

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

**CP (IB)178/MB/C-IV/2021**

Under section 9 of the I&B Code, 2016

In the matter of

**STCI Finance Limited**

...Financial Creditor

v/s.

**DSK Southern Projects Private Limited**

**[U45200PN200PTC132140]**

...Corporate Debtor

Order Delivered on: 09.12.2020

Coram:

Shri Rajesh Sharma

Hon'ble Member (Technical)

Smt. Suchitra Kanuparthi

Hon'ble Member (Judicial)

*Appearances (via videoconferencing):*

For the Petitioner : Mr. Ayush J Rajani, PCA.

For the Respondent : Mr. Ashutosh Srivastava, Advocate

**ORDER**

*Per:* Rajesh Sharma, Member (Technical)

1. This is a Company Petition filed under section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC) by STCI Finance Limited ("the Financial Creditor"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against DSK Southern Projects Private Limited ("the Corporate Debtor") for initiating Corporate Insolvency Resolution Process (CIRP).

2. The Corporate Debtor is a Private Limited Company incorporated on 29.05.2008 under the Companies Act, 1956, with the Registrar of Companies (RoC), Maharashtra, Pune. Its Corporate Identity Number (CIN) is U45200PN2008PTC132140. Its registered office is at 1187/60, DSK House, J.M. Road, Shivaji Nagar, Pune-411005. Therefore, this Bench has jurisdiction to deal with this petition.
3. The Application is filed by Ms. Sabita Braganza, Assistant General Manager of Financial Creditor vide its Power of Attorney claiming total claiming a sum of Rs.38,73,54,786.40 which includes interest of Rs.14,86,70,423/- at the rate of 14.50% p.a. as Normal Interest and 2% as Penal Interest as on 15.01.2021.

#### Case of the Financial Creditor

4. The Corporate Debtor is a Private Limited Company incorporated under the Companies Act, 1956 and is engaged in the business of Real Estate Development.
5. The Financial Creditor submits that the Corporate Debtor approached them for grant/sanction of Term Loan facilities to the tune of Rs. 30 crores for deployment in various on-going real estate projects. The Financial Creditor considered the request of the Corporate Debtor and granted/sanctioned the Term Loan facility vide sanction letter dated 27.06.2016 and the amount was disbursed on 30.06.2016.
6. The Loan Agreement was entered into by the Financial Creditor as Lender, D.S. Kulkarni Developers Limited as Borrower and the Corporate Debtor as the Co-Borrower on 27.06.2016.
7. To secure the Term Loan facility, the Corporate Debtor alongwith D S Kulkarni Developers Limited as borrower executed Loan Agreement on 27.06.2016. To further secure the aforesaid Term Loan, the Corporate Debtor created

registration of charge/mortgage in favour of the Financial Creditor. The details of charge/mortgage are provided as under: -

- i. First exclusive charge by registered mortgage of all the right, title and interest of the Corporate Debtor in all that piece and parcel of unsold units in the project, 'Mantri DSK Pinnacle' situated at Cave Temple Road, Off Bannerghatta Road, Hulimavu, Bengaluru-560076, Karnataka, India together with an undivided share of land project, amenities relevant car parking and other amenities belonging to the Corporate Debtor;*
  - ii. First exclusive charge on Corporate Debtor's share of all existing and future receivables in the project 'Mantri DSK Pinnacle' (Corporate Debtor) share is 36% as per JDA between Corporate Debtor & Mantri Dwellings Private Limited (now known as Shore Dwellings Private Limited)*
  - iii. First exclusive charge on the Escrow Account opened for deposit of all receivables from the project 'Mantri DSK Pinnacle'*
8. The Financial Creditor has enclosed the following documents along with the Petition which are reproduced hereinunder:
- a) copy of Sanction Letter dated 22.06.2016;
  - b) copy of Board Resolution dated 27.06.2016;
  - c) Copy of Loan agreement dated 27.06.2016;
  - d) Copy of Indenture of Mortgage dated 27.06.2016;
  - e) Copy of Memorandum of Hypothecation dated 27.06.2016;
  - f) Copy of Escrow Account Agreement dated 23.06.2016 executed between Financial Creditor, Corporate Debtor and HDFC Bank;
  - g) Copy of Undertaking dated 27.06.2016;
  - h) Copy of Deed of Guarantee dated 27.06.2016;

- i) Copy of Continuing Security Letter dated 27.06.2016;
  - j) Copy of Demand Promissory Note dated 27.06.2016
9. The Financial Creditor submits that Corporate Debtor enjoyed the Term Loan facility but failed to repay the outstanding dues as a result of which the loan account of the Corporate Debtor was classified as Non-Performing Asset (NPA) with effect from 01.02.2018 as per Reserve Bank of India prudential norms.
10. The Financial Creditor has submitted the NeSL Report dated 27.01.2021 which reflects the default amount Rs. 38,73,54,786.40. The Financial Creditor also enclosed the certificate under section 65B of Indian Evidence Act, 1872.

Reply by the Corporate Debtor

11. The Corporate Debtor submits that as per loan agreement dated 27.06.2016, the loan was to be repaid by D.S. Kulkarni Developers Limited not by Corporate Debtor.
12. The Corporate Debtor through its representative filed affidavit in reply thereby submits that the Petition is filed to cause unnecessary trouble to the Corporate Debtor and the Petition u/s 7 of the Code, is barred by “Principle of Res Judicata” as the application of initiation of CIRP process by the Financial Creditor is already pending before this Tribunal.
13. The Application under section 7 of the Code bearing CP No. 1633(IB)/MB/2019 before this Tribunal for initiation of CIRP against D.S. Kulkarni Developers Ltd. and the same was admitted by the order dated 26.09.2019 by this Tribunal. Accordingly, Mr. Manoj Kumar Agrawal, was appointed as IRP in the matter.
14. Financial Creditor approached the IRP and had submitted its claim for the Loan amount of Rs.30,00,00,000/- (Rupees thirty crore only) along with the interest which was admitted by the IRP. As per the list of Financial Creditors list dated

17.06.2021, the Financial Creditor is one of the Creditor having 1.9899% voting share.

15. The Financial Creditor is already taking part in the CIRP of D.S. Kulkarni Developers Ltd. and has already filed the claims of the same amount as per the latest list of Financial Creditors. The Corporate Debtor relied in *Company Appeal (AT) (Insolvency) Nos. 346 & 347 of 2018 Dr. Vishnu Kumar Agarwal Vs. M/s Piramal Enterprises Ltd.* by National Company Law Appellate Tribunal wherein it is held that for the same set of debts claim cannot be filed by same Financial Creditor in two separate Corporate Insolvency Resolution Process. The Hon'ble NCLAT observed as under:

*“31. The matter can be looked from another angle. The question arises whether the ‘Financial Creditor’- (‘M/s. Piramal Enterprises Ltd.’) can claim same amount of Rs. 40,28,76,461/- from the ‘Resolution Professional’ appointed pursuant to the ‘Corporate Insolvency Resolution Process’ against the ‘Corporate Guarantor No.1’ (‘Sunrise Naturopathy and Resorts Pvt. Ltd.’), as also from the ‘Resolution Professional’ appointed pursuant to ‘Corporate Insolvency Resolution Process’ initiated against ‘Sunsystem Institute of Information Technology Pvt. Ltd.’- (“Corporate Guarantor No.2”)? Admittedly, for same set of debt, claim cannot be filed by same ‘Financial Creditor’ in two separate ‘Corporate Insolvency Resolution Processes’. If same claim cannot be claimed from ‘Resolution Professionals’ of separate ‘Corporate Insolvency Resolution Processes’, for same claim amount and default, two applications under Section 7 cannot be admitted simultaneously. Once for same claim the ‘Corporate Insolvency Resolution Process’ is initiated against one of the ‘Corporate Debtor’ after such initiation, the ‘Financial Creditor’ cannot trigger ‘Corporate Insolvency Resolution Process’ against the other ‘Corporate Debtor(s)’, for the same claim amount (debt).*

*32. There is no bar in the ‘I&B Code’ for filing simultaneously two applications under Section 7 against the ‘Principal Borrower’ as well as the ‘Corporate Guarantor(s)’ or against both the ‘Guarantors’. However, once for same set of claim application under Section 7 filed by the ‘Financial Creditor’ is admitted against one of the ‘Corporate Debtor’ (‘Principal*

*Borrower' or 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower'). Further, though there is a provision to file joint application under Section 7 by the 'Financial Creditors', no application can be filed by the 'Financial Creditor' against two or more 'Corporate Debtors' on the ground of joint liability ('Principal Borrower' and one 'Corporate Guarantor', or 'Principal Borrower' or two 'Corporate Guarantors' or one 'Corporate Guarantor' and other 'Corporate Guarantor'), till it is shown that the 'Corporate Debtors' combinedly are joint venture company.*

*33. For the reasons aforesaid, while we uphold the initiation of the 'Corporate Insolvency Resolution Process' initiated under Section 7 of the 'I&B Code' against 'Sunsystem Institute of Information Technology Pvt. Ltd.'- ('Corporate Guarantor No.2') by impugned order dated 24th May, 2018, we hold that the impugned order dated 31st May, 2018 initiating 'Corporate Insolvency Resolution Process' under Section 7 against the 'Sunrise Naturopathy and Resorts Pvt. Ltd.'- ('Corporate Guarantor No.1') for same very claim/debt is not permissible and the application under Section 7 was not maintainable.*

16. The Corporate Debtor submits that the immovable properties in the present proceeding are already the part of the Corporate Insolvency Resolution Process initiated in C.P. No. 1633 (IB)/MB/2019 and the Financial Creditor is already taking part in that process. The Corporate Debtor further submits that the property mortgaged under the loan agreement between the Financial Creditor and D.S. Kulkarni Developers Limited as borrower is already into CIRP.

*Findings/Observation:*

17. We have prudently gone through the pleadings available on record. The Financial Creditor has granted/sanctioned the Term Loan Facility of Rs.30,00,00,000/- to the Corporate Debtor on 27.06.2016 as Co-borrower. The Corporate Debtor executed various loan and security documents to secure the aforesaid Credit Facility. The Corporate Debtor enjoyed the Credit Facility but failed to repay the outstanding dues as a result of which the account of the

Corporate Debtor was classified as Non-Performing Assets on 01.02.2018 as per Reserve Bank of India prudential norms. The Corporate Debtor filed its reply to the Petition and submits that Petition is not maintainable and is liable to be dismissed on the ground that for the same set of claims the Petition has already admitted and moratorium was already initiated against D.S. Kulkarni Developers Private Limited.

18. The Financial Creditor enclosed the ledger account of the Corporate Debtor alongwith the Petition which shows that the last credit entry was made on 08.05.2019 for an amount of Rs. 89,61,064/- and the Petition was filed on 29.01.2021, thus the Petition is squarely falling within the Period of limitation.
19. The issue for consideration is that whether for the same set of debt two separate petitions cannot be filed, though it is a settled law that liability of principal borrower is co-extensive as enunciated u/s 128 of the Contract Act, 1872, and the creditor may proceed against the Principal Borrower, Co-Borrower and the Guarantor simultaneously. However, the Corporate Debtor relied on the judgment of Hon'ble NCLAT in the case of *Dr. Vishnu Kumar Agarwal Vs. Piramal Enterprises Limited*, (*supra*) it was laid down that there cannot be two CIRP proceedings for same set of claims.
20. However, the judgment of Hon'ble NCLAT in *State Bank of India Vs. Athena Energy Ventures Private Limited*, further clarified that CIRP can be initiated against the principal borrower, co-borrower and the guarantor simultaneously. Declining the contentions in the matter of Piramal, the Hon'ble NCLAT has observed as follows:

*“4. The Adjudicating Authority heard the parties and referred to observations of this Tribunal in the matter of “Piramal”. Keeping Judgement in the matter of Piramal in view, the Adjudicating Authority raised question that when Application under Section 7 had been admitted against the Principal Borrower whether the present Application by the same Financial Creditor*



*could be admitted against Corporate Guarantor on same set of claims and default. The Adjudicating Authority relied on Para – 32 of the Judgement in the matter of Piramal and reproduced the same as under:-*

*“In para 32 of their Judgement (supra) the Hon’ble NCLAT observed as under:-*

*“There is no bar in the ‘I&B Code’ for filing simultaneously two applications under Section 7 against the ‘Principal Borrower’ as well as the ‘Corporate Guarantor(s)’ or against both the ‘Guarantors’. However, once for same set of claim application under Section 7 filed by the ‘Financial Creditor’ is admitted against one of the ‘Corporate Debtor’ (‘Principal Borrower’ or ‘Corporate Guarantor(s)'), second application by the same ‘Financial Creditor’ for same set of claim and default cannot be admitted against the other ‘Corporate Debtor’ (the ‘Corporate Guarantor(s)’ or the ‘Principal Borrower’). Further, though there is a provision to file joint application under Section 7 by the ‘Financial Creditors’, no application can be filed by the ‘Financial Creditor’ against two or more ‘Corporate Debtors’ on the ground of joint liability (‘Principal Borrower’ and one ‘Corporate Guarantor’, or ‘Principal Borrower’ or two ‘Corporate Guarantors’ or one ‘Corporate Guarantor’ and other ‘Corporate Guarantor’), till it is shown that the ‘Corporate Debtors’ combinedly are joint venture company.”*

*Relying on the above paragraph, the Adjudicating Authority discussed and concluded that the Principal Borrower and Respondent could not be called joint venture Company as they were independent Companies having independent Memorandum of Association. Then, relying on the above paragraph in the matter of Piramal, the Adjudicating Authority*



*declined to admit the Application as it was on same set of facts, claim and default for which CIRP was already initiated and was in progress in CP(IB) No.616/7/HDB/2018 and where according to the Adjudicating Authority, the claim of Applicant had already been admitted. Thus, the Application of the Appellant against the Respondent came to be rejected.”*

21. In the case of Athena, the final order of the Hon’ble NCLAT is:

*“The Appeal is allowed. Impugned Order passed by the Adjudicating Authority dated 4th March, 2020 is quashed and set aside. CP(IB)No. 466/7/HDB/2019 filed by the Appellant before Adjudicating Authority is restored to the file of the Adjudicating Authority. The Adjudicating Authority is directed to admit the Application CP(IB)No.466/7/HDB/2019 and pass further necessary Orders as per provisions of IBC. The Adjudicating Authority is requested to appoint the same IRP/RP as has been appointed in CP(IB)616/7/HDB/2018 in the CIRP proceeding against M/s. Athena Chattisgarh Power Ltd. (Principal Borrower). The IRP/RP will act in accordance with law keeping observations in this Judgment in view.”*

22. After considering the submissions made by the parties and by following the interpretation in the matter of Athena Energy Ventures Private Limited, this Bench is of the considered view that two separate petitions can be filed for two sets of claims being the Corporate Debtor as co-extensively liable for default made by the borrower and Co- borrower collectively.
23. The Corporate Debtor submitted that the claim of the Financial Creditor was already admitted by the IRP in C.P. No. 1633 (IB)/MB/2019. Mere admission of claims by the IRP doesn’t debar the Financial Creditor from realizing its claim amount under IBC. Therefore, this Bench is of view that the Financial Creditor is liable to get its dues from the Co-borrower Corporate Debtor and from borrower by all available means.

24. It is also observed by the Bench that the Corporate Debtor nowhere in the reply has disputed the claim amount nor denied the Loan Agreement entered between the parties. In view of the aforesaid, this Bench finds no reason to deny the admission of the Application filed by the Financial Creditor. Hence the Application u/s 7 of the Code is complete and therefore deserves to be admitted.
25. On perusal of the documents submitted by the Applicant, it is clear that financial debt amounting to more than Rs.1,00,000/- (Rupees One Lakh Only) is due and payable by the Corporate Debtor to the Applicant. There is default by the Corporate Debtor in payment of debt amount. Hence, the Application filed by the Financial Creditor is hereby admitted.
26. The application is complete and has been filed under the proper form. The debt amount is more than Rupees One Lakh and default of the Corporate Debtor has been established and the application deserves to be admitted.
27. The Applicant has proposed the name of Mr. Manoj Kumar Agarwal, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P00714/2017-2018/11222] as Interim Resolution Professional, to carry out the functions as mentioned under I&B Code and has also given his declaration that no disciplinary proceedings are pending against him

### ORDER

This Application being C.P. (IB) No. 178/MB/C-IV/2021 filed under Section 7 of I&B Code, 2016, presented by STCI Finance Limited, Financial Creditor/ Applicant against DSK Southern Projects Private Limited, Corporate Debtor for initiating corporate insolvency resolution process is admitted. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

- I. That this Bench as a result of this prohibits:

- 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;
  - d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to
- a. such transactions as may be notified by the Central Government in consultation with any financial sector regulator;
  - b. a surety in a contract of guarantee to a Corporate Debtor.
- IV. That the order of moratorium shall have effect from the date 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 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.
- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.

VI. That this Bench appoints Mr. Manoj Kumar Agarwal, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P00714/2017-2018/11222] as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.

e) The Registry is directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or Whats App. Compliance report of the order by Designated Registrar is to be submitted today.

Sd/-

Rajesh Sharma  
Member (Technical)  
09.12.2021

Sd/-

Suchitra Kanuparthi  
Member (Judicial)