

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

CP (IB) No. 173/Chd/Chd/2019

**Under Section 7 of the
Insolvency & Bankruptcy
Code, 2016**

In the matter of:

Punjab National Bank

Through its Attorney Sh. V. Vishwanadh, Chief Manager

Having its Head Office at Plot No.4

Sector 10, Dwarka, New Delhi-110075

Branch Office- Large Corporate Branch
(LCB), PNB House, Bank Square, Sector
17-B, Chandigarh, PIN-160017

....Petitioner-Financial Creditor

Vs.

Himalayan Vegefruit Ltd.

Having its registered office at # 1536

Sector 33-D, Chandigarh, PIN 160033

CIN: U15134CH1993PLC013679

...Respondent-Corporate Guarantor

Judgment delivered on: 10.01.2023

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

Present:

For the Petitioner-Financial Creditor : Mr. D.K. Gupta, Advocate

For the Respondent-Corporate Debtor : Proceeded ex parte on 06.12.2022

PER: HARNAM SINGH THAKUR, MEMBER (JUDICIAL)

JUDGMENT

The present petition has been filed by **Punjab National Bank** (hereinafter referred to as 'Petitioner/Financial Creditor') through Sh. V. Vishwanadh, Chief Manager under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to initiate the Corporate Insolvency Resolution Process ('CIRP') against **Himalayan Vegefruit Ltd.** (hereinafter referred to as 'Respondent/Corporate Debtor'). The petition is signed by Sh. V. Vishwanadh, with the affidavit verifying the contents of the application appended thereto.

2. The Corporate Debtor is stated to be incorporated on 06.09.1993 under the Companies Act, 1956. The company having its registered office at #1536 Sector 33-D, Chandigarh, PIN 160033. Therefore, the jurisdiction lies with this Bench of the Tribunal. The master data of the corporate debtor is attached as Annexure-4 (Pg No.93-99) of the petition.

3. The brief facts of the case are that the corporate guarantor carries on the business as manufacturers, bottlers, caners, importers, exporters, buyer, sellers or otherwise deal in all types of beverages, juices, soft drinks, and processing of fruits and vegetable products. The firm requested financial creditors for grant of financial assistance of Rs.300 Lakh as CC Limit which was sanctioned by the bank. The board of Directors of corporate debtor vide Resolution dated 02.02.2007 resolved to give corporate guarantee in favour of principle borrower. M/s Hillcrest Foods, through its partners requested the bank for enhancement of CC Limit from Rs.300 Lakhs to Rs.500 Lakhs which was sanctioned by financial

creditor vide sanction dated 05.02.2008. Vide resolution dated 05.02.2008, the corporate guarantor, resolved to give corporate guarantee in favour of principle borrower. The borrower firm got CC Limit enhanced from Rs.500 Lakhs to Rs.700 Lakhs, vide sanction dated 28.04.2012, the corporate guarantor, resolved to give corporate guarantee in favour of principal borrower. The borrower further requested to enhance CC Limit from Rs.700 Lakhs to Rs.1050 Lakh and grant of fresh term of Rs.50 Lakh by way of take over from Himachal Pradesh Financial Corporation which was sanctioned on 03.08.2013 and fresh term loan of Rs.50 Lakh was approved. The borrower further requested to enhance CC Limit from Rs.1050 Lakhs to Rs.1100 Lakh which was sanctioned by the financial creditor on 29.07.2013. The board of Directors of Corporate Guarantor vide Resolution dated 25.05.2014, authorised its Director to approach the financial creditor bank to enhance the CC Limit from Rs.1050 Lakhs to Rs.1500 Lakh. The principle borrower vide balance and confirmation letter dated 19.09.2017 confirmed the correctness of the balance amount of Rs.15,15,04,294.48/- (Rupees Fifteen Crores Fifteen Lakhs Four thousand Two Hundred Ninety-Four and Paise Forty Eight Only) in CC account. The Hillcrest principal borrower violated terms and conditions of loan agreement and petitioner informed borrower and corporate guarantor regarding the irregularity in the account and requested to pay the overdue amount. The account of the firm was declared NPA on 30.06.2018. The financial creditor initiated SARFAESI action and issued notice dated 01.08.2018. The financial creditor bank also filed a recovery suit at the Debt Recovery Tribunal.

4. It is stated in Part-IV of Form No.1 that the total amount claimed to be in default is Rs. 17,41,01,685/- (Rupees Seventeen Crores Forty-One Lakh One

Thousand Six Hundred Eighty-Five Only) and date of default is 30.06.2018 i.e. when the account was declared NPA. Copy of Sanction (Annexure A-6, A-7, A-18, & A-20), Calculation of interest/default (Annexure A-8), ROC charge (Annexure A-9), Notice u/s 13(2) (Annexure A-11), CIBIL report (Annexure A-13), statement of account-CC (Annexure A-14), Computer Certificate (Annexure A-15), Partnership deed (Annexure A-16), Resolutions (Annexure A-17, A-19, A21 & A-22), Hyp. Agreements (Annexure A-23, A-24, A-25, A-30, & A-31), Agreements of Guarantee (Annexure-A-26, A-27, A-28, A-32, A-33 & A-34), Sale Deed (Annexure A-36 & A-36/T), Title Deed register (Annexure-37), CERSAI Record (Annexure-A39) is attached with the main petition.

5. The notice of this petition was issued to the respondent corporate debtor vide order dated 09.05.2019 to show cause as to why this petition be not admitted. The Affidavits of service were filed vide Diary No. 3032 dated 17.06.2019. Reply has been filed vide diary No.3984 dated 08.08.2019 wherein it is stated that hypothecation agreement and agreement of guarantees are insufficiently stamped and are executed on an unauthorised stamp papers. Thus, CIRP can only be initiated against the corporate debtor which in this case is M/s Hillcrest Foods, who has not been arrayed as necessary party. Insolvency process cannot be first initiated against the respondent without proceeding and exhausting the relief provided against the principal debtor. The petitioner till date has failed to invoke the corporate guarantee given by respondent and raising a specific demand to this effect failing which the respondent cannot become a corporate financial debtor. The Insolvency and Bankruptcy Code does not contain provisions prescribing inter-se rights, obligations and liabilities of corporate guarantors. The synopsis has been filed by the applicant vide Diary No.00555/1 dated 15.11.2022.

6. The rejoinder has been filed vide diary No.4109 dated 16.08.2019 wherein it is stated that all loan documents have been adequately stamped. The corporate guarantor is one of the partners of M/s Hillcrest Foods as per partnership deed dated 15.09.2010 and has executed various guarantee agreements. The borrower and guarantor stand on the same footing, the guarantor is liable to pay the entire dues of the financial creditor. During the course of proceedings, respondent corporate guarantor did not choose to appear and ultimately proceeded against ex parte vide order dated 06.12.2022.

7. We have heard the learned counsel for the petitioner and have also perused the record carefully.

8. Section 7(5)(a) of the Code is as follows:-

*“5) Where the Adjudicating Authority is satisfied that—
(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application.”*

9. The issue for consideration is whether the present application is filed within limitation. It can be seen from the records that the date of default is 30.06.2018 i.e. when the account was declared NPA. The present petition is filed vide diary No.1318 dated 18.03.2019. It can be said that the present petition is well within the period of limitation of three years.

10. Another issue for consideration is whether there is a default in payment or not. It is observed from the record that in the present case, the default is evidenced by copy of Sanctions (Annexure A-6, A-7, A-18, & A-20), Calculation of interest/default (Annexure A-8), ROC charge (Annexure A-9), Notice u/s 13(2) (Annexure A-11), CIBIL report (Annexure A-13), State of account-CC (Annexure A-14), Computer Certificate (Annexure A-15), Partnership deed (Annexure A-16),

Resolutions (Annexure A-17, A-19, A21 & A-22), Hyp. Agreements (Annexure A-23, A-24, A-25, A-30, & A-31), Agreements of Guarantee (Annexure-A-26, A-27, A-28, A-32, A-33 & A-34), Sale Deed (Annexure A-36 & A-36/T), Title Deed register (Annexure-37), CERSAI Record (Annexure-A39) is attached with the main petition. Although, it is pleaded on behalf of the respondent corporate guarantor that without taking any action against the principal borrower M/s Hillcrest Foods no action under Section 7 is maintainable against the respondent corporate guarantor. However, this plea of respondent is not tenable because it is settled principle of law that liability of principal borrower and guarantor is joint and several as well as co-extensive. Moreover, respondent guarantor is a partner of M/s Hillcrest Foods principal borrower as is evident from the partnership deed (Annexure A-16). Therefore, it cannot be said that the present petition is not maintainable against the respondent corporate guarantor. In these circumstances, respondent corporate guarantor cannot shirk its liability under the garb of the plea that no action has been taken against the principal borrower before filing the present application against respondent.

Here, reliance can be placed upon the case of *SBI vs. Mahendra Kumar Jijodia (2022) ibclaw.in 89 NCLAT*, wherein the NCLAT took the view that even in situations where corporate insolvency of a corporate debtor has not been initiated, an application for initiation of personal insolvency of the guarantor can be entertained by the Adjudicating Authority.

11. The application filed in the prescribed Form No.1 is found to be complete. Another condition is that there are no disciplinary proceedings pending against the proposed Resolution Professional. In the present case, in Part III of Form 1, Mr. Bhusan Sharma, had been proposed as Interim

Resolution Professional (IRP). Form No.2 dated 26.02.2019 has been submitted by Interim Resolution Professional i.e. Mr. Bhusan Sharma is attached at Annexure-A-5 of the application. The Law Research Associate of this Tribunal has checked the credentials of Mr. Bhusan Sharma, and there is nothing adverse against him. In view of the above, we appoint Mr. Bhusan Sharma, Registration No.IBBI/IPA-001/IP-P00351/2017-18/10652, Email: bhushansharma@hotmail.com, Mobile No. 9878009920, the Interim Resolution Professional with the following directions: -

- i.) The term of appointment of Mr. Bhusan Sharma shall be in accordance with the provisions of Section 16(5) of the Code;
- ii.) In terms of Section 17 of the Code, from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the Corporate Debtor shall report to the Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the Code, including taking control and custody of the assets over which the Corporate Debtor has ownership rights recorded in the balance sheet of the Corporate Debtor, etc. as provided in Section 18 (1) (f) of the Code. The Interim Resolution Professional is directed to prepare a complete list of the inventory of assets of the Corporate Debtor;

- iii.) The Interim Resolution Professional shall strictly act in accordance with the Code, all the rules framed thereunder by the Board or the Central Government, and in accordance with the Code of Conduct governing his profession and as an Insolvency Professional with high standards of ethics and morals;
- iv.) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of Section 13 (1) (b) of the Code read with Section 15 calling for the submission of claims against Corporate Debtor;
- v.) It is hereby directed that the Corporate Debtor, its Directors, personnel, and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the Corporate Debtor as a going concern and extend all cooperation in accessing books and records as well as assets of the Corporate Debtor;
- vi.) The Suspended Board Of Directors is directed to give complete access to the Books of Accounts of the corporate debtor maintained under section 128 of the Companies Act. In case the books are maintained in the electronic mode, the Suspended Board of Directors are to share with the Resolution Professional all the information regarding Maintaining the Backup and regarding Service Provider

kept under Rule 3(5) and Rule 3(6) of the Companies Accounts Rules, 2014 respectively as effective from 11.08.2022, especially the name of the service provider, the internet protocol of the Service Provider and its location, and also address of the location of the Books of Accounts maintained in the cloud. In case accounting software for maintaining the books of accounts is used by the corporate debtor, then IRP/RP is to check that the audit trail in the same is not disabled as required under the notification dated 24.03.2021 of the Ministry of Corporate Affairs. The statutory auditor is directed to share with the Resolution Professional the audit documentation and the audit trails, which they are mandated to retain pursuant to SA-230 (Audit Documentation) prescribed by the Auditing and Assurance Standards Board ICAI. The IRP/Resolution Professional is directed to take possession of the Books of Account in physical form or the computer systems storing the electronic records at the earliest. In case of any non-cooperation by the Suspended Board of Directors or the statutory auditors, he may take the help of the police authorities to enforce this order. The concerned police authorities are directed to extend help to the IRP/RP in implementing this order for retrieval of relevant information from the systems of the corporate debtor, the IRP/RP may take the assistance of Digital Forensic Experts empanelled with this Bench for this purpose. The Suspended Board of Directors is also directed to hand over all user IDs and passwords relating to the corporate debtor, particularly for government portals, for various compliances. The Interim Resolution

Professional is also directed to make a specific mention of non-compliance, if any, in this regard in his status report filed before this Adjudicating Authority immediately after a month of the initiation of the CIRP.

- vii.) The Resolution Professional is directed to approach the Government Departments, Banks, Corporate Bodies and other entities with requests for information/documents available with those authorities/institutions/others pertaining to the corporate debtor which would be relevant in the CIR proceedings. The Government Departments, Banks, Corporate Bodies and other entities are directed to render the necessary information and cooperation to the Resolution Professional to enable him to conduct the CIR Proceedings as per law.
- viii.) The Interim Resolution Professional shall after collation of all the claims received against the Corporate Debtor and the determination of the operational position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying the constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene the first meeting of the Committee within seven days of filing the report of the constitution of the Committee; and
- ix.) The Interim Resolution Professional is directed to send a regular progress report to this Tribunal every fortnight.

12. In the given facts and circumstances, the present petition being complete and having established the default in payment of the Financial Debt for the default amount being above the threshold limit, the petition is admitted in terms of Section 7(5) of the IBC and accordingly, also direct moratorium in terms of sub-section (1) of Section 14 of the code to take effect as below:

- a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel, or other authority;
- b) transferring, encumbering, alienating, or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Operational Assets and Enforcement of Security Interest Act, 2002; and
- d) 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) It is further directed that the supply of essential goods or services to the corporate debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period. The provisions of Section 14(3) shall, however, not apply to such transactions as may be notified by the Central Government in consultation with any operational sector regulator and to a surety in a contract of guarantee to a corporate debtor.
- f) The order of moratorium shall have effect from the date of this order till 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 the corporate debtor under Section 33 as the case may be.

13. We direct the Financial Creditor to deposit a sum of ₹1,00,000/- (Rupees One Lakh Only) with the Interim Resolution Professional, to meet out the expense to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The amount, however, is subject to adjustment by the Committee of Creditors as accounted for by the Interim Resolution Professional on the conclusion of CIRP.

14. A copy of the order shall be communicated to both parties. The learned counsel for the petitioner shall deliver a copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send a copy of this order to the Interim Resolution Professional at his email address forthwith.

15. The petition is admitted accordingly.

Sd/-

(Subrata Kumar Dash)
Member (Technical)

January 10, 2023

SD/TB

Sd/-

(Harnam Singh Thakur)
Member (Judicial)