

**NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, CHENNAI**

CP/670/IB/2017

In the matter of
**M/s.Stanbic Bank
Ghana Limited** ... Petitioner/Financial Creditor

Vs.

**M/s. Rajkumar Impex
Private Limited** ... Respondent/Guarantor

Order delivered on: 27.04.2018

Coram:

**K. ANANTHA PADMANABHA SWAMY, MEMBER (J)
S.VIJAYARAGHAVAN, MEMBER (TECHNICAL)**

For the Petitioner: *Shri. Anirudh Krishnan, Advocate*
For the Respondent: *Shri. S. R. Rajagopal, Advocate*

ORDER

Per: K. ANANTHA PADMANABHA SWAMY, MEMBER (J)

Under consideration is a Company Petition filed by M/s. Stanbic Bank Ghana Limited (in short Petitioner/Financial Creditor) against M/s. Rajkumar Impex Private Limited (in short Respondent) under section 7 of the Insolvency and Bankruptcy Code, 2016 (in short IB Code 2016) r/w Rule 4 of Insolvency &

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Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short, IB Rules 2016).

The petitioner/Financial creditor herein is a bank incorporated at Ghana having its registered office at 215, south Liberation Link Airport City, Accra, Ghana and the respondent herein is a guarantor, a private Company registered under the Companies Act, 1956 having its registered office at No. 119, St. Mary's road, Abhiramapuram, Chennai – 600 018.

Brief Facts :

- a. The entire issue in controversy arises out of Loan Agreements dated 24.02.2012 and 15.04.2014 (Page nos. 15-68 of the petition) entered into between the Petitioner/Financial Creditor and M/s. Rajkumar Impex Ghana Limited (the Principal Borrower), the wholly owned subsidiary of the Respondent Company. Each of these loan agreements contain

exclusive jurisdiction clause conferring jurisdiction to the Courts of England and Wales.

- b.** Pursuant to the said Loan Agreement, the petitioner/financial creditor and the respondent entered into a deed of guarantee dated 12.04.2012 which specifically made the guarantee an “on demand guarantee” which was invocable on demand. Independent of the respondent’s obligation as a Guarantor, the said deed also contained an indemnity issued by Respondent to the petitioner/financial creditor.
- c.** As per clause 19.2 of the Guarantee and Indemnity Deed dated 12.04.2012 between the petitioner/financial creditor and the respondent herein it is clear that the Tribunal has competent jurisdiction in spite of the lis pendens before the Ghana court.

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“19.2 The parties to this guarantee irrevocably agree that, subject as provided below, the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this guarantee or its subject matter or formation (including non-contractual disputes or claims). Nothing in this clause shall limit the right of the Lender to take proceedings against the Guarantor in any other court of competent jurisdiction, nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdictions, whether concurrently or not, to the extent permitted by law of such other jurisdiction.”

It is further noted from the terms of the loan dated 24.02.2012 in clause 8 that the loan was sanctioned with the security which includes the guarantee given by the respondent herein.

“Security :

Security required by the Bank for loan shall be as follows:

8.1 security required :

The bank requires the following as security for the entire customer's indebtedness to the Bank from time to time, all such security to be

in form and substance satisfactory to the Bank:

8.1.1 Legal mortgage over Customer's fixed assets valued at USD5,300000.00 and located at plot number 69 Block "D" Sector 3N Layout at Techiman in the Techimanian Municipality of the Brong Ahafo Region of the Republic of Ghana measuring 7.79 acres.

8.1.2 Fixed and Floating Charge over Customers movable asset including all raw and processed cashew nut stocks to be stamped for USD 20,530000.00.

8.1.3 Unlimited parent corporate guarantee from Rajkumar Impex Private Limited, registration number 18-29136 (the "Guarantor"), incorporated in India.

8.1.4 General assignment of Customer's sale proceeds and receivables."

- d.** When there was a default by the Principal Borrower, proceedings were initiated in Ghana (Suit No. BFS 13/2016 on 20.11.2015) against the Principal Borrower (Page 8 of the additional affidavit and documents) and against the respondent before the English Courts (Case No. CL-2017-000235 on 20.04.2017) (page 107 of the petition).

e. While the proceedings before the Ghana court is still pending and no money has been recovered till date pursuant to the same the English Court passed an order dated 08.08.2017 analyzing the evidence. The parties to the agreement have agreed to submit themselves to the jurisdiction of English Courts and English Law. The said order was certainly an order on merits. This order is proof of default at the end of the Respondent. It is on the basis of this default of the Respondent (as recognized by decree of the English Courts) that the present petition has been filed.

f. The learned Counsel for the petitioner submitted that M/s. Rajkumar Impex Ghana Limited (in short Principal Borrower) is the subsidiary of the Respondent herein and has borrowed money to the tune of US\$10,849,284.88 from the Petitioner/

Financial Creditor and has failed to repay the said amount as per the terms and conditions of loan agreements. Since the principal borrower has failed to repay the loan amount, the petitioner/Financial Creditor filed a suit before the Ghana Court and is pending for disposal. The Respondent herein is a guarantor to said loan amount by way of a deed of indemnity and guarantee with the petitioner/Financial Creditor dated 12.04.2012 in which the Respondent has assured the petitioner/Financial Creditor that the Respondent would repay the amount borrowed on failure of the same by the principal borrower and also would indemnify the petitioner/Financial Creditor. Since the Principal Borrower failed to repay the loan amount and petitioner/Financial Creditor initiated proceedings before the Hon'ble High Court of Justice, Queen's

Bench Division, Commercial Court, London against this Respondent as per "On Demand Clause", i.e. clause 19 of the "Deed of indemnity and Guarantee" dated 12.04.2012 wherein the parties agreed that the governing law would be English Law and the courts of England and Wales have exclusive jurisdiction. The said Hon'ble Court after giving sufficient opportunity to the Respondent made an order dated 08.07.2017 and a decree was passed in favour of the Petitioner/Financial Creditor for a sum of US\$12,878,922.47 comprising the principal amount and the interest thereon. Since this Respondent who is the guarantor herein did not repay the amount as per the order of the said Hon'ble Court, the present petition is filed before this Tribunal on the basis of the said decree with prayer to admit the petition and to initiate

Corporate Insolvency Resolution Process against the Respondent under Insolvency and Bankruptcy Code, 2016.

- g.** The learned Counsel for the Respondent filed a counter and vehemently argued that the petition under IB Code, 2016 is not maintainable on the grounds that the petitioner/Financial Creditor not being an Indian Company within the meaning of Companies Act, 2013 cannot invoke the provisions of IB Code and prefer a petition styling themselves to be a Financial Creditor. He further submitted that the application was signed by the agent in Ghana on 31.10.2017 and that a constituted attorney cannot institute application on behalf of their principal invoking the provisions of section 7 of the IB Code, 2016. The rules framed thereunder entitle only a person authorised or

authorised representative to verify the pleading and that the pleadings verified by an agent is not maintainable. He also submitted that the principal borrower is an independent entity and not a subsidiary of the Respondent Company. Having failed to recover the amount from the principal borrower, the Petitioner/Financial Creditor cannot enforce the claim against the Guarantor and the Guaranteed liabilities are recoverable only under certain conditions as envisaged under Clause 2.2 of the said "Deed of Guarantee and Indemnity dated 12.04.2012. It was further argued that it was not proved by way of pleadings filed before this Tribunal including the order of Hon'ble High Court of Justice, Queen's Bench Division, Commercial Court, London that none of the circumstances warranted the invocation of guarantee or the fact that

debt is not recovered has been established. Further, the order made by the Hon'ble High Court of Justice, Queen's Bench Division, Commercial Court, London is not conclusive as the same has not been given on merits and relied on the provision of section 13 of the Code of Civil Procedure Code in support of his submissions.

- h.** Further, the provision of Foreign Exchange Management (Guarantee) Regulation, 2000 mandates permission to be obtained from the Reserve Bank of India (RBI) prior to signing of the guarantee. Admittedly, no approval has been obtained and no valid guarantee has been executed. Suppressing the clause 2.2, a suit was filed before the Hon'ble High Court of Justice, Queen's Bench Division, Commercial Court, London and an ex-parte decree was obtained. M/s. Rajkumar Impex Ghana Limited has

disputed the amount claimed by the petitioner/Financial Creditor and the matter is pending before the Hon'ble High Court at Synia, Ghana. Since a civil proceeding is pending, the application invoking the provisions of IB Code, 2016 is not maintainable. Further, the alleged liability of the principal borrower is secured by fixed assets and the petitioner/Financial Creditor has already invoked the provisions of Ghana Lenders and Borrowers Act and taken possession of the principal borrower's immovable properties. The Petitioner/Financial Creditor issued a letter dated 02.11.2015 to the principal borrower towards notice of realisation of collateral security pursuant to section 34 of the Borrowers and Lenders Act, 2008 (Act 773) and the same was duly replied by the principal borrower vide its letter dated

26.11.2015. Suppressing all these facts, the Petitioner/Financial Creditor approached the Hon'ble High Court of Justice, Queen's Bench Division, Commercial Court, London and obtained an ex-parte order. The Hon'ble High Court of Justice, Queen's Bench Division, Commercial Court, London has not considered the said aspects and therefore the judgment is not on merits. The claim based on the same is bad in law and the application under IB Code, 2016 is not maintainable. The learned Counsel for the Respondent relied on the following case laws and on the Foreign Exchange Management Regulations, 2000 in support of his submissions.

1. **67 L.W 1100 – The Karnataka Vegetable Oils and Refineries Limited Vs. the Madras Industrial Investment Corporation Limited-** it was held that where an application for winding up of a company was

preferred under section 162 and 166 of the Company Act by a creditor who had ample security for his debt and there was no averment that the security was insufficient or that he ever demanded additional security though the mortgage deed contained a specific provision enabling him to demand such additional security and the application was not supported by any other creditor desiring that the company should be wound up and the company objected to the winding up on the ground that its financial embarrassment was only temporary due to cause beyond its control and that the winding up would not be in best interests of the company and also for the reasons that the petitioning creditor had other remedies which could be pursued by him to enforce his rights;

2. **22001 5 SCC 265 - International Wollen Mills Vs Standard Wool (UK) Limited** it was held on facts that the decree was not on merits and could not be enforced in India.

3. **2001 SCC Online Bon 1179 - Manipal finance Corporation Limited Vs CRC Limited** it was held that there is no dispute about the pendency of the arbitration proceedings for the same cause of

action. Therefore the present petition cannot be entertained and the same deserves to be dismissed..... The winding up petition is not a legitimate means to seek to enforce payment of the debt which bona fide disputed by the Company.....;

4. **(2008) 142 Comp Cas 647 (Bom) China shipping Development Co limited Vs Lanyard Foods Limited** it was decided whether the foreign court had jurisdiction and that judgement of English court was rendered on merits.....;

5. **Company Appeal (AT) (Insol) No. 30 of 2017 Palogix Infrastructure Private Limited Vs ICIC Bank Limited** it was held that the Power of attorney holder is not competent to file an application on behalf of a Financial Creditor or Operational Creditor or Corporate Applicant and that an authorised person has power to do so; In view of the above the learned Counsel for the Respondent prayed to dismiss the petition.

- i. The learned Counsel for the Petitioner/Financial Creditor submitted that the dispute is irrelevant for the purpose of

an application under Section 7 of the IB Code, 2016 consequently the dispute with the principal borrower is also irrelevant. Guarantee was "On Demand" instrument and there arise no necessity to prove that the situations under clause 2.1 and 2.2 of Guarantee Deed had arisen. In any event it is impossible to go beyond the decree. He relied on the provisions of section 128 and 141 of the Contract Act, 1872 and submitted the fact that the proceedings are pending against the Principal Borrower and as on date no recovery has been made. It is also a settled law that the liability of the Guarantor is co-extensive with that of the principal borrower. There is no law which prevents the creditor to proceed against both the principal borrower and the guarantor independently. Creditor need not necessarily exhaust the remedy available

against the principal borrower before proceeding against the guarantor. It is upto the guarantor to see whether the principal borrower pays and not that of the creditor. The guarantor's right against the principal borrower is protected by virtue of the right of subrogation. Clause 3.3 of the Guarantee Deed provides that the petitioner/Financial Creditor need not be obliged to take any action against the borrower before enforcing the rights against the guarantor as referred to in para 11 of the judgment of Hon'ble High Court of Justice, Queen's Bench Division, Commercial Court, London. Letter dated 11.03.2015 is a conclusive evidence of the debt as it is in accordance with Clause 13 of the Guarantee Deed. The respondent is not only liable as guarantor but also as a principal obligator. With regard to the submission made by the Respondent that

the conditions of guarantee are not met, he submitted that it is not open to go beyond the decree once there is a foreign court decree. The order of Hon'ble High Court of Justice, Queen's Bench Division, Commercial Court, London is conclusive and it was made on merits even though it is an ex-parte order, it is based on the consideration of the matter by studying the evidence on record. The IB Code, 2016 does not prohibit filing a petition by foreign creditor. He further submitted that Rule 23 of the National Company Law Tribunal Rules read with Form 1 permits an authorised Representative to present an application or petition before Tribunal and the authorised representative includes an authorised agent. The board of directors authorized the POA to file the petition under IB Code, 2016 and the POA is signed by the directors of the

petitioner/Financial Creditor. Finally the learned Counsel for the petitioner/Financial Creditor submitted that the FEMA (Guarantee) Regulations, 2000 are not applicable as they apply only if the Principal Debtors/Borrower is an Indian. The learned Counsel for the petitioner relied on the following case laws in support of his submissions;

1. 1969 1 SCC, 620 Bank of Bihar Limited Vs Dr. Damodar Prasad,

AIR 2012 SC 2288 Ram Kishun and others Vs State of UP and others,

1986 2 SCC 145 SBI Vs Saksaria Sugar Mills Limited and others,

1970 SCC Online Mad 130 Arumugam Chettiar Vs Sadasivam Pillai and others,

1977 SCC Online Kar 105 The Hukumchand Insurance Co Limited Vs Bank of Baroda,

1981 SCC Online Cal 188 Punjab National Bank Vs Mehra Brother (P) Limited,

**1992 3 Supreme Court Cases 159
State Bank of India Vs Indexport
Registered and others,**

**1992 SCC On line Ori 31 Sukur
Pradhan and others Vs Orissa State
Financial Corporation and others,**

**1997 SCC Online Madras 709
Balakrishnan Vs Chunnilal Bagmar,**

**Manu/SC/0541/2010 United Bank of
India Vs Satyawati Tandon and
others,**

**2015 7 SCC 337 Central bank of
India Vs C L Vimla** to say that creditor
need not exhaust the remedy against the
principal borrower before proceeding
against the guarantor.

2. **1969 1 SCR 620 Wright Vs Simpson,
6 Ves Jun 714, 734 referred in Bank
of Baroda Vs Dr. Damodar Prasad**
wherein held that it is for the guarantor
to see whether the principal borrower
pays and not that of the creditor;
3. **1969 1 SCR 620 Bank of Baroda Vs
Dr. Damodar Prasad and 1968 23
SCR 724 Amritlal Goverdhanlalan Vs
state Bank of Travancore** it was held
that the Guarantor's right against the
principal borrower is protected by virtue
of its right of subrogation;
4. **2007 SCC Online Bom 319 China
Shipping Development Co Vs Lanyard
Foods Limited,**

2001 (5) SCC 265 International Wollen Mills Vs Standard Wool (UK) Limited,

2017 (2) SCC 253 M/s. Alcon Electronics P Limited Vs Celem S A,

AIR 1927 ALL 570 Ishri Prasad Vs Shri Ram,

1928 SCC Online Rang 7 Abdul Rahman Vs Mohamad Ali Rowthar

1958 Ker 203 Govindan Asari Vs Sankarfan Asari to say that the foreign summary judgment based on the merits is enforceable in India.

5. **2017 SCC Online SC 1025 M/s. Innoventive Industries Limited Vs ICICI Bank and another** it was held that dispute irrelevant for the purpose of determining an application under section 7 of the IB Code, 2016.

6. **Civil Appeal No. 15135 of 2017 Macquerie Bank Limited Vs Shilpi Cable Technologies Limited** it was held that there is no restriction on a duly authorized POA holder signing on behalf of the Company to initiate proceedings under the IB Code, 2016 and there is no restriction on a foreign company initiating proceeding under the IB Code, 2016. In view of the above, the learned Counsel for the petitioner/Financial Creditor prayed for allowing the petition and initiate corporate insolvency

resolution process against the Respondent.

- j.** Heard both the parties and perused the pleadings.
- k.** Taking into consideration the submissions made by both the parties, the issue that arise before us is whether the Petitioner/Financial Creditor has made out a prima facie case under IB Code, 2016 for the purpose of initiating corporate insolvency resolution process against the Respondent who is the guarantor for the principal borrower or not. It is on record that the Petitioner/Financial Creditor initiated proceeding against the Respondent/ Guarantor before Hon'ble High Court of Justice, Queen's Bench Division, Commercial Court, London and it has passed decree on 08.07.2017. It is contended by the Respondent that the order

made by the said Commercial Court, London is not conclusive and it is also not on merits. On perusal of the said order the Tribunal observes that it is recorded by the Hon'ble Judge that there was an order for serving the notice to the defendant i.e. the Respondent herein and it is also recorded that proceedings were duly served to the defendant. However, the defendant did not thereafter file any acknowledgement of service or defence or any other document in relation to the proceedings. Thereafter the application was filed and it is also recorded that the application was also duly served on the defendant and the date of hearing was also informed to the defendant. (Para 3, 4 and 5 of the order). It is also recorded in para 5 of the order that the defendant has neither appeared nor represented although it has been given every opportunity to do so.

Subsequently the Hon'ble Judge has also recorded that he turned to the merits of the application. (Para 6 of the order). The Hon'ble Judge has elaborately gone into the merits of the application and finally recorded that the defendant's liability to the claimant arises not only qua guarantor but by reason of clause 2.3 of the deed, liable as principal obligator and indemnifier and as a primary party to the claimant. (Para 21).

1. The Hon'ble Judge has also observed that there is no other compelling reason for a trial and passed the decree in favour of the Petitioner/Financial Creditor herein. It is also on record that the Respondent has never appeared before the said Commercial Court, London despite of the notice served and it is also on record that the Respondent has not proved that either they have filed an application to set aside the order or filed an

appeal against the said order before the appropriate court. Without filing an appeal or application to set aside the order of the Hon'ble High Court of Justice, Queen's Bench Division, Commercial Court, London and now contending that the said order is not made on merits is not supported by any law and therefore the Respondent is estopped from making such plea before this Adjudicating Authority. It is a well settled law that the courts need not go beyond a decree made in favour of a party and in this case the decree made by the Hon'ble High Court of Justice, Queen's Bench Division, Commercial Court, London. Since the Respondent failed to defend its case before Hon'ble High Court of Justice, Queen's Bench Division, Commercial Court, London, now it cannot contend that the said order is not on merits. The case laws relied by the

learned Counsel for the petitioner is in support of the clarification to the queries raised by the Respondent. In view of all the submissions made by the parties and the observations made, the Tribunal concludes that the petitioner/Financial Creditor has made out a prima facie case under IB Code, 2016.

m. In view of the above observations, we hereby admit the petition as the petitioner has made out a prima facie case and also proved that there is a debt due payable by the Principal Borrower and there is a decree made against the Respondent/Guarantor. This Tribunal has no jurisdiction to enforce the foreign decree; however there is no bar in it taking cognizance of the foreign decree. The English Commercial Court is recognized under Section 13 and 44A of CPC.

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“44A. Execution of decrees passed by Courts in reciprocating territory.”-(1)

Where a certified copy of a decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

Explanation I: “Reciprocating territory” means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section, and “Superior Courts”, with reference to any such territory, means such courts as may be specified in the said notification.

Explanation II: "Decree" with reference to a superior Court means any decree or judgment of such court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

The List of the Reciprocating Territories as per the Provisions of Section 44 A of the Code of Civil Procedure, 1908, is as under:

"United Kingdom, Aden, Fiji, Republic of Singapore, Federation of Malaya, Trinidad and Tobago, New Zealand, the Cook Islands (including Niue) and the Trust Territories of Western Samoa, Hong Kong, Papua and New Guinea, Bangladesh and United Arab Emirates."

- n. The objections raised by Counsel for the Respondent are not valid ground for rejection of the instant petition. Therefore the petition stands admitted.
- o. The Tribunal thus orders for the commencement of the Corporate Insolvency

Resolution Process which shall ordinarily get completed within 180 days, reckoning from the day this order is passed.

- p.** We appoint Ms. Deepa V Ramani, (Registration No. IBBI/IPA-002/IP-00118/2017-2018/10287), having office at No. 40, TNHB Complex, No. 180 Luz church Road, Chennai – 600 004 as an Interim Resolution Professional (IRP) proposed by the Applicant. There is no disciplinary proceedings pending against the IRP and is name is reflected in IBBI website. The IRP is directed to take charge of the Respondent/ Corporate Debtor's management immediately. The IRP is also directed to cause public announcement as prescribed under Section 15 of the IB Code, 2016 within three days from the date of receipt of this order and call for submissions of the claim in the manner prescribed.

q. The Tribunal declares that the moratorium shall have effect from the date of this order till the completion of corporate insolvency resolution process for the purpose referred to in Section 14 of the IB Code, 2016. The Tribunal orders for the prohibition of the following, namely:

- 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.
- Transferring, encumbering, alienating or disposing of by the corporate debtors any of its assets or any legal right or beneficial interest therein;

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- 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002)
- The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- The supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. The provisions of Sub-section (1) of

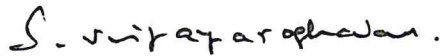
Section 414 shall not apply to such transactions, as notified by the Central Government.

- r. The IRP appointed shall comply with the provisions of sections 13(2), 15, 17 & 18 of the Code. The Directors, Promoters or any other person associated with the management of Corporate Debtor are directed to extend all assistance and cooperation to the IRP as stipulated under Section 19 and for discharging the functions under Section 20 of the IB Code.
- s. The petitioner/Financial Creditor as well as the Registry is directed to send the copy of this order to IRP on appointment so that the IRP can take charge of the Corporate Debtor's assets etc. and make compliance with this order as per the provisions of the IB Code, 2016.

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t. The Registry is also directed to communicate this order to the Financial Creditor and the Corporate Debtor.

With the above directions the petition is **disposed of**.



(S.VIJAYARAGHAVAN)
MEMBER (TECHNICAL)



(K.ANANTHA PADMANABHA SWAMY)
MEMBER (JUDICIAL)

gp/dv/sd/pb