guarantor. Even otherwise the Corporate Debtor along with the Principal Borrower and other guarantors entered into consent terms with the Applicant bank on 17.10.2019 whereby it acknowledged its liability as a guarantor to pay a sum of Rs. 11.50 Crores to the bank in four tranches, latest by 31.12.2019. Since the debt was acknowledged unequivocally by the Corporate Debtor by way of executing consent terms on 17.10.2019, the present Application, which was filed on 23.08.2022, cannot be said to be barred by time.
19. Secondly, it has been argued on behalf of the Corporate Debtor that since the entire amount stands already paid to the Applicant bank, the present Application cannot be maintained. In this regard, it has been pointed out that as per the consent terms dated 17.10.2019, a total amount of Rs. 11.50 Crores was to be paid to the Applicant bank

by 31.12.2019. Admittedly, a sum of 4.75 Crore was paid after the execution of the consent terms. The remaining amount could not be paid as the Principal borrower i.e. Maestros Mediline Systems Private Limited was admitted into CIRP in 28.11.2019. Therefore, the last tranche could not be paid for which neither the Principal Borrower nor the Corporate Debtor in the capacity of a Guarantor can be blamed. It has also been contended on behalf of the Corporate Debtor that after the admission of the Principal Borrower into CIRP, liquidation proceedings were initiated and during the course of the liquidation proceedings of the Principal Borrower a sum of Rs. 7.21 Crore has been recovered as is evident from the email Annexure 4 attach with the reply. Therefore, nothing remains recoverable either from the Principal Borrower or from the guarantor i.e. the Corporate Debtor.

20. So far as the question of the disability of the Principal Borrower or for that matter of the Corporate Debtor to repay the remaining amount as per the consent terms in view of the imposition of moratorium w.e.f. 28.11.2019 is concerned, in our considered view, the Corporate Debtor cannot be allowed to draw any advantage out of it. The moratorium, if any, which came into being on 28.11.2019 when an admission order was passed by NCLT Mumbai in a Petition u/s 9 of the Code filed by M/s Moditech International against the Principal Borrower due to a default committed by the latter in respect of an Operational Debt of Rs. 1.28 Crores. The Applicant bank cannot be put to disadvantage on this account. In any case, the consent terms dated 17.10.2019 were breached. Here it is further worthwhile to mention that as per the consent terms, the Principal Borrower as well as the Corporate Debtor were required to jointly pay a sum of Rs. 8.25 Crores by 30.09.2019 whereas even till that date only sum of Rs. 4.75 Crores were paid. Therefore, the violation of the consent terms by the Corporate Debtor cannot be solely attributed to the moratorium imposed on 28.11.2019 as the default of the consent terms had already taken place in September, 2019 itself, as stated above. Therefore, the argument raised on behalf of the Corporate

Debtor is not sustainable in the eyes of law. In the light of these facts, the law laid down by the Hon'ble Supreme Court in Shekhar Resorts Limited's case (supra) relied upon by the Corporate Debtor cannot be applied to the facts and circumstances of the instant case.

21. It is further noticeable that it was stipulated in the consent terms itself that in case of default of payment of the OTS terms on or before 31.12.2019 the entire amount claimed in the OA would be payable along with interest cost etc. Therefore, it cannot be said that the Corporate Debtor along with the Principal Borrower was required to pay only a sum of Rs. 11.50 Crores as per the consent terms. Rather, due to default in payment of the consent terms much before 31.12.2019, as stated above, the entire amount claimed by way of OA filed before DRT became due and payable.
22. In this context it is further pertinent to mention that even if a sum of Rs. 7.21 Crore was realized during the liquidation process of the Principal Borrower i.e. Maestros Mediline Systems Pvt. Ltd., it cannot be said that the entire liability of the Corporate Debtor as well as the Principal Borrower has come to an end. It is further noteworthy that the Applicant bank has lodged a claim of Rs. 76.73 crores before the Liquidator against which a claim of 73.73 crores was admitted. As the Applicant bank has recovered only a sum of Rs. 7.21 crores in the liquidation proceedings of the Principal Borrower, it cannot be said that the liability of the Corporate Debtor being guarantor has come to an end or that the Applicant bank is not entitled to proceed against the Corporate Debtor.
23. No other points have been raised.
24. From the foregoing discussion, it become evident that the Applicant Bank has been able to establish the existence of Financial debt in respect of default has been committed by the Corporate Debtor in the capacity of a guarantor. Besides, the Application u/s 7 of the Code has been filed within the period of limitation. Therefore, we find the present case to be a fit one to be admitted u/s 7 of the Code, 2016. It

is ordered accordingly in the following terms:

**ORDER**

- a. **The above Company Petition No. (IB) - 1106(MB)/2022 is hereby admitted** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **MMS Infrastructure Limited.**
- b. This Bench hereby appoints Mr. Jitendra Kumar Jain, Registration No: IBBI/IPA-002/IP-N00033/2016-17/10070 as the Interim Resolution Professional having registered office at C/o Level 9, Platina, C-59, G Block, BKC, Bandra (East), Mumbai - 400051, email :- [jit1.jain@gmail.com](mailto:jit1.jain@gmail.com), to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Financial Creditor shall deposit an amount of Rs. 5 Lakhs towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- d. That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial

Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the Corporate Debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the

concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.

**Accordingly, this Petition is admitted.**

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

**Sd/-**

**ANIL RAJ CHELLAN**  
**Member (Technical)**

*ANKIT*

**Sd/-**

**KULDIP KUMAR KAREER**  
**Member (Judicial)**