

THE NATIONAL COMPANY LAW TRIBUNAL

KOCHI BENCH, KOCHI

TIBA/19/KOB/19

(Under Section 7 of IBC 2016 r/w rule 4 of IB(A&AA) RULES, 2016

Order delivered on 19th November 2019

Coram: 1. Hon'ble Shri Ashok Kumar Borah, Member (Judicial)
2. Hon'ble Shri Veera Brahma Rao Arekapudi, Member (Technical)

In the matter of

The South Indian Bank Ltd.]
Round South,]
Thrissur,] : Financial Creditor/Applicant
Represented by Asst. General Manager]

Vs.

M/s Atlas Gold Townships (India) Pvt. Ltd.]
Regd Office: XI/305 H, Opp. CIAL]
Vappalassery, Nedumbassery] : Corporate
Debtor/Respondent]
Angamaly, Kochi – 683 572]

Parties/Counsels Present:

For Operational Creditor/Applicant : Shri Sunil Sankar, Advocate

For Corporate Debtor/Respondent : Shri Shameem Ahamed M.P., Advocate

ORDER

1. The South Indian Bank Limited filed this Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ["I & B Code" for short] read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, ("I & B Rules" for short) against M/s. Atlas Gold Township Pvt. Ltd, treating as 'Corporate Guarantor/ Corporate Debtor' with a request to initiate Corporate Insolvency Resolution Process



2. South Indian Bank (India) Limited is a Banking Company registered under Companies Act, having its Registered Office at SIB House, Mission Quarters T B Road, Thrissur – 680 001 (Hereinafter referred as 'Financial Creditor'). The Corporate Debtor Company is a private limited company which is a part of Atlas Group of companies, registered under the Companies Act having its Registered Office in XI/305 H, Opp. CIAL, Vappalassery, Nedumbassery, Angamaly – 683 572. The Authorised and Paid-up Share Capital of the Corporate Debtor Company is ₹ 50,00,00,000.00 and ₹ 22,00,00,000.00 respectively (Hereinafter referred as "Corporate Guarantor/ Corporate Debtor").

Applicant's Submission

3. The counsel for the Financial Creditor through his application stated that M/s. Atlas Jewellery Pvt. Ltd. (Hereinafter referred as 'Principal Borrower') had borrowed funds from them and the Corporate Debtor Company herein stood as a Corporate Guarantor to Principal borrower who is due to pay an amount of Rs. 241,24,15,790.97 as on 31.12.2015, to South Indian Bank, Thrissur Branch (Hereinafter referred as the 'Bank').
4. The Principal borrower and the group entities including the corporate debtor stood as guarantors and had also mortgaged certain properties. The total loan amount sanctioned by the applicant bank to the principal borrower, was to the tune of ₹ 237 Crores as on 21.03.2013 and 21.10.2013.
5. The Bank had initiated recovery proceedings under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002 and also initiated Original suit before the Debt Recovery Tribunal, Ernakulam. An amount of ₹ 259.64 Crores is due as on 23.10.2019, under the credit facilities availed by the principal borrower for which the corporate debtor herein is a guarantor, and hence claimed that there is a 'debt due'.



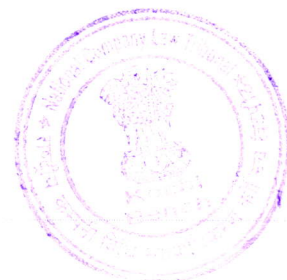
Submissions by the Corporate Debtor

6. The Corporate Debtor, through its preliminary objection opposes the admission of the application for insolvency resolution. It is submitted that the documents submitted by the Bank are ex-facie contrary to law and facts and also barred by limitation and not maintainable. The counsel further prayed to dismiss the application "*in-limine*" without admitting the application.
7. The learned counsel for corporate debtor submitted that the Bank had obtained signatures of the guarantors including the corporate debtor herein on various pre-printed documents as part of the documentation procedure.
8. The counsel submitted that the principal borrower could not meet its commitments under the Loan Agreement, thereby, the loans were classified as Non-Performing Assets by the Financial Creditors. The counsel further submitted that without following any of the mandatory proceedings under the SARFAESI Act, the Bank had proceeded to sell all the immovable properties mortgaged by the principal borrower as well as the guarantors by invoking the powers vested with them. No details had been forwarded by the Bank regarding the amount recovered by it by way of sale of properties after 31.12.2015.
9. The counsel for the corporate debtor claimed that the applicant bank had recovered the entire alleged dues of the Principal borrower by way of sale of immovable and movable properties which are of high value in nature and they have collected more amount than what were the actual dues from the principal borrower.
10. Further, the principal borrower and its directors filed a Writ Petition No. 27923 of 2018 before the Hon'ble High court of Kerala challenging recoveries made by the Bank under the SARFAESI Act.
11. The counsel for the Corporate Debtor contested the instant application on the following points:
 - On the grounds of limitation



- On the grounds that the application is not 'complete' as mandated under Section 7 (3) of I &B Code.
12. In the guarantee agreement entered between the parties the guarantor is liable to make the payment upon "demand". Therefore, the applicant bank had invoked guarantee vide letter dated 01.01.2016. Based on this letter the Financial Creditor called upon to pay the amount 'immediately'. However, by assuming that the guarantee invocation letter was served on 01.01.2016, i.e., the date of default would be 01.01.2016. that being the limitation got expired on 31.12.2018. as The Application was filed under Section 7 of the I & B Code in April 2019, it is therefore clearly time-barred. Thereby, prayed to dismiss the application on this ground alone.
13. The counsel for the Corporate Debtor relied upon the Supreme Court *judgement dated 18.09.2019, Gauravindhbai Dave v. Asset Reconstruction Company India Ltd and another (Civil Appeal No. 4952 of 2019)* stated that the present case being "an application" which is filed under section 7, would fall only within the residuary of Article 137 of the Limitation Act, which is as under:

PART II Other applications			
Sl.No.	Description of Suit	Period of Limitation	Time from which period begins run
137.	Any other application for which no period of limitation is provided elsewhere in this Division.	Three Years	When the right to apply accrues.



14. The second contention raised by the counsel for the corporate debtor is that the application is not complete as it does not include any record of default from the information utility. It is clearly stated in Section 7 (3) (a)

The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

15. Therefore, the counsel for the corporate debtor claimed that “or such other record” appearing in Section 7 (3) of I & B Code cannot be read in isolation and it has to be read as “such other record or evidence of default” which is followed by “as may be specified”. The words ‘such other’ is common to ‘record and evidence of default’ which is followed by ‘as may be specified’. Therefore, the record of default can be either of

a) record of default from an information utility or

b) other records/ or evidence as may be specified by the board.

Since there is no alternative records/evidence specified by the Insolvency and Bankruptcy Board of India (‘Board’), the acceptable documents can be only the record of default authenticated by information utility. The counsel further submitted that the only Information Utility registered by Insolvency and Bankruptcy Board of India is National E-Governance Service Limited (NeSL), the Reserve Bank of India had issued a circular (Exhibit B4 with the counter statement) directing the Bank to put in necessary infrastructure, so as to comply with the provisions of I & B Code.

16. The counsel for the corporate debtor submitted that the objective of having an authentication by a 3rd party regulated body is clearly mentioned in clauses of IBC Bill, 2016.

“..... The requirement to provide proof of default ensures that financial creditor do not file frivolous applications or applications which prematurely put the corporate debtor into insolvency resolution proceedings for extraneous considerations. The

adjudicating authority/ Tribunal can, within fourteen days from the date of receipt of the application, ascertain the existence of a default from the records of a regulated information utility.....”

It was further submitted that it is not left to the discretion of the applicants to bring any documents of their choice. Even assuming that a statement of accounts is acceptable for arguments sake, without admitting, here in this application there is no such bank statements produced by the applicant showing the outstanding as on the date of filing the application.

17. The corporate debtor further submitted that it is a basic principle of law that if a statute mandates a thing has to be done in a particular manner, that has to be done in that manner alone and not in any other way. The Corporate Debtor relies upon the judgement of Supreme Court in the case of following:-

- *Ramachandra Keshav Adke (Dead) by Lrs. And Ors. Vs. Govind Joti Chavare and Ors. Reported in AIR 1975 SC 915.*
- *Shiv Kumar Chandha and Ors. Vs. Municipal Corporation of Delhi and Ors. (1993) 3 SCC 161.*
- *M. Shankara Reddy and Ors. Vs. Amara Ramakoteswara Rao and Ors (AIR 2018 AP18).*

18. The counsel claimed that the Bank itself admitted that they have sold all the securities which they were holding. There was no notice served on the Guarantor, before they have sold such securities. The notice referred by the counsel for the applicant bank is not a notice served on guarantor, but on the principal borrower. The Guarantee Agreement therefore become void and the counsel prayed to dismiss the above application.

Rejoinder and its reply

The Financial Creditor filed rejoinder denying the contentions raised in the objection by reiterating what has been stated in its application.

19. The learned counsel stated that the averment raised by the Corporate Debtor that the Bank had obtained signatures of the respondent on various



pre-printed documents are part of the documentation procedure is mischievous. All documents were executed by the corporate debtor, as per the requirements of the credit facility. He further submitted that it is an admitted fact that the principal borrower could not meet the commitments under the loan agreement. Due to the default caused in repayment by the principal borrower, the credit facilities were classified as Non-Performing Assets on 31.12.2015 in accordance with the guidelines of the Reserve Bank of India.

20. The counsel for the financial creditor further submitted that in accordance with the provisions of the SARFAESI Act, 2002 and the interim directions of Hon'ble Debt Recovery Tribunal (DRT) (OA. No. 40 of 2016), the hypothecated movables such as watches, gold and diamond ornaments were sold through public auction. The details of the recoveries made through the sale of immovable secured assets under securitisation proceedings were annexed with rejoinder as Annexure I (41). The recoveries made under SARFAESI proceedings are duly credited into the loan account of the principal borrower and the financial creditor filed an affidavit in this regard. The O.A which has been filed before the Debt Recovery Tribunal is still pending and the counsel for the principal borrower had not filed any written statements disputing the liability.
21. The counsel for the Bank admits that the bank guarantee was invoked on 01.01.2016 and time was available till 01.01.2019. The counsel further submitted that the principal borrower was the 3rd petitioner in the Writ petition filed in August, 2018, which was dismissed by the Hon'ble High court of Kerala, i.e., WPC No. 27923 of 2018. In this Writ Petition, the principal borrower had admitted the availing of credit facilities from the Financial Creditor before the Hon'ble High Court. The admission by the principal borrower is binding on the guarantor. It was further reaffirmed that the classification as Non-Performing Asset is a record of 'default' and pendency of DRT proceedings cannot, in any manner interdict an enquiry by this Hon'ble Tribunal.



22. The learned counsel for the corporate debtor rebutted that there is no acknowledgement of any sort of liability made by the principal borrower in the Writ petition. Under Section 18 of the Limitation Act, the acknowledgement has to be an 'acknowledgement of liability'. The said writ petition only narrates the facts which has led to the filing of the Writ Petition and nowhere it states that the principal borrower owes any debt to the Applicant Bank. He has also relied on Allahabad High Court judgement in the case of **Gulam Murtaza v. Fasiunnissa Bibi (AIR 1935 ALL 129)**

"In order that a written acknowledgment may be of avail to a plaintiff under Section 19, Limitation Act , it is necessary that such acknowledgment must have been made before the expiration of the period prescribed for the suit. It is equally necessary that it must be a clear and unambiguous acknowledgment specifically admitting liability in respect of the debt sued upon and it must be signed by the party or by his authorised agent. If an admission amounts to such an acknowledgment, then if it is made before the expiry of the period, it is helpful and the suit can be maintained for the recovery of the earlier debt, the time being extended by the acknowledgment. In such an event there is no question of there being a fresh cause of action or a fresh promise to pay a debt which can be sued upon. On the other hand, if the acknowledgment is made after the period of limitation has expired, then the acknowledgment is of no utility and cannot save limitation."

Findings

23. This is an application filed under section 7 of I & B Code. The Corporate Debtor questioned the maintainability of the application stating that:
- a. the application is incomplete and;
 - b. barred by limitation.
24. What are the factors to be considered in a case of this nature is noted by sthe Hon'ble Supreme Court in **Innoventive Industries Ltd. v. ICICI Bank**

& Anr. (Civil Appeal Nos.8337 - 8338 of 2017) SC. It is good to read Paragraph 30 in the said judgment. It read as follows:

".....30. On the other hand, as we have seen, in the case of a Corporate Debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the Financial Creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise. "

25. In the present application, South Indian Bank had granted credit facility amounting to Rs.237 Crore in favour of the principal borrower and in pursuance of the sanction letter issued by the Bank, the Corporate Debtor herein, had executed various documents, including a guarantee agreement and letter confirming deposit of Title Deeds. Thereafter, the principal borrower defaulted in payment of the loan. The recovery proceedings under DRT was initiated by the financial creditor in Debt Recovery Tribunal II, Kerala & Lakshadweep, for recovery of dues are well within the period of limitation. The Corporate Debtor herein is a guarantor vide an Agreement of Guarantee dated 23.03.2013 regarding the loans given to M/s Atlas Jewellery Private Limited which was invoked on 01.01.2016. The notice of invocation of guarantee was issued by the Financial Creditor on 01.01.2016 to the Corporate Debtor. This application was considered under a question of Limitation as the application was placed before the Tribunal after 3 years on 10.04.2019.

For the purpose, we relied on clause 6 of the Agreement of Guarantee, stated as:

'6. The Guarantor(s) also agree that any admission or acknowledgement in writing by the Borrower of the amount of indebtedness of the Borrower or otherwise in relation of the subject matter of this guarantee, shall be binding on the guarantor(s) and

the guarantor(s) accept the correctness of any statement of account served on the Borrower by the Bank and the same shall be binding and conclusive as against the guarantor(s) also and the guarantor(s) agree that in making an acknowledgement or making a payment the Borrower shall be treated as duly authorized agent of Guarantor(s) for the purpose of Section 18 and 19 of Indian Limitation Act, 1963.'

In the light of the above clause, in the guarantee agreement, which boils down to whether the principal borrower has furnished any acknowledgement of debt or revival letter regarding his loan amount.

To support his argument that the application is not barred by limitation, the counsel for the Financial Creditor has drawn an attention to the Writ Petition filed by the principal borrower as 3rd petitioner with the Hon'ble High Court of Kerala in August 2018 questioning the Bank's right to recovery under SARFAESI proceedings and RDB Act.

We have gone through the copy of the petition which was dismissed by the Hon'ble High Court of Kerala. The relevant portions of the Writ Petition are as under:

a. *The 3rd petitioner, for its business, had borrowed funds from the 2nd respondent Bank. Various immovable properties of all the 1st and 2nd petitioners were mortgaged to secure the loans. The 1st and 2nd petitioners had also offered personal guarantee for the borrowings of the 3rd petitioner. Some properties of sister concerns of the petitioners, viz., M/s Atlas Gold Townships (I) (P) Ltd. , M/s Atlas Golden Land and Developers (P) Ltd. and M/s R. I Kant (P) Ltd were also mortgaged to secure the borrowings of the 3rd petitioner.*

d.*Consequently, the 3rd petitioner defaulted in its repayment to the 2nd respondent. On the accounts being classified as NPA, the 2nd respondent initiated action under SARFAESI Act, against the secured assets of the petitioners, and those of the sister concerns.*

Further, we have also relied on various judgements, wherein, it was decided that when a debt is shown in the Financial Statements of the corporate debtor, even though the debt itself is time barred by limitation, it is considered as a clear acknowledgement of debt. This position was reiterated in the case of **TJSB Sahakari Bank Ltd. Vs. M/s. Unimetal Casting Ltd. (CP (IB) – 3622/ I&BP/MB/2018).**

28. Going by the same yard stick, here in the instant application, the principal borrower has admitted his liability as well as default to the Financial Creditor in the Writ Petition filed by him in the Hon'ble High Court of Kerala. As such, we are also considering this as an admission and acknowledgement of debt which in turn take away the bar of limitation.

When we read this along with clause (6) of the Agreement of Guarantee, we are of the view that the admission of acknowledgement of debt by principal borrower is binding on the guarantor. As such, this application is within limitation and binding on the guarantor who is the corporate debtor in the instant application.

29. A Financial Creditor falls under section 5(7) can file an application for Initiating Corporate Insolvency Resolution Process against a Corporate Debtor before this Adjudicating Authority when the default has occurred. No doubt the debt claimed is a financial debt as defined under section 5(8) of I & B Code. Herein this case Annexure I (3) is found a legally executed Agreement of Guarantee. Annexure I (3) proves that Financial Creditor is entitled to claim due amount of the principal borrower from their guarantor under the purview of section 5(8) (h) of I & B code.

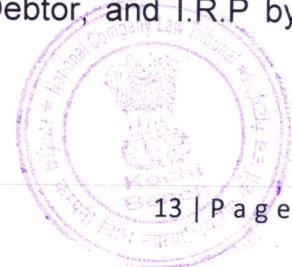
In **State Bank of India v. M/s. Indexport Registered** [1992 SCC (3) 159], the Apex Court held that the decree holder bank can execute the decree against the guarantor without proceeding against the principal borrower. Guarantor's liability is co- extensive with that of the principal debtor.



30. In an application of this nature, this Adjudicating Authority is bound firstly to consider as to whether there is existence of default from the records and information utility or based on other evidence furnished by the Financial Creditor. If the Financial Creditor succeeds in proving default of which the claim put forward by the Financial Creditor and satisfy Section 7 (5)(a) of the I & B Code, this Adjudicating Authority is bound to admit the application. The procedure adopted for the disposal of this application is summary in nature. This petition has been filed by the Financial Creditor on 10/04/2019. Financial Creditor has succeeded in proving existence of default. Annexure I (2) dated 21.03.2013, Annexure I (9) dated 03.07.2013 and Annexure I (40) dated 14.01.2016 filed with the application and Exhibit B2 with the counter strengthen the Financial Creditor's contention that Corporate Debtor admitted its default. The Financial Creditor also produced statement of accounts and computation statement to show that amount claimed in the application is due from the Corporate Debtor. The same can be considered as "such other record or evidence of default" under Section 7 (3) of I & B Code as proof for the due amount. The existence of default is, therefore, stand proved by the Financial Creditor.
31. The Financial Creditor proposed the name of Resolution Professional, Shri Manivannan. J, who is competent to work as IRP. The Financial Creditor certified that, no disciplinary proceeding is pending against him.
32. The Financial Creditor succeeded in establishing that the application is complete in all respects. For the aforesaid reasons we are inclined to admit this petition, subject to any amount received from SARFAESI proceedings as on 31.12.2015, the amounts so received shall be proportionately reduced from the claim made in this TIBA/19/KOB/2019.
33. Accordingly, **we admit this petition under section 7 of I&B Code, 2016** declaring a **moratorium** for the purpose referring to in section 14 of the I&B Code with following directions.



- (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 Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
 - (d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (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 the moratorium period.
 - (3) 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.
 - (4) The order of moratorium shall affect the date of such order till the completion of the corporate insolvency resolution process.
34. 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.
35. Mr. Shri Manivannan. J, having Registration No: IBBI/IPA-002/IP-N00534/2017-18/11695 and address is Plot No. 53B, 8/330, Vishalakshi Nagar, Fourth Cross street, Santhosapuram, Chennai, Tamil Nadu- 600 073, having email id: euitablelegal@gmail.com is hereby appointed as Interim Resolution Professional.
36. Necessary public announcement as per section 15 of the I & B Code, 2016 may be made. Let the copy of the order be communicated to the Financial Creditor/Operational Creditor as well as Corporate Debtor, and I.R.P by way of E-mail and speed post forthwith.



37. Communicate a copy of this order to the Financial Creditor, Corporate Debtor and to the Interim Insolvency Resolution Professional.
38. This Application is disposed of accordingly. No order as to costs.

Dated this the 19th day of November, 2019

Sd/-

Sd/-

Veera Brahma Rao Arekapudi
Member (Technical)

Ashok Kumar Borah
Member (Judicial)

Certified to be True Copy

Sheyamma
25/11/2019.

Deputy Registrar
National Company Law Tribunal
Kochi Bench

Memo No. TIBA/19/KOB/2019 4-16

Date: 19.11.2019

To

1. Mr. Sunil Shanker, Advocate, KN Shivasankaran and Associates, Srelakshmi, Shanti Lane, Ravipuram Road, Ernakulam-682016. (**Counsel for the applicant**)
2. Mr. Shameem Ahamed, Advocates, M/s Ahmed & Ahmed, Choondani Building, Kathrikadavu Junction, Ernakulam-682017. (**Counsel for the respondents**)
3. Shri Manivannan J, (Reg.No. IBBI/IPA-002/IP-No0534/2017-18/11695) Plot No.53B, 8/330, Vishalakshi Nagar, Fourth Cross Street, Santhoshapuram, Chennai, Tamilnadu-600 073 (**Interim Resolution Professional**)

