IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA

Company Petition (IB) No. 198/KB/2023

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) Rule, 2016.

IN THE MATTER OF:
Indian Bank
... Applicant/ Financial Creditor.
Versus

M/s. Bostin Engineers Pvt Ltd.
... Respondent/ Corporate Debtor.

Date of Pronouncement: April 01, 2024.

CORAM:
SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI. D. ARVIND, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:

For the Applicant:	**Mr. Santosh Kumar Ray, Adv** **Ms. Rituparna Sanyal, Adv.** **Ms. Sannoyee Chakravorty, Adv.** **Ms. Zeba Khan, Adv.** **Ms. Muskan Saha, Adv.**
For the Respondent:	**Mr. Ratnanko Banerjee, Sr. Adv.** **Mr. Rahul Auddy, Adv.** **Mr. Aditya Goopta, Adv.** **Mr. Snehasish Chakraborty, Adv.** **Mr. Debendra Raut, PCS**

ORDER

Per D. Arvind, Member (Technical):

1. The Court congregated through hybrid mode.

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2. Heard the Learned Counsel appearing on behalf of the Financial Creditor and the Learned Senior Counsel appearing on behalf of the Corporate Debtor.

3. This instant application is preferred under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity "I&B

Code") by the **Indian Bank** (hereinafter referred to as the "Applicant"/ "Financial Creditor") against **M/s. Bostin Engineers Pvt. Ltd.** (hereinafter referred to as the "Respondent"/ "Corporate Debtor") seeking commencement of the Corporate Insolvency Resolution Process for brevity "CIRP" in respect of the Corporate Debtor.

4. The total amount claimed to be in default is **Rs. 45,82,87,707.03/-** as on 15.07.2023 and the **Date of Default** is claimed as on **31.08.2021**.

Factual Conspectus:

5. The Corporate Debtor is a Corporate Guarantor to Power Max (India) Ltd. (Principal Borrower) for the credit facilities availed by the Principal Borrower.

6. The Principal Borrower had approached the Financial Creditor for sanction of Ad hoc CC Limit in the year in the year 2008 and the same was duly approved and sanctioned by the Financial Creditor on 10.07.2008 for a sum of Rs. 60 Lakh over and above the existing regular CC Limit of Rs. 60 Lakh.

7. That, such credit facility was renewed and enhanced on 10.12.2008 by the Financial Creditor for meeting the working capital requirement by the Financial Creditor which was accepted by the Principal Borrower and its Guarantors vide sanction letters dated 11.12.2008 and 12.12.2008.

8. The Credit facilities were reviewed and enhanced by the Financial Creditor from time to time, and on 22.06.2020, the

principal borrower was further sanctioned credit facilities being the IND Covid Emergency Credit Line of Rs. 1.75 Crore to meet the cash flow mismatches being faced by the Principal Borrower company due to adverse impact of the COVID-19 outbreak, by the Financial Creditor. The said sanctioned credit facilities in the year 2020 were again reviewed on 01.11.2021.

9. The Principal Borrower along with its Guarantors failed to repay the principal amount and interest and consequently, the Financial Creditor declared the account of the Principal Borrower as Non-Performing Asset (NPA) on 28.11.2021 as per prevailing directives/ guidelines relating to asset classification issued by the Reserve Bank of India (RBI).

10. Vide an Order dated 01.05.2023 passed by this Adjudicating Authority in C.P. (IB) No. 104/KB/2022 filed under Section 10 of the I&B Code, the Principal Borrower (Power Max (India)) was put into CIRP and the Financial Creditor in terms of the Public Announcement has filed its Form C – proof of claim on 11.05.2023.

11. The Notice under Section 13(2) of the SARFAESI Act, 2002 was issued by the Financial Creditor to the guarantors of the principal borrower including the corporate debtor on 17.07.2023 for recalling the outstanding sums due and payable to the applicant.

Submissions made by the Applicant:

12. That, the Corporate Debtor and the Principal Borrower herein have acknowledged the sanction letter dated 22.06.2020, annexed as Annexure A-6 at Page 232-233 of Volume II of the Application.

13. That, the Corporate Debtor in its board resolution dated 26.06.2020 resolved that the Corporate Debtor shall provide a guarantee for availing the credit facility sanctioned vide the sanction letter dated 22.06.2020. Further, the Principal Borrower in its board resolution dated 26.06.2020 resolved that the Principal Borrower has availed credit facilities vide a sanction letter dated 22.06.2020. Copy of the Acknowledgement of the Sanction Letter by the Guarantors along with the Board resolution is annexed at Annexure A-7 at Pages 234-243 of Volume II to this Application.

14. That, the Corporate Debtor has executed the deed of guarantee dated 26.06.2020, annexed at Pages 282-286 to the application, wherein it has been acknowledged by the Corporate Debtor that the Corporate Debtor is jointly and severally liable to pay the bank on demand the outstanding dues availed by the Principal Borrower, i.e., M/s. Power Max (India) Pvt Ltd. In the deed of guarantee dated 26.06.2020, the total banking facilities availed by the Principal Borrower have also been acknowledged by the Corporate Debtor.

15. That, the Principal Borrower has acknowledged its debt by executing an acknowledgment of debt cum security dated 20.04.2020 annexed at Pages 321-323 to the application.

16. That, vide a sanction letter dated 01.11.2021, annexed at Pages 326-347 to the application, the Financial Creditor has only renewed the credit facilities availed by the said Principal Borrower.

17. That, after the initiation of CIRP on 01.05.2023 against the Principal Borrower, the Financial Creditor has submitted its proof of claim on 11.05.2023, annexed at Pages 362-366 to the application.

18. That, the Financial Creditor invoked the guarantee by issuing a notice under Section 13(2) of the SARFAESI Act, 2002, annexed at Pages 368-387 to the application, wherein all the guarantors were called upon to pay the outstanding dues.

Submissions made by the Respondent, per contra:

19. That, the Corporate Debtor is not the Principal Borrower of the alleged loan. The Principal Borrower company is already under CIRP by an order dared 01.05.2023 passed under Section 10 of the I&B Code in C.P. (IB) No. 104/KB/2022 by this Adjudicating Authority. The Financial Creditor herein, did not object to the same as it was aware of the proceedings from the pre-admission stage of the Section 10 Application.

20. That, the Respondent has availed many credit facilities from the Financial Creditors since 2004. The interest and/or

instalment in the said credit facilities has regularly been repaid by the Respondent to the Applicant Bank and had a healthy financial relationship even during the period of the COVID-19 outbreak.

21. That, the Financial Creditor has not invoked the guarantee. It is a settled position of law that before suing the guarantor for repayment of loans availed by the principal Borrower, the financial creditor has to invoke a guarantee from the respondent company and thus, there is no default committed by the Corporate Debtor and therefore, the present application is not maintainable.

22. That, the Deed of Guarantee executed by the Corporate Debtor is on 26.06.2020 and the applicant by its sanction letter dated 01.11.2021 renewed and/or revived the facilities on certain terms and conditions and the Corporate Debtor herein is not privy to such arrangement. It is further alleged that the change and/or variance in the terms of the contract sans the consent of the guarantor shall lead to the discharge of the guarantor from its guaranteed obligations.

23. That, the Financial Creditor has already lodged the claim on the entire outstanding in the CIRP of the principal borrower company and therefore, the Financial Creditor cannot demand the entire outstanding from the Corporate Debtor as recovery of the outstanding claim twice would lead to unjust enrichment of the Financial Creditor.

Argument advanced by the Learned Senior Counsel for the Corporate Debtor at hearing:

24. The Learned Senior Counsel for the Corporate Debtor at hearing would submit that the Sanction Letter dated 10.07.2008 does not mention the Corporate Debtor herein as a guarantor and therefore no guarantee could have been executed by the Corporate Debtor.

25. Further, he has submitted that the Corporate Guarantee dated 12.12.2008 executed by the Corporate Debtor limits the guarantee to a sum of Rs. 200 Lakh. In terms of Section 186(2) of the Companies Act, 2013, the company cannot extend a guarantee exceeding 60% of its paid-up share capital and therefore the guarantee is not enforceable.

Submissions in counter by the Applicant to the contentions of the Learned Senior Counsel for the Respondent:

26. The Learned Counsel for the Applicant has claimed that the Corporate Debtor executed a deed of guarantee dated 10.07.2008, annexed to Pages 66-70 to the Application in favour of the Financial Creditor and since the sanction letter dated 10.07.2008 does not mention the name of the Corporate Debtor, no deed of guarantee has been executed by the Corporate Debtor is baseless.

27. Further, it is submitted that a sanction letter dated 10.12.2008, annexed at Pages 103-108 to the application was granted in favour of the Principal Borrower and the Corporate Debtor acknowledged the said sanction letter on 11.12.2008

and further by a board resolution held on 11.12.2008 resolved to extend corporate guarantee in favour of the Financial Creditor, annexed at Pages 112-115 to the application. Further, the Corporate Debtor executed the Deed of Guarantee on 12.12.2008, in favour of the Financial Creditor, annexed at Page 147-151 to the application.

28. Further, regarding the claim under Section 186(2) of the Companies Act, 2013, the Learned Counsel for the applicant submits that such ought not to be countenanced since there is no pleading in the reply affidavit. Reliance is placed on the judgment rendered by the Hon'ble Supreme Court of India in ***Ravinder Singh v. Janmeja Singh & Ors.*** reported at **2000 8 SCC 191, Para 7.**

29. Further, it is submitted that the contention of the Corporate Debtor hit by the "Doctrine of Indoor Management" and Section 70 of the Contract Act, 1872 as the liability of the Corporate Debtor arises from the contractual agreement between the Financial Creditor and Corporate Debtor and non-compliance if any on account of the internal management is the responsibility of the company. It is submitted that in case of non-compliance of relevant provisions, the company shall be liable since the person dealing with the company is entitled to assume that there has been necessary compliance with regards to the internal management. Further, since compliance under Sections 185 and 186 is a part of internal management for which penal provisions are laid down and the perusal of the penal provisions reveals that it is the company

which is liable for non-compliance if any of Sections 185 and 186 of the Companies Act, 2013, and it does not affect the contractual obligation of the company and the guarantee agreement executed is duly enforceable in law.

30. The Learned Counsel for the Applicant further relies on Section 70 of the Contract Act, 1872 that envisages that "*where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.*"

31. Further, it is submitted that the sanction letter dated 01.11.2021, annexed at Page 326-327 to the application (relevant Page 333 of Volume II of the Application), clearly states that "*Company shall ensure that the Corporate Guarantee furnished by the group company, M/s. Bostin Engineers Pvt Ltd has complied with Section 186 of the Companies Act.*"

32. Further, it is contended that in relation to the non-compliance with Section 186 of the Companies Act, 2013, the auditor of the company has not passed any such remarks or report, thus, the Financial Creditor herein is protected under the doctrine of indoor management. Reliance is placed on the judgment rendered by the Hon'ble Delhi High Court in ***Eveready Industries Ltd v. KKR India Financial Services Limited*** reported at **2022 SCC Online Del 395.**

Analysis and Findings:

33. It would be evident that vide an order dated 01.05.2023, the Principal Borrower of the Corporate Debtor herein was put in CIRP.

Issue relating to the validity of guarantee.

34. It is evident that by an Agreement of Guarantee dated 26.06.2020, executed by the Corporate Debtor, herein (Guarantor) to M/s. Power Max (India) Private Limited (Principal Borrower), the guarantor agrees with the Financial Creditor Bank that:

> "*3. The Guarantor(s) hereby declare/s that this guarantee shall be continuing guarantee and shall not be considered as cancelled or in any way affected by the fact that at any time the said accounts may show no liability against the Borrower or may even show a credit in borrower's favour but shall continue to be a guarantee and remain in operation in respect of all subsequent transactions.*" **(Extract taken from Clause 3 of the deed of guarantee dated 26.06.2020 annexed at Page 284 to the application)**

35. Further, it is evident that by a sanction letter dated 01.11.2021, annexed at Page 326-327 to the application, the Financial Creditor has renewed the credit facility availed by the Principal Borrower. We have noted that the deed of

guarantee dated 26.06.2020 is a continuing contract by way of guarantee. There is neither any rescission of the deed of guarantee dated 26.06.2020 nor any exemption or exclusion clauses to the deed of guarantee have been placed before us. Thus, execution of a fresh sanction letter, as on 01.11.2021 in the present case at hand, to renew or revive the credit facilities availed by the Principal Borrower, does not revoke the rights as provided under the deed of guarantee dated 26.06.2020. We would rely upon the judgment rendered by the Hon'ble Apex Court in ***Lata Construction v. Rameshchandra Ramniklal Shah (Dr),*** reported at (**2000) 1 SCC 586: 1999 SCC OnLine SC 743 at page 590**, where it was held that:

> **"*8. [...] the rights under the earlier agreement*** *of 1987* ***were kept alive even after the second agreement****.* ***The rights under the first agreement had not been given up and there was no substitution of the earlier agreement in its entirety by the new agreement****.*
> ***9.*** *We may, at this stage, refer to the provisions of Section 62 of the Indian Contract Act which provides as under:*
> > *"62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."*
>
> *This provision contains the principle of "novation" of contract.***"**
>
> **(Emphasis Added)**

36. Thus, the right of the Financial Creditor Bank herein is still alive under the deed of guarantee dated 26.06.2020 even after execution of a fresh sanction letter on 01.11.2021.

Issue relating to the simultaneous proceedings against Principal Borrower and Corporate Guarantor.

37. Now, coming to the issue regarding the simultaneous proceedings of the corporate insolvency resolution against the Principal Borrower and Corporate Guarantor as well. The Learned Senior Counsel for the Respondent has claimed that since the Financial Creditor has already submitted its proof of claim in the CIRP of the Principal Borrower company and therefore, the Applicant cannot demand the entire outstanding from the Corporate Debtor herein is misconceived and not tenable in the eyes of law.

38. At this juncture, we would refer **Sections 127** and **128 of the Contract Act, 1872,** enjoin as under:

> **"127. Consideration for guarantee. —** *Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee***."**

> **"128. Surety's liability. —** *The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract***."**

39. Further, the Section 60(2) of **the I&B Code, 2016,** which is reproduced verbatim, herein below for clarity; it reads:

> **"***Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in*

*this Code, **where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such National Company Law Tribunal**.*"

40. We would rely upon the judgment of the Hon'ble NCLAT in ***State Bank of India* v. *Athena Energy Ventures Private Limited*** reported in **MANU/NL/0436/2020: (2020) ibclaw.in 344 NCLAT,** reiterated that:

> "**19.** ***It is clear that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as Guarantor.*** *The law as laid down by the Hon'ble High Courts for the respective jurisdictions, and law as laid down by the Hon'ble Supreme Court for the whole country is binding. In the matter of Piramal, the Bench of this Appellate Tribunal "interpreted" the law. Ordinarily, we would respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner it was interpreted in the matter of Piramal. For such reasons, we are unable to uphold the Judgment as passed by the Adjudicating Authority*."
>
> **(Emphasis Added)**

41. Further, in ***IFCI Limited v. NTCIL Infrastructure Private Limited*** in **C.P. (IB) No. 24/KB/2023**, reported in **MANU/NC/5353/2023: (2023) ibclaw.in 774,** we have already taken a view that:

> "... ***It is therefore trite, axiomatic and settled law that simultaneous proceedings*** ***under*** *Section 7 of the* ***I&B Code****,* ***can be initiated and continued against both the Principal Borrower as well as the Corporate Guarantor*****."**
>
> **(Emphasis Added)**

42. Thus, from the enumerations supra, we are of the considered opinion that a Financial Creditor shall have the right to initiate and continue simultaneous proceedings against both the Principal Borrower as well as the Corporate Guarantor.

Disputed Debt versus Financial Debt.

43. Now, we would proceed to consider regarding the issue relating to the non-compliance under Section 186 of the Companies Act, 2013. The Learned Senior Counsel for the Respondent has claimed that the Corporate Guarantee executed by the Corporate Debtor limits the guarantee to a sum of Rs. 200 Lakh. As per Section 186(2) of the Companies Act, 2013, the company cannot extend a guarantee exceeding 60% of its paid-up share capital and therefore the guarantee is not enforceable. Thus, he has contended that the "Debt" in question at hand is a "Disputed Debt" and cannot be considered within the ambit of a "Financial Debt".

44. Before, considering the merit of the claim, we have noted that the allegation of violation of Section 186 of the Companies Act, 2013 **has not been recorded in the pleadings, only raised during the course of argument.** In this context, we would

refer the judgment of the Hon'ble Apex Court in ***Union of India vs Ibrahim Uddin*** reported in **(2012) 8 SCC 148**, held that no relief can be granted based on grounds outside the pleadings of the parties. No party can be permitted to travel beyond its pleading. In other words, it is not a matter of right that an argument made outside the pleadings should be considered. Further, we would refer the judgment rendered by the Hon'ble Apex Court in ***Ram Sarup Gupta (Dead) by Lrs. vs. Bishun Narain Inter College and Ors.*** reported in **(1987) 2 SCC 555** that:

> "***6. [...]. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it****. The object and purpose of pleading is to enable the adversary party to know the case it has to meet.*"
>
> **(Emphasis Added)**

45. Further, the Hon'ble Apex Court in ***Bachhaj Nahar v. Nilima Mandal***, reported in **(2008) 17 SCC 491** held that a case not specifically pleaded can be considered by the court unless the pleadings in substance contain the necessary averments to make out a particular case and issue has been framed on the point. **In absence of pleadings, the court cannot make out a case not pleaded, suo motu**. The relevant para of the judgment is reproduced in verbatim:

> "*12. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in*

substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in ***Bhagwati Prasad*** *and* ***Ram Sarup Gupta (supra)*** *referred to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case.* ***Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo moto***."

(Emphasis Added)

46. However, if we consider the merit of the allegation as raised by the Learned Senior Counsel for the Respondent, we could find that Section 186 of the Companies Act, 2013, deals with loan and investment by a company. As per Section 186 (2) of the Companies Act, no company shall directly or indirectly can give any loan to any person or other body corporate exceeding

60% of paid-up share capital free reserves and security premium account or 100% of its free reserves and securities premium account. In case such loan amount exceeds the overall limit provided in Section 186 (2) of the Act, 2013 then the same can be given provided it is approved by a Special Resolution passed in the general meeting.

47. We are of the view that the violation of Section 185 of the Companies Act, 2013, may invite consequences, as per the provisions of the companies act, but may not absolve the defaulter from ramification of the I&B Code. But another wider proposition as to "*whether legal remedies can be resorted for resolution of dispute arising out of illegal transaction*" need to be kept in view. The proposition may be addressed by saying that the I&B Code does not provide remedy to applicant, but is a code introduced to resolve the insolvency of the Defaulter or Personal Guarantor. Thus, when the funds utilised for extending the financial facility were not procured by illegal means and belong to corporate person, which is an independent legal person, the Personal Guarantor qua the Corporate Debtor, may not be entitled to benefit of the violation of section 185 as his defence.

48. We are of the view that the violation of Section 186 of the Companies Act, 2013 hit by the "Doctrine of Indoor Management" and if there is any non-compliance of the provisions, it is not the I&B Code to decide the issue. If the Corporate Debtor defend itself by claiming that the "debt" of which the default has occurred on the part of it, is a "disputed

debt" as it has not been sanctioned by complying the provisions under the Companies Act, 2013 and on the very ground the application under Section 7 of the I&B Code is not maintainable, it is our interference that this proposition is not correct. The concept of dispute in debt, however relevant under Section 9 of the Code, but not relevant in admission under Section 7 of the Code. To admit an application under Section 7 of the I&B Code filed by the Financial Creditor triggering the insolvency proceedings in respect of the Corporate Debtor, the Adjudicating Authority is required to check whether there is any "debt" and "default", the application is complete, the amount of default crosses the threshold financial limit and the application is not barred by limitation.

49. We would rely upon the judgement passed by the Hon'ble NCLAT in ***Vineet Khosla vs. Edelweiss Asset Reconstruction Company Ltd.*** reported at **MANU/NL/0427/2019** wherein it is held that:

> **"*[...]*** *it is clear that at the stage of admission of Application under Section 7, the requirement is to give limited Notice and the considerations would be to see whether or not satisfaction by Adjudicating Authority could be reflected on the basis of Sub-Section (5) of Section 7.* ***If there is a financial debt, which is more than*** *Rs. 1 Lakh* ***and there is a default and if the Application is complete, the Application would have to be admitted.*** *The Corporate Debtor is entitled to point out* ***that a default has not occurred in the sense that the 'debt' which may include a disputed claim is not due.*** *Corporate Debtor may point out that the debt*

is not due by showing that it is not payable in law or in fact.**”**

(Emphasis Added)

50. It is a settled position of law that in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has to check the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. In this context, the Hon'ble Apex Court in the case of ***Innoventive Industries Ltd.* v. *ICICI Bank*** reported at **(2018) 1 SCC 407: MANU/SC/1063/2017 has** laid down that:

> **“*27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins*.** *...’*
>
> **“*28.*** *... the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact.* ***The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete,*** *...*”
>
> **xxx xxx xxx xxx**
>
> **“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*.”**

(Emphasis added)

51. In an identical matter, we have taken a similar view, in the case of ***EDCL Infrastructure Ltd. v. Urban Infraprojects Pvt. Ltd.*** in **I.A. (IB) No. 2105/KB/2023** in **C.P. (IB) No. 106/KB/2023,** decided on 08.02.2024, reported at **(2024) ibclaw.in 200 NCLT,** that:

> ***"36.*** *Further, the Hon'ble Apex Court in Bachhaj Nahar v. Nilima Mandal, reported in (2008) 17 SCC 491 held that* ***a case not specifically pleaded can be considered by the court unless the pleadings in substance contain the necessary averments to make out a particular case and issue has been framed on the point. In absence of pleadings, the court cannot make out a case not pleaded, suo motu****. The relevant para of the judgment is reproduced in verbatim:*
>
> *"12. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues*

generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta (supra) referred to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. ***<u>Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo moto</u>***.*"*

(Emphasis Added)

37. *<u>In the given facts, we are of the view that the Corporate Debtor who is beneficiary of the violation committed by the Financial Creditor, cannot be aggrieved and consequently cannot challenge such violation. In the case in hand, the Financial Creditor could not have advanced loan in breach of Section 186(2) of the Companies Act, 2013 to the Corporate Debtor and yet the Corporate Debtor who took loans from the Financial Creditor cannot be aggrieved to challenge such disbursements to him</u>.*

38. *<u>Section 186(2) of the Companies Act, 2013, is a protection mechanism to the shareholders/</u>*

> *stakeholders of the Company (Financial Creditor in this case) so that the persons who are managing the company cannot and should not give loan in excess of limits prescribed which would be in excess of their capacity and could land the company in deep trouble should there be a default of the loan lent. That is why Section 182 of the Companies Act, 2013, provides that in case the company wishes to give loan in excess of the limits prescribed, the same can be done only with the approval of shareholders by passing special resolution.*
>
> ***39. Therefore, aggrieved party in such violation under Section 186(2) of the Companies Act, 2013, would be the shareholder/ stakeholders of the Financial Creditor and Regulators. It is not open for the Corporate Debtor to take shelter under such violations and refuse to repay money borrowed.***"
>
> **(Emphasis Added)**

On "Debt" and "Default"

52. Further, the Applicant has supplied the "NeSL" Report by way of an affidavit dated 26.09.2023. We have noted that the Principal Borrower has made a default of Rs. 32,29,80,332.46/- and the date of default is recorded as on 31.08.2021.

On Limitation

53. We have further noted that this application has been filed on 21.09.2023 within the prescribed limitation period as envisaged under Section 238A of the I&B Code, 2016 read with

Article 137 of the Limitation Act, 1963. Further, the amount to be in default is execs of prescribed threshold limited prescribed under Section 4 of the I&B Code. We are of the view that the application is complete in all respect.

Conclusion

54. Thus, in terms of the enumerations supra, we **ALLOW** this instant application bearing **Company Petition (IB) No. 198/KB/2023** filed under **Section 7 of the I&B Code**, and accordingly, we order the initiation of the **Corporate Insolvency Resolution Process (CIRP)** in respect of the Corporate Debtor by the following **Orders**:

i. The Application filed by **Indian Bank (Financial Creditor),** under Section 7 of the Insolvency & Bankruptcy Code, 2016, is hereby, **ADMITTED** for initiating the **Corporate Insolvency Resolution Process** in respect of **M/s. Bostin Engineers Pvt. Ltd. (Corporate Debtor).**

ii. As a consequence of this Application being admitted in terms of Section 7 of the I&B Code, moratorium as envisaged under the provisions of Section 14(1) of the Code, shall follow in relation to the Respondent/Corporate Debtor, as per clauses (a) to (d) of Section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come into force.

iii. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016, prohibits the following, as:

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 asset 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.*

[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 license, permit, registration, quota, concession, clearances 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, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

iv. 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.

v. 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.

vi. The Applicant has proposed the name of **"Mrs. Rachna Jhunjhunwala",** Address: Siddha Western, 9 Western Street, Room No. 134, Kolkata 700013, Registration No. **IBBI/IPA-001/IP-P00389/2017-18/10707,** as the "IRP". We have perused that there is a written communication and consent of IRP in Form 2 with Affidavit, annexed at Pages 396-399 to the application, as per the requirement of Rule 9(l) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that there are no disciplinary proceedings pending against him with the Board or IIIP of ICAI. In addition, further necessary disclosures have been made by **"Mrs. Rachna Jhunjhunwala"** as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7(3)(b) of the code. Hence, we appoint **"Mrs. Rachna Jhunjhunwala"** as the **Interim Resolution Professional** (IRP) of the Corporate Debtor to carry out the functions as per the I&B Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and

Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the I&B Code.

vii. In pursuance of Section 13 (2) of the Code, we direct the IRP or the RP, as the case shall cause a public announcement immediately with regard to the admission of this application under Section 7 of the Code and **call for the submission of claims** under Section 15 of the Code. The public announcement referred to in Clause (b) of sub-section (1) of Section 15 of the Insolvency & Bankruptcy Code, 2016, shall be made immediately. The expression immediately means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

viii. During the CIRP period, the management of affairs of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of Section 17 of the I&B Code. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of

which coercive steps will follow. There shall be no future opportunities in this regard.

ix. The Interim Resolution Professional is also free to take police assistance to take full charge of the Corporate Debtor, its assets and its documents without any delay, and this Court hereby directs the concerned **Police Authorities** and/or the **Officer-in-Charge** of Local Police Station(s) to render all assistance as may be required by the Interim Resolution Professional in this regard.

x. The IRP or the RP, as the case may be, shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.

xi. The Financial Creditors shall be liable to pay to IRP a sum of **Rs. 3,00,000/-** (Rupees Three Lakh Only) as payment of his fees as advance, as per Regulation 33(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which amount shall be adjusted at the time of final payment. The expenses relating to the CIRP are subject to the approval of the Committee of Creditors (CoC).

xii. In terms of sections 7(5) and 7(7) of the Code, the **Registry of this Adjudicating Authority** is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional

by Speed Post and through email immediately, and in any case, not later than two days from the date of this Order.

xiii. Additionally, the **Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (RoC), to whom the company(ies) are registered with, by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

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

xv. The IRP/RP shall be liable to submit the periodical report including the minutes of the CoC of the Corporate Debtor, with regard to the progress of the CIRP in respect of the Corporate Debtor to this Adjudicating Authority from time to time.

xvi. The order of moratorium shall cease to have effect as per Section 14(4) of the I&B Code.

55. Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

Next Occasion for the Progress Report:

56. Post the Company Petition on **15/ 05/ 2024** for hearing the Periodical Progress Report by the IRP/RP as appointed herein.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 01st Day of April, 2024.

Bose, R. K. [LRA]