

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1**

C.P. (I.B) No.131/7/NCLT/AHM/2019

**Coram: MADAN BHALCHANDRA GOSAVI, MEMBER (JUDICIAL)
VIRENDRA KUMAR GUPTA, MEMBER (TECHNICAL)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING BEFORE THE AHMEDABAD BENCH OF THE
NATIONAL COMPANY LAW TRIBUNAL ON 16.03.2021**

Name of the Company:

Dena Bank
V/s
Utility Agrotech industries Pvt Ltd

Section:

7 of the Insolvency and Bankruptcy Code, 2016

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open court vide separate sheet.



**(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)**



**(MADAN B. GOSAVI)
MEMBER (JUDICIAL)**

Dated this the 16th day of March, 2021.

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1**

**CP (IB) No.131/7/NCLT/AHM/2019 & CP (IB)
No.132/7/NCLT/AHM/2019**

CP (IB) No.131/7/NCLT/AHM/2019

In the matter of :

Dena Bank (Now Bank of Baroda)
Having Registered office at
10-C, "G" Block, Bandra Kurla
Complex, Bandra (East),
Mumbai-400 051

... Financial Creditor

Versus

M/s Utility Agrotech Industries Pvt. Ltd.
CIN:U01119GJ1994PTC023942
Registered Office at:
Shop No.120, Lower Ground Floor,
Kohinoor Textile Market, Ring Road,
Surat-395002.

.... Corporate Debtor

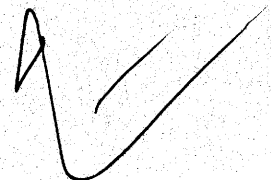
CP (IB) No.132/7/NCLT/AHM/2019

Dena Bank (Now Bank of Baroda)
Having Registered office at
10-C, "G" Block, Bandra Kurla
Complex, Bandra (East),
Mumbai-400 051

... Financial Creditor

Versus

M/s Supreme Fine Fab Pvt. Ltd.
CIN:U17119GJ1993PTC019577
Registered Office at :
Plot No.823/2, Road No.8,



GIDC Sachin, Sachin,
Surat-394230

.... Corporate Debtor

Date of Hearing: 02.03.2021

Date of Pronouncement of Order 16.03.2021

**Coram: MADAN B. GOSAVI, MEMBER(J)
VIRENDRA KUMAR GUPTA, MEMBER (T)**

Appearance :

Learned Counsel Mr. A.S. Panesar appeared for the Financial Creditor.

Learned Counsel Mr. Mohit Gupta for the Corporate Debtor.

COMMON-ORDER

[Per: Madan B. Gosavi, Member (Judicial)]

1. In CP(IB) 131 of 2019, Dena Bank (Now Bank of Baroda) filed application under Section 7 of IBC, 2016 against M/s. Utility Agrotech Industries Pvt. Ltd., the Corporate Debtor and Corporate Guarantor of M/s. Supreme (India) Impex Limited to start CIRP of corporate guarantor / Corporate Debtor on the ground that Corporate Debtor has committed default in paying the financial debt of Rs.55,38,117/-. The date of default is stated at 13.06.2018.
2. CP(IB) 132 of 2019 is filed by Dena Bank (Now Bank of Baroda) against another corporate guarantor Supreme Fine Fab Pvt. Ltd. The second Guarantor of M/s. Supreme (India) Impex Limited on the ground that corporate guarantor / Corporate Debtor committed default in paying the financial debt of Rs.58,75,000/-.

3. Since the Financial Creditor Dena Bank has filed these two applications under Section 7 of IBC, 2016 against two corporate guarantors of same principal borrower M/s. Supreme (India) Impex Limited and as the facts of the applications filed by the Financial Creditor and the defence raised by the Corporate Guarantors are the same, this common order is passed to dispose of both above CP(IB) 131 of 2019 and CP(IB) 132 of 2019.
4. For the brevity, the fact of CP(IB) 132 of 2019 are stated below. The facts are admitted in both petition by the both corporate guarantors and they are as follows:
 - Supreme (India) Impex Limited and M/s. Utility Agrotech Industries Pvt. Ltd. had executed deed of guarantee on 02.01.2018. Since the principal borrower committed default in paying the loan amount which was disbursed by the Financial Creditor, the Financial Creditor by letter dated 17.01.2019 invoke the guarantees and called upon both the guarantors (Corporate Debtors) to pay the debt but they could not comply the same.
 - These applications are filed to initiate CIRP of the Corporate Debtors under Section 7 of IBC, 2016.
 - In both applications, Corporate Debtor are served with notices of the applications. Its authorized representative appeared and filed affidavit in reply.

- We have gone through the contents of the reply. The corporate Guarantors raised four common defences i.e (i) Financial Creditor wrongly declared loan account of principal borrower to be NPA ignoring various guidelines issued by RBI and more particular guidelines dated 30.01.2014 (ii) the Financial Creditor failed to comply provision of Section 252 of the IBC, 2016 (it is relating to submitting the financial statement of the debtor to the Information Utility Service Provider), (ii) Principal borrower is already admitted in CIRP at the instance of the bank, hence, this proceedings on the basis of same debt and default is not maintainable. & (iv) application is not filed properly by Authorized Officer of the Bank.

5. We heard Learned Counsel for the Financial Creditor and Learned Counsels for the Corporate Debtors. Both have submitted their written notes of arguments.
6. In this case, there is no dispute about following relevant facts (i) Financial debt is more than Rs.1 lakh due and payable by these Corporate Debtors upon invocation of their guarantees by the bank, (ii) Corporate Guarantors committed default in paying the same and (iii) debt is not time barred.
7. Ultimately on the basis of above proved facts, application to start CIRP of the Corporate Debtor required to be admitted but the Corporate Debtor raised above defences. We deal with them one by one.

8. It is one of the defences raised by the corporate guarantor that the bank declared the principal borrower's loan account to be NPA was illegally and ignoring various circulars / guidelines of the RBI. We do not find any substance in this defence. The fact admitted on record is that the principal borrower did not pay the loan as per the terms of the loan agreement. It has committed default. The guarantees given by the corporate guarantors are rightly invoked by the bank vide letter dated 17.01.2019. They were called upon to pay the debt but they also failed to pay. In case of Innoventive Industries Ltd. Vs. ICICI Bank & Ors., Supreme Court held that *"It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be"*.

Hence, the defence raised by the corporate guarantor about non-observing guideline issued by RBI by the Financial Creditor cannot be the defence to be considered in this proceedings. It is not recovery proceedings, hence, we reject this defence out-rightly.

9. The second defence raised by the corporate guarantor that Financial Creditor did not comply the provision of Section 215 of the IBC, 2016. Section 215 of IBC, 2016 states the procedure of submitting financial statements of the debtor to Information Utility Service Provers. However, atleast till date, it is not necessary for the Financial Creditor to file certificate of default issued by Information Utility for initiating CIRP of the Corporate Debtor. It is not mandate of law. Financial Creditor can prove the facts i.e debt is due and payable and its defaults by way of other evidence also. In above case, there is overwhelming evidence to establish both facts. Even otherwise both facts are not in dispute. Hence, we reject this defence raised by the corporate guarantors.
10. Third defence required somewhat analysis. It is contended by the Corporate Debtor that once the principal borrower is admitted in CIRP, the application under Section 7 of IBC, 2016 is not maintainable against the guarantors for self-same debt and its default. To substantiate this argument, Learned Counsel for Corporate Debtor relied on order of Hon'ble NCLAT in case of Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd. Company Appeal (AT) (Insolvency)

No. 346 & 347 Of 2018 | 08-01-2019 Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd. as against this Learned Counsel for Financial Creditor submitted that there is no bar stated in IBC, 2016 for initiation of CIRP against the corporate guarantor once the principal borrower is admitted in CIRP to support his submission, Learned Counsel relied on the order of Hon'ble NCLAT in case of State Bank Of India vs Athena Energy Ventures Pvt Ltd in Company Appeal (AT) (Ins) No.633 of 2020.

11. We have gone through both the orders of Hon'ble NCLAT. In fact, the order of NCLAT in case of State Bank Of India vs Athena Energy Ventures Pvt Ltd. is later in point of time and Hon'ble NCLT had dealt with its earlier order in case of Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd. and ultimately held that *"Company Appeal (AT) (Ins) No.633 of 2020 We have referred to these details as Hon'ble Supreme Court of India in Judgement in the matter of "State Bank of India V. Ramakrishnan & Anr." (which was pronounced on 14th August, 2018 three days before the above Notification) ((2018) 17 SCC 394) and discussed Section 60(2) and (3) as they stood before this amendment was enforced. We will refer to the above Judgement in the matter of "Ramakrishnan" later. At present, we have referred to the above provision which had come on the statute book when Act 26 of 2018 was enforced and the Judgement in the matter of Piramal which was passed on 8th January, 2019 did not notice the above amendment. If the above provisions of Section 60(2) and (3) are kept in view,*

it can be said that IBC has no aversion to simultaneously proceeding against the Corporate Debtor and Corporate Guarantor. If two Applications can be filed, for the same amount against Principal Borrower and Guarantor keeping in view the above provisions, the Applications can also be maintained. It is for such reason that Sub-Section (2) of Section 60 provides that if insolvency resolution process or liquidation or bankruptcy proceedings of a Corporate Guarantor or Personal Guarantor as the case may be of the Corporate Debtor is pending in any Court or Tribunal, it shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such Corporate Debtor. Apparently and for obvious reasons, the law requires that both the proceedings should be before same Adjudicating Authority. It is clear that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as Guarantor. The law as laid down by the Hon'ble High Courts for the respective jurisdictions, and law as laid down by the Hon'ble Supreme Court for the whole country is binding. In the matter of Piramal, the Bench of this Appellate Tribunal "interpreted" the law. Ordinarily, we would respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner it was interpreted in the matter of Piramal. For such reasons, we are unable to uphold the Judgement as passed by the Adjudicating Authority.

12. It has further held by Hon'ble NCLAT in above order that "it is clear that in matter of guarantee, CIRP can proceed against

the principal borrower as well as the guarantor. The law laid down by the Hon'ble High Court for the respective of jurisdiction, and law as laid down by the Hon'ble Supreme Court for the whole country is binding. In the matter of Piramal, the Bench of this Appellate Tribunal "interpreted" the law. Ordinarily, we respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner in which it was interpreted in the matter of Piramal. For such reason, we are unable to uphold the judgment as passed by Adjudicating Authority, hence, upon reading of entire order of Hon'ble NCLAT in case of State Bank of India. Vs. Athena Energy Ventures Pvt. Ltd., it is clear that Hon'ble NCLAT has considered its earlier order and amendment made in Section 60(2)(3) of IBC, 2016 so also the decision of Hon'ble Supreme Court in the case of State Bank of India vs V. Ramakrishnan and Another and has ultimately held that CIRP proceedings against the principal borrower and guarantor can be proceeded with and there is no bar in IBC, 2016 against such proceeding.

13. Learned Counsel for the Corporate Debtor argued that in case of difference of opinion while interpreting the law by same Appellate Tribunal in two different orders then earlier order has to be followed. For which he relied rulings of Hon'ble Apex Court in case of Union of India & Anr vs Raghubir Singh reported in 1989 AIR 1933, 1989 SCR (3) 316. We have gone through that ruling. However, in this case, Hon'ble NCLAT while deciding the case of Athena Energy has made it clear

as to why it could not support the interpretation of the law as made by earlier Bench of Hon'ble NCLAT in case of Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd. Hon'ble NCLAT has relied on ruling of State Bank of India V. Ramakrishnan and Another and also various amendment carried in IBC, 2016 relating to corporate insolvency process of principal borrower and guarantor and held that simultaneous proceedings against borrower and guarantor are permitted to go on. Hence, we hold that this defence as raised by the Corporate Debtor (corporate guarantor) is not maintainable.

14. It is also submitted by the Learned Counsel for the Corporate Debtor (corporate guarantor) that the officer who had filed this application on behalf of bank was not properly authorized. These proceedings are filed on the basis of power of attorney are not maintainable. We make it clear that officer presenting the application is not the Financial Creditor but it is the bank who is Financial Creditor. Since debt and default are admitted by the Corporate Debtor, we do not think it proper to reject these applications on this technical ground more particularly when we are dealing with the matter pertain to commercial / economic law where huge public money is involved.
15. Considering the above facts and provision of law various orders, rulings etc., we have come to the conclusion that the Corporate Debtor in both above applications required to be admitted in CIRP.

16. The Financial Creditor suggested the name of one Mr. Vikash Prakash Gupta, having Registration No. IBBI/IPA-007-IP-P00501/2017-2018/10889, Email: vikas.gupta@bngca.com for appointment as Interim Resolution Professional against whom, no disciplinary proceeding is pending. The applications are defect free. Hence, we admit the Corporate Debtors in CIRP by following order:

ORDER

1. Corporate Debtor M/s Utility Agrotech Industries Pvt. Ltd. and M/s. Supreme Fine Fab Private Ltd. are admitted in Corporate Insolvency Resolution Process under Section 7 of Insolvency and Bankruptcy Code, 2016.
2. We appoint one Mr. Vikash Prakash Gupta, having Registration No. IBBI/IPA-007-IP-P00501/2017-2018/10889, Email: vikas.gupta@bngca.com under Section 12(1)(c) of the IB Code as IRP.
3. That the Moratorium under Section 14 of the Code shall come to effect from 16.03.2021 till the completion of 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 Corporate Debtor under Section 33, as the case may be.

4. That the Bench hereby prohibits the institution of suits or continuation of pending suit 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(s), transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; 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 SARFAESI Act, 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.
5. Further, litigation or any application, if any, is pending before any competent Court of law under the provisions of the SARFAESI Act and RDB Act, prior to pronouncement of this order such proceedings are expected to be dealt with in accordance with law r.w. Section 14 and Section 238 of the Insolvency & Bankruptcy Code, 2016.
6. That the supply of essential goods or services to Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the Moratorium, period. The Corporate Debtor to provide effective

assistance to the IRP as and when he takes charge of the Corporate Debtor.

7. The IRP so appointed shall make Public announcement of Corporate Insolvency Resolution Process (CIRP) be made immediately as specified under Section 13 of the Code and by calling for submissions of claim under Section 15 of the Code.
8. The IRP shall perform all his functions as contemplated, *inter-alia*, by Sections 17,18,20 & 21 of the Code. It is further made clear that all personnel connected with Corporate Debtor, its Promoter or any other person associated with management of the Corporate Debtor are under legal obligation under Section 19 of the Code extend every assistance and co-operation to the Interim Resolution Professional. Where any personnel of the Corporate Debtor, its Promoter or any other person required to assist or co-operate with IRP, do not assist or Co-operate, IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.
9. The IRP shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor Company' and manage the operations of the Corporate Debtor Company as a going concern as a part of obligation

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No.132/7/NCLT/AHM/2019**

imposed by Section 20 of the Insolvency & Bankruptcy Code, 2016.

10. We direct the Financial Creditor / Applicant to pay the IRP a sum of Rs. 2,00,000/- (Rs. Two Lakhs) as fees & expenses till the COC decides about his fees / expenses.
11. The Registry is directed to communicate a copy of this order to the Petitioner-Financial Creditor, Corporate Debtor and to the Interim Resolution Professional and the concerned Registrar of Companies, after completion of necessary formalities, within three working days and upload the same on website immediately after pronouncement of the order.
12. The commencement of Corporate Insolvency Resolution Process (CIRP) shall be effective from the date of this order.
13. CP(IB) No. 131/7/NCLT/AHM/2019 & CP(IB) 132 of 2019 are allowed and stands disposed of.


(Virendra Kumar Gupta)
Member (Technical)


(Madan Bhalachandra Gosavi)
Member (Judicial)

Prakash