

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

CP 3799 (IB)/MB/2018

Under Section 7 of the I&B Code, 2016

In the matter of

ResponsAbility Fair Agriculture Fund

...Financial Creditor/ Petitioner

v/s

Abhay Nutrition Private Limited

...Corporate Debtor

Order dated 2nd April 2019

Coram: Hon'ble Mr V.P. Singh, Member (Judicial)

Hon'ble Mr Ravikumar Duraisamy, Member (Technical)

For the Petitioner: Adv. Pooja Mahajan, Adv. Mutafa Kachwala and
Adv. Ketki Pansare

For the Respondent: Adv. Mihir Mekal, Adv. Ankit Parekh

Perse; V.P. Singh, Member (Judicial)

ORDER

1. This Company Petition No. 3799/2018 is filed on 8.10.2018 by the ResponsAbility Fair Agriculture Fund, Financial Creditor or Petitioner for initiation of Corporate Insolvency Resolution Process (**CIRP**) against the Abhay Nutrition Pvt Ltd, the Corporate Debtor on the grounds that the Corporate Debtor has guaranteed the loan given by the Financial Creditor to the Krishi Nutrition Limited (**Borrower**) and the borrower has defaulted in repayment of the loan.
2. The Borrower is a company incorporated under the laws of Dubai and a wholly owned subsidiary of the Corporate Debtor. The Corporate Debtor is a company incorporated under the Companies Act, 1956 on 15.05.2008 with its registered office at Gut No. -84, Gundewadi, Bhokardan Road, Jalna, Maharashtra- 431203, India.
3. The Financial Creditor had granted a loan of \$47,50,000/- to the Borrower vide three promissory notes on the following conditions:

- a. Promissory note dated 28.11.2016 for the principal amount of \$12,50,000/- with an interest rate of 7.25% per annum and a maturity date of 31.05.2017 (**Promissory note 1**);
- b. Promissory note dated 21.12.2016 for the principal amount of \$15,00,000/- with an interest rate of 7.25% per annum and a maturity date of 21.08.2017, with principal amortisation of \$5,00,000/- on 21.06.2017 (**Promissory note 2**); and
- c. Promissory note dated 28.02.2017 for the principal amount of \$10,00,000/- with an interest rate of 7.25% per annum and a maturity date of 31.07.2017, with principal amortisation of \$5,00,000/- on 30.06.2017 (**Promissory note 3**);

The copy of the said Promissory Notes and the Board Resolution of the borrower had been annexed to the Petition.

4. The disbursement of the loan amount was made on 30.11.2016, 21.12.2016 and 28.02.2017 for Promissory note 1, 2 and 3 respectively. A copy of the SWIFT statement for disbursement of the amount under the said three Promissory Notes along with the bank statement reflecting the disbursement had been submitted on record.
5. The Financial Creditor entered into a corporate guarantee deed dated 28.10.2016 with the Corporate Debtor for guaranteeing the amounts loaned by the Financial Creditor to the Borrower as per the Promissory notes. The copy of the Guarantee Deed has been annexed to the Petition.
6. We have heard arguments for both the sides and perused the records.
7. The petition is filed by Mr Amit Nawandhar, transaction officer of ResponsAbility Fair Agriculture Fund, duly authorised by the Board Resolution dated 11.06.2018 of Credit Suisse Funds AG which is the fund management company of the Petitioner fund.
8. The Corporate Guarantee Deed is executed at Indore, Madhya Pradesh on 28.10.2016 between the Corporate Debtor and the Financial Creditor for securing the repayment of funds received by the Borrower as loans as evidenced by promissory notes by the Financial Creditor. The Guarantor has agreed to issue a guarantee

for an amount of up to \$50,00,000/- on behalf of the Borrower in favour of the Financial Creditor. The said deed is signed by Mr Kachrual K Patni, authorised by the Board of Directors of Corporate Debtor at their meeting held on 05.10.2016. The Corporate Debtor, being a guarantor for the loan availed by the Borrower, has co-extensive liability to repay the debt.

9. The date of default is stated to be 14.06.2017 as being ten business days from the due date under Promissory note 1, i.e. 31.05.2017. The Petitioner has annexed a detailed computation of total outstanding amount along with amount in default from the date of grant till 15.09.2018 along with interest and penalty under the said promissory notes.
10. The Corporate Debtor has filed its affidavit in reply on 25.01.2019 stating, among other things, that the validity and enforceability of the Deed of Guarantee need to be proved under the laws of Switzerland. The Corporate Debtor has relied upon clause 27 of the Corporate Guarantee Deed which deals with governing law and jurisdiction is reproduced below:

"This Guarantee shall be governed by and construed in accordance with the laws of Switzerland. The Guarantor agrees that the courts of Zurich, Switzerland are to have jurisdiction to settle any disputes which may arise out of or in connection with Guarantee and that accordingly, any legal proceedings so arising may be brought in those courts and the guarantor irrevocable and unconditionally submits to the jurisdiction of those courts."

11. The Corporate Debtor states that the above clause is three fold. The first part of the above clause exclusively deals with governing law for the Corporate Guarantee Deed under question. It clearly states that this guarantee allegedly invoked by the Financial Creditor against the Corporate Debtor under the Corporate Guarantee Deed is governed by the laws of Switzerland. Secondly, it further clearly establishes that any legal proceedings arising from any disputes between the parties shall be decided by the courts of Zurich, Switzerland. In view of the governing law, being the laws of Switzerland and the competent courts of Zurich, Switzerland have the jurisdiction to settle any disputes arising out of or in connection with Corporate Guarantee Deed, the Financial Creditor in view thereof is not authorised to file an Application since the Corporate

Guarantee Deed is governed by the laws of Switzerland. It is stated that this Tribunal, which is enacted under the Indian Laws, is not the appropriate forum considering.

12. The Corporate Debtor submits that the latter part of the aforesaid clause only refers to proceedings to invoke the guarantee and does not permit the Financial Creditor to initiate proceedings against the Corporate Debtor before this Tribunal. The Corporate Debtor further submits that in any event, unless it is determined that the said Deed is valid and has been properly invoked as per Swiss law and is also in compliance with Indian law including being duly stamped, the Financial Creditor cannot initiate proceedings for an insolvency resolution under the Code before this Tribunal. If the Financial Creditor is alleging that the said Deed is in compliant with Swiss law and has been properly invoked under Swiss law, then its remedy will lie in the court of Switzerland, and the debt in India will become crystallised only after a proper judgment is obtained by the Financial Creditor in a Swiss court. The relevant latter part of the aforesaid clause as relied upon by the Petitioner in its written submissions is reproduced below:

"Nothing herein shall limit the right of the Secured Party to take proceedings against the Guarantor in any other court of competent jurisdiction nor shall the taking of proceedings in one or more jurisdictions preclude the Secured Party from taking proceedings in any other jurisdiction, whether concurrently or not."

13. The Petitioner had sent notice to guarantor intimating default in repayment and demanding payment under Corporate Guarantee Deed vide letters dated 21.07.2017 and 27.09.2017. The Petitioner has also annexed e-mail dated 21.11.2017 and 08.02.2018 sent by the Financial Creditor demanding payment under default from the Corporate Debtor.
14. The Corporate Debtor sent an e-mail on 09.02.2018 to the Financial Creditor stating inter-alia ' *we are committed to paying back with interest but only after the sanction of SBI facility.*'
15. The Petitioner sent a legal notice dated 23.03.2018 to the Corporate Debtor demanding payment under the three Promissory notes as the Borrower has defaulted in repayment. The said notice

was sent via e-mail on 23.03.2018. The Corporate Debtor replied to the said e-mail requesting to find an amicable solution. In a legal reply dated 30.03.2018 to the legal notice dated 23.03.2018, the Corporate Debtor has merely sought documents which are already in the knowledge of the Corporate Debtor.

16. The registered address of the Corporate Debtor is within the territorial jurisdiction of this Tribunal, and in a proceeding under section 7 of the I&B Code, we are only concerned with the existence of debt and default. The judgment of the Hon'ble Supreme Court in *M/s. Innoventive Industries Ltd. Vs. ICICI Bank Ltd.* – (2018) 1 SCC 407 settles the position above in the following paragraph as reproduced below:

"...in the case of a corporate debtor who commits a default of 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 default has occurred. It is of no matter that the debt is disputed 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."

17. The deed of corporate guarantee is signed by the authorised person of the Corporate Debtor, and the fact of giving a guarantee on behalf of the Borrower is not denied by the Corporate Debtor. It is also not in dispute that the Borrower has defaulted in repayment of the debt. The Petitioner has also intimated the default in repayment by the Borrower to the Corporate Debtor as far back as 21.07.2017 specifically mentioning as follows:

"The Guarantee secures repayment of the principal amount together with all accrued interest on the outstanding unpaid principal amount and all the costs and penalties under the Note up to an amount of \$5,000,000.00. According to the section 4 of the Guarantee, on the occurrence of an event of default under the Note, the Guarantor shall, upon demand, forthwith pay to the Note Holder without demur all the amounts payable by the Issuer under the Note."

We thank you for the attention of this matter and making the necessary arrangements with Krishi Nutrition Limited to settle their debt."

The Corporate Debtor cannot rely upon the above language to contend that the Petitioner did not demand repayment of the loan from the Corporate Debtor and hence the guarantee has not been properly invoked as per clause 4 of the deed. The demand is even more specifically evidenced by the e-mails dated 21.11.2017 and 08.02.2018 sent by the Financial Creditor demanding payment under default from the Corporate Debtor.

18. The Corporate Debtor has also contended that the Financial Creditor was well aware of the fact that the Corporate Debtor was required to obtain prior written permission from the State Bank of India and the Syndicate Bank before undertaking any guarantee obligation on behalf of any third party before executing the Corporate Guarantee Deed. Despite this, the Financial Creditor proceeded to execute the said Corporate Guarantee Deed without the Corporate Debtor obtaining the said prior written permission. Further it is stated that there is a letter dated 20.01.2019 issued by the State Bank of India to the Corporate Debtor informing that permission/NOC from the member bank of consortium/lender banks for the Corporate Guarantee Deed is not obtained and all the assets of the Corporate Debtor viz. stocks, receivable, plant and machinery/ factory, land, building and other collateral are hypothecated/mortgaged with the consortium bankers and are the first charge holder on the properties of the Corporate Debtor. It is submitted that in effect the said Corporate Guarantee Deed was thus non-binding agreement and would only become a binding contract once the said consents were obtained. The said letter of the State Bank of India dated 20.01.2019 is produced by the Corporate Debtor along with its written submissions.
19. It is noted that the contention of the Corporate Debtor is incorrect and wrong as what is contended is contrary to what is stated in the letter of the SBI dated 20.01.2019. In the letter, it is stated that *'Thus, in case of invocation of Corporate Guarantee the obligation/claim will be subordinate to our charge.'* Even otherwise, the contention of the Corporate Debtor is not maintainable and rejected.

1. The Corporate Debtor has also objected that the Financial Creditor has failed to initiate any legal proceedings against the Borrower. The Financial Creditor has wilfully filed this petition against the Corporate Debtor with the knowledge that no proceedings have been initiated against the Borrower. This would not come in the way of a petition against the Corporate Debtor as has been held by the Hon'ble NCLAT in *Ferro Alloys Corporation Limited vs Rural Electrification Corporation Limited, Company Appeal (AT) (Insolvency) No. 92 of 2017* in the following paragraph:

"...it is not necessary to initiate 'Corporate Insolvency Resolution Process' against the 'Principal Borrower' before initiating 'Corporate Insolvency Resolution Process' against the 'Corporate Guarantors'. Without initiating any 'Corporate Insolvency Resolution Process' against the 'Principal Borrower', it is always open to the 'Financial creditor' to initiate Corporate Insolvency Resolution Process against the Corporate Guarantor as the creditor is also the 'Financial Creditor' qua the 'Corporate Guarantor'."

20. In light of the above observations when the Corporate Debtor has not raised any dispute upon the existence of a debt or default, the objections of the Corporate Debtor are not maintainable in the present proceedings.
21. As per the discussions above, we do not find merit in any objections raised by the Respondent.
22. The Petitioner has proposed the name of Mr Vikas Prakash Gupta, a registered insolvency professional having Registration Number [IBBI/IPA-001/P00501/2017-18/10889] as **Interim Resolution Professional**, to carry out the functions as mentioned under I&B Code, and given his declaration; no disciplinary proceedings are pending against him.
23. The Application under sub-section (2) of Section 7 of I&B Code, 2016 is complete. The existing financial debt is of more than rupees one lakh against the corporate debtor and its default is also proved. Accordingly, the petition filed under section 7 of the I&B Code for initiation of corporate insolvency resolution process against the corporate debtor deserves to be admitted.

ORDER

This petition filed under Section 7 of I&B Code, 2016, against the Corporate Debtor for initiating corporate insolvency resolution process is at this moment 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 such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- IV. That the order of moratorium shall have effect from 02.04.2019 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 at this moment appoints Mr Vikas Prakash Gupta, a registered insolvency professional is having Registration Number [IBBI/IPA-007/P00501/2017-18/10889] as Interim Resolution Professional to carry out the functions as mentioned under I&B Code. Fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.

24. The Registry is at this moment directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. **Compliance report of the order by Designated registrar is to be submitted today.**

Sd/-
RAVIKUMAR DURAISAMY
Member (Technical)

Sd/-
V.P. SINGH
Member (Judicial)

2nd April 2019