



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

**IA No. 312/2023
And
CP (IB) No. 54/Chd/J&K/2019**

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

In the matter of:

Jammu & Kashmir Bank Ltd.
through Sh. Rabindra Kumar, Chief Manager,
M.A. Road, Srinagar,
Jammu & Kashmir-190001, and
Branch Office at Phase 2, Sector 54 Mohali,
Punjab-160055 and Krishna Complex,
Sec-3, J&K Bank,
B.U. Trikuta Nagar, Jammu

....Petitioner-Financial Creditor

Vs.

Ace Engineering (India) Pvt. Ltd.
having its Registered Office at
Lane No. 4, SIDCO Industrial Area,
Bari Brahmana, Jammu & Kashmir-181133
CIN No: U25209HR1951PLC001694

...Respondent-Corporate Debtor

Judgment delivered on: 06.03.2023

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

Present:

For the Petitioner-Financial Creditor : Mr. Mayank Mathur, Advocate
For the Respondent-Corporate Debtor : Mr. Amandeep Singh Talwar, Advocate

PER: HARNAM SINGH THAKUR, MEMBER (JUDICIAL)

JUDGMENT

The present petition has been filed by **Jammu & Kashmir Bank Ltd.**

(hereinafter referred to as 'Petitioner/Financial Creditor') through its Authorized



Representative, Mohd. Hanief Kirmani, 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 **Ace Engineering (India) Pvt. Ltd.** (hereinafter referred to as 'Respondent/Corporate Debtor'). The petition is signed by Mr. Mohd. Hanief Kirmani, with the affidavit verifying the contents of the application appended thereto.

2. The Corporate Debtor is stated to be incorporated on 29.12.2010 under the Companies Act, 1956. The company having its registered address at Lane No. 4, SIDCO Industrial Area, Jammu & Kashmir-181133. Therefore, the jurisdiction lies with this Bench of the Tribunal. The master data of the corporate debtor is stated to be filed on page 28 of the petition.

3. Brief facts of the case are that in 2012, the corporate debtor availed various credit loan facilities i.e. cash credit limit of Rs. 9 crores (including take over of sanctioned cash-credit limit of Rs. 7.5 crores from Indian Overseas Bank), Bank guarantee facility of Rs. 5 crores (including take over of sanctioned cash-credit limit of Rs. 4 crores from Indian Overseas Bank) vide sanction letter bearing No. JKB/CHQ/A&AP/2012-3962 dated 12.12.2012 from a financial creditor for manufacturing of steel grade grills, steel doors window frames, pre-fabricated huts and steel bridges, etc. The loan agreement and other security documents were executed between the parties. In the Year 2015, the corporate debtor was granted one time SOD facility of Rs. 4 crore from the financial creditor for the completion of an order of Rs. 16.14 crore for a period of 6 months or till completion of the supply order (whichever is earlier) @ rate of interest base rate+ 315 DPS i.e. presently



effective 13% p.a. with monthly rests or such other rate of interest may be prescribed by the Bank from time to time was sanctioned by financial creditor vide sanction letter No. JKB/CHQ/A&AP/2015-1335 dated 11.09.2015. The loan agreement and other security documents were executed between the parties. The last payment received from the corporate debtor was on 29.12.2017. Thereafter, the credit facility account of the corporate debtor became irregular and the financial creditor did not receive any payment from the corporate debtor. Hence, the financial creditor was constrained to declare the account of the corporate debtor as a Non-Performing Asset (NPA) on 31.03.2016 as per the norms and guidelines issued by the Reserve Bank of India. The recall notice was sent to the corporate debtor by the financial creditor on 10.04.2017.

4. It is stated in Part-IV of Form No.1, the total amount claimed to be in default is Rs. 10,11,23,983.19 (Rupees Ten Crores Eleven Lakhs Twenty Three Thousand Nine Hundred and Eighty Three Paise Ninteen Only) (Rs. 8,90,88,599.72 and Rs. 1,20,35,383.47/- and further interest at the rate of 12.15% and 12.65% per annum from 31.10.2018) and date of default is 31.03.2016 i.e. when account of the corporate debtor was classified as Non-Performing Asset (NPA). Copy of sanction letter and loan agreement (Annexure P3 and P5); Hypothecation Agreement, letter of continuity, undertaking, memorandum of title deed, agreement to mortgage, certificate of registration of mortgage, deed of personal guarantee, counter-guarantee, deed of guarantee (Annexure P4 and P6); Loan re-call notice (Annexure P7), statement of account depicting outstanding balance as on 31.10.2018 (Annexure P8), a certificate under Section 2A (a) and (b) of Bankers' Book Evidence Act, 1891 (Page 627) are attached with the main petition.



5. The notice of this petition was issued to the respondent corporate debtor to show cause as to why this petition be not admitted. An affidavit of service was filed vide Diary No. 1688 dated 02.04.2019. The reply was filed vide Diary No. 3215 dated 04.07.2019 wherein it is stated that there was no financial debt due and payable. The applicant had already received monies in lieu of full settlement of accounts and has issued release letters in favour of the guarantors. The Bank had deliberately not disclosed full and final settlement qua cash-credit facilities Account NO. 0375020100000140 amounting to Rs. 9 crores and secured overdraft facility Account No. 0375030100000072 amounting to Rs. 4 crores from J&K Bank Ltd. Trikutanagar, Jammu had already been entered upon and Bank has received more than Rs. 11.30 crore. The instant case has been filed after a full and final settlement. On 20.04.2016, the respondent and guarantors (Sh. Siddharth Bhatia and Sh. Munish Bhatia both Sons of Sh. Madan Bhatia) entered into an "agreement to sell" dated 20.04.2015 and Power of Attorney dated 20.04.2016 registered before Third Additional Munisiff Jammu whereby, in consideration of repayment of entire loan liability due towards the applicant Bank, the director of the non-applicant company namely Puneet Resutra agreed to transfer property measuring 175 kanal to guarantors (Annexure R1). After receiving the notice under Section 13 of the SARFAESI Act and execution of an agreement between parties, the guarantors requested the Bank to release the property. The Bank accepted the proposal and issued a letter dated 15.06.2017 to guarantors absolving them of their liability loan subject to the full and final payment of Rs. 10 crores. Thereafter, Rs. 11 crores have been paid in view of the settlement. The Bank issued a possession notice on 18.08.2017 (Annexure R4).



The respondent filed an application under Section 17 A vide order dated 23.11.2017. It was directed that the Bank shall not sell/auction or mortgage property. On 05.01.2018, the guarantor paid the entire amount. The Bank issued partial release letter dated 05.01.2018 (Annexure A6). Thereafter, Bank filed suit for recovery (Annexure A7). That J&K Bank entered into a settlement with the Guarantors namely Munish Bhatia and Sidharth Bhati both sons of Madan Mohan Bhatia R/o 8-A Canal Road Jammu qua the loan accounts in question and released mortgaged property and personal Guarantee/surety after receiving full and final payment of more than Rs. 11.30 crores. The liability of the Borrower and Guarantors is joint & several/ Coextensive. The settlement made by J&K Bank is admitted fact and binding upon all the parties. After payment of more than Rs. 11.30 crores, the Bank has issued a communication dated 15.06.2017 and 05.01.2018 whereby the respondent- J&K Bank has released the mortgaged properties.

6. The rejoinder was filed vide Diary No. 3909 dated 06.08.2019 wherein it is stated that the corporate debtor failed to repay the credit facilities availed. The financial creditor has filed a criminal complaint which has led to FIR with Crime Branch, Jammu and Mr. Puneet Rustora was arrested for the same (Annexure P1/4). The part-payments made by the corporate debtor have duly been reflected on the statement of accounts forming part of the record, no recovery was made by the financial creditor with respect to the outstanding amount of Rs. 10,11,23,983.19/- (Rupees Ten Crores Eleven Lakhs Twenty Three Thousand Nine Hundred Eighty Three Paise Nineteen Only) as on 31.10.2018 along with further interest. No settlement was ever done between the financial creditor and



corporate debtor qua guarantors. The part-payment receipt of Rs. 10 crores was partially adjusted towards the various credit facilities. Despite the part-payment, the corporate debtor is still liable to pay the outstanding amount of Rs. 10,90,78,704.19/- (Rupees Ten Crores Ninety Lakhs Seventy Eight Thousand Seven Hundred and Four Paise Nineteen Only) as on 30.06.2019. The mortgaged property of the guarantor's Sh. Munish Bhatia & Sh. Sidharth Bhatia which was mortgaged with the Bank as per the valuation report dated 02.05.2017 valued at Rs. 845.00 lakhs- realizable value, Rs. 1057.00 lakhs as market value and Rs. 800.00 lakhs as distressed value (Annexure P1/5). The agreement of the financial creditor with the corporate debtor is a separate legal contract and deed of guarantee executed by guarantors that as per the Contract Act, the one against the debtor can be enforced without having anything to do with the guarantor. No settlement was ever done by the financial creditor and corporate debtor. The letter nowhere mentions that the part-payment received is in respect of the settlement of the entire dues of the Corporate Debtor. The letter dated 05.01.2018 mentions that the remaining outstanding in the account of the corporate debtor shall remain payable by and recoverable from the corporate debtor.

7. The short written submissions were filed by the petitioner vide Diary No. 00206/01 dated 06.12.2022 wherein in addition to facts stated in the rejoinder, it is further stated that the corporate debtor filed suit for specific performance of an alleged agreement to sell dated 20.04.2016 executed between the corporate debtor and the guarantors which depicts that corporate debtor is well aware of fact that no settlement had been made with the guarantors in respect of the outstanding liability and the corporate debtor is liable to repay the outstanding



amount. Further, the corporate debtor filed a Writ of Mandamus bearing W.P(C) no 1685 of 2022 on 10.08.2022 before the Hon'ble Jammu and Kashmir and Ladakh at Jammu seeking directions to the financial creditor to consider the case of the corporate debtor as full and final settlement and accept the proposal of the corporate debtor to liquidate the Loan Account, in contrary to this corporate debtor has stated that the settlement has already been made. The short written submissions were filed by the respondent vide Diary No. 00206/2 dated 30.01.2023 reiterating the facts stated in reply.

8. We have heard the learned counsel for the petitioner as well as the respondent and have also perused the record carefully.

9. 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 are no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application."

10. It is noted that the applicant bank has still not released the property of the corporate debtor situated at SIDCO Industrial Complex Samba, which still stands mortgaged with the bank. The letter dated 05.01.2018 issued to guarantors also clearly stands the position as below:

"Notwithstanding this, the remaining outstanding amount in the account of M/S Ace Engineering Infratech {P} Ltd together with interest, costs and expenses thereupon shall payable by and recoverable from the said Borrower and not from you"

It is pleaded by petitioner that the contract of guarantee is a Tripartite Arrangement, and the property with respect to the guarantor cannot be released without intimation and consent of the borrower as it is in the teeth of the provisions



of the Indian Contract Act, 1872. The Hon'ble Supreme Court, in the case of (Civil) No. 245/2020, **Lalit Kumar Jain vs. Union of India & Ors**, while adjudicating on the issue as to whether "the release or discharge of a principal borrower from the date owed by it and its creditors, by an involuntary process, i.e., by operation of law or due to liquidation or insolvency proceeding", does not absolve the surety/guarantor of her liability, which arises out of an independent contract. Thus, under the provisions of the Indian Contract Act, 1872 the contract with the principal borrower and the contract with the surety/guarantor stand on a completely different footing.

It is pleaded by the Corporate debtor that he had filed a Writ of Mandamus bearing W.P(C) no 1685 of 2022 on 10.08.2022 before the Hon'ble Jammu and Kashmir and Ladakh at Jammu seeking directions to the financial creditor to consider the case of the corporate debtor as full and final settlement and accept the proposal of the corporate debtor to liquidate the Loan Account, per contra the corporate debtor has stated that the settlement has already been made. This plea is untenable as per the sanction letters dated 12.12.2012, 11.09.2015 and loan agreements 30.03.2013, 11.09.2015 (Annexure P3 and P5), deed of guarantee dated 11.09.2015 loan amount remains to be paid in full. Therefore, the amount which is still pending, amounts to debt and default. The application filed in the prescribed Form No.1 is found to be complete. Reliance has also been placed by the corporate debtor on the case of the Hon'ble Apex Court in the case of **Vidarbha Industries Power Ltd. Vs. Axis Bank Ltd.** (2022) 91 SC but the same is misplaced because the facts of the present case are distinguishable from those facts which were before the Hon'ble Supreme Court in the case relied upon.



A civil suit has also been filed by petitioner against respondent-Corporate Debtor but, this suit would not affect the CIRP proceedings. In view of the decision of the Hon'ble NCLAT in the case of **Harkirat S. Bedi vs Oriental Bank of Commerce**, Company Appeal (AT) (Ins) No. 499 of 2019 and **Karan Goel vs. M/s. Pashupati Jewellers & Anr**-Company Appeal (AT) (Insolvency) No. 1021 of 2019, we are of the view that the filing of suits and proceedings does not restrict the financial creditor for initiation of CIRP of the corporate debtor. Apart, in contract of guarantee, the liability of the principal borrower and guarantor(s) is joint and several. Thus, even if, either the principal borrower or guarantor has been discharged then the other party would not stand discharged automatically till the liability is met out or discharged.

11. The first 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 mentioned as 31.03.2016 i.e. when the account of the corporate debtor was classified as a Non-Performing Asset (NPA). The present petition is filed vide Diary No. 64 dated 07.01.2019 and was e-filed vide diary No. 501 dated 31.01.2019. It can be safely said that the present petition is well within the period of limitation of three years.

12. 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 sanction letters dated 12.12.2012, 11.09.2015 and loan agreements 30.03.2013, 11.09.2015 (Annexure P3 and P5); Hypothecation Agreement, letter of continuity, undertaking, memorandum relating to deposit of title deed dated 11.09.2015 , agreement to mortgage, certificate of registration of mortgage, deed



of personal guarantee, counter-guarantee, deed of guarantee dated 11.09.2015 (Annexure P4 and P6); loan recall notice (Annexure P7), statement of account depicting outstanding balance as on 31.10.2018 (Annexure P8), a certificate under Section 2A (a) and (b) of Bankers' Book Evidence Act, 1891 (Page 627) are attached with the main petition. As per the financial records, it is evident that an amount of Rs. 10,11,23,983.19 (Rupees Ten Crores Eleven Lakhs Twenty Three Thousand Nine Hundred and Eighty Three Paise Nineteen Only) (Rs. 8,90,88,599.72 and Rs. 1,20,35,383.47/- and further interest at the rate of 12.15% and 12.65% per annum from 31.10.2018) is still pending which amounts to debt and default, when the corporate debtor avoided the payment of the outstanding amount despite repeated requests by the petitioner-financial creditor.

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13. The present application has been filed for the replacement of Interim Resolution Professional (IRP). The prior condition is that there are no disciplinary proceedings pending against the proposed IRP. In the present case, in Part III of Form 1, Mr. Neeraj Bhatia has been proposed as IRP. However, vide IA No. 312 of 2023, Mr. Yatin Sharma is proposed as new IRP substituting Mr. Neeraj Bhatia. Form No.2 dated 22.10.2021, Form-B dated 27.04.2022 along with the certificate of IBBI issued in favour of the proposed Interim Resolution Professional i.e. Mr. Yatin Sharma is submitted. The Law Research Associate of this Tribunal has checked the credentials of Mr. Yatin Sharma, his AFA certification is valid upto 26.04.2023 and there is nothing adverse against him. Thus, IA No. 312/2023 is allowed. In view of the above, we appoint Mr. Yatin Sharma, Registration No. IBBI/IPA-001/IP-P-02008/2020-21/13112, MobileNo.9810162206, E-mail:SHARMA



YATIN@YAHOO.COM the Interim Resolution Professional with the following directions: -

- i.) The term of appointment of Mr. Yatin 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 a request 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.

14. 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.

15. 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.

16. 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 e-mail address forthwith.

17. The petition is admitted accordingly.

Sd/-
(Subrata Kumar Dash)
Member (Technical)

Sd/-
(Harnam Singh Thakur)
Member (Judicial)

March 06, 2023

VN/TB