NATIONAL COMPANY LAW TRIBUNAL HYDERABAD BENCH COURT HALL NO: II

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J) CORAM: SHRI. SANJAY PURI, - HON'BLE MEMBER (T)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 28.08.2024 AT 10:30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO	Company Petition IB/400/7/2022
NAME OF THE COMPANY	APF Estates Pvt Ltd
NAME OF THE PETITIONER(S)	Invest Assets Securitization and Reconstruction Pvt Ltd
NAME OF THE RESPONDENT(S)	APF Estates Pvt Ltd
UNDER SECTION	7 of IBC

ORDER

Orders pronounced, recorded vide separate sheets. In the result, this Petition is admitted.

Sd/-MEMBER (T) Sd/-MEMBER (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL HYDERABAD BENCH - II, HYDERABAD

CP (IB) No.400 OF 2022

[Under Section 7 of the Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

In the matter of M/s.Invent Assets Securitisation and Reconstruction Private Limited

M/s.Invent Assets Securitization and Reconstruction Private Limited, (Acting in its capacity as a trustee of Invent/1415/S12 Trust), Regd Office: Suite B, Ground Floor, 'Bakhtawar' Ground Floor, 225 Nariman Point, Mumbai – 400 021.

....Petitioner

VERSUS

M/s.APF Estates Private Limited, (Corporate Guarantor to M/s.MBX Impex Private Limited) APF Estates Private Limited, 5-9-45, Aashi Towers, Basheerabad, Hyderabad – 500 063.

....Respondent/Corporate Guarantor

Date of Order: 28.08.2024

Coram:

Hon'ble Rajeev Bhardwaj, Hon'ble Member (Judicial) Hon'ble Sanjay Puri, Member (Technical)

Counsels Present:

For the Petitioner: Ms.Raina Birla, Advocate
For the Respondent: Mr.Rajesh Kumar Herur

Per: Rajeev Bhardwaj, Member (Judicial)

ORDER

1. When M/s.MBX Impex Private Limited (**Borrower**) failed to pay the loan amount taken from Indian Bank (**Lender**), the assignee of the debt i.e., M/s.Invent Assets Securitization and Reconstruction Private Limited (**Petitioner**) has filed the present Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process (**CIRP**) against M/s.APF Estates Private Limited (**Respondent**), one of the guarantors of the loan.

2. Case of the Petitioner:

- a) The Indian Bank has sanctioned open cash credit for Rs.10 crores and bank guarantee of Rs.90 crores in favour of the borrower vide letter **Annexure B dated 02.05.2009.**
- b) For taking the loan, both the parties executed various documents and further the respondent stood as guarantor by executing Guarantee Deed Annexure D dated 11.08.2009. Consent letter Annexure E dated 11.08.2009 was also sent by the respondent to the borrower.
- c) The account of borrower became NPA on 31.03.2012 on its failure to repay the loan amount. Thereafter, the Indian Bank assigned the debt to the present petitioner vide **Annexure H dated 30.07.2014.**
- d) When the borrower as well as guarantors including respondent failed to repay the loan amount, the petitioner issued notice **Annexure G dated** 30.04.2012 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), calling them to pay the debt amount.
- e) The petitioner has also filed OA No.463 of 2012 for the recovery of debt and the Debts Recovery Tribunal, Hyderabad issued Recovery Certificate **Annexure I dated 04.10.2018** for the recovery of

Rs.96,82,79,543.19 against the borrower and the guarantors including the respondent.

- f) The borrower was admitted into CIRP vide order dated 13.11.2019 (Annexure C of the additional documents) and then admitted into liquidation vide order dated 01.03.2022 (Annexure D of the additional documents).
- g) The guarantee was invoked vide notice **Annexure L dated 22.07.2022** and it is claimed that the respondent is liable to pay Rs.3,09,95,76,683.08 as on 09.09.2022.
- h) The present petition is within limitation as the guarantee deed was invoked vide notice dated 22.07.2022. Moreover, if the limitation is taken to run from the date of the issuance of the recovery certificate, then also the petition has been filed within time by excluding the period in view of the decision of the Hon'ble Apex Court in *Misc Application No.21 of 2022*.
- i) The petitioner is also a financial creditor because the debt has been legally assigned by the Indian Bank as per procedure and further the date of default has been recorded in the Information Utility as per Regulation 20 (1A) of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulation 2017. Similarly, the petition has been filed by authorised person, in view of the Board Resolution (Annexure M) and authorisation letter (Annexure N).

3. Case of the Respondent:

i. The respondent took the objection that the petitioner is not a financial creditor under Section 7 of the IBC and further the dues claimed by the petitioner cannot be termed as financial debt under Section 5(8) of the

IBC. Therefore, the requirements of Section 7 for filing the petition under Section 7 of the IBC have not been met.

- ii. Additionally, this petition has been filed beyond limitation period. The petitioner has not approached this authority within a period of 3 years before 04.10.2021 and thus, no petition either under Sections 7 or 95 IBC can be filed against the respondent. Even by taking the date of issuance of the recovery certificate, i.e., 04.10.2018 as the starting point of limitation, the present petition is also hit by the Law of Limitation.
- iii. Further, the debt has also not been assigned as per the procedure and no resolution regarding the authorisation of the assignment of the debt has been relied upon.
- 4. We have heard learned counsels for both the parties and have also gone through the entire records.
- 5. Advancement of loan by the Indian Bank to the borrower and execution of the guarantee deed by the respondent are not in dispute. The dispute is relating to the status of the petitioner and respondent as financial creditor and corporate debtor, respectively and further the filing of the petition within the limitation period.
- 6. The loan was advanced by the Indian Bank, who later on vide agreement Annexure H dated 30.07.2017 assigned the said loan to the petitioner. All rights and liabilities relating to loan granted to the borrower, M/s.MBX Impex Private Limited have been taken over by the petitioner by executing a legal and valid document. The assignment of debt is as per the law and the learned counsel for the respondent has failed to show any infirmity in this transaction. Therefore, the petitioner has stepped into the shoes of the Indian Bank vis-a-vis the loan granted to the borrower and accordingly it is a financial creditor of the respondent.

7. When the borrower as well as the guarantors failed to discharge their loan liabilities, Notice **Annexure G dated 30.04.2012** under Section 13(2) of the SARFAESI Act, 2002 was issued to them. The relevant para of the Notice which is material in the present context is reproduced below:

"Therefore, all of you and each of you are hereby called upon to pay the amount due as on 28.04.2012 viz., Rs.94,09,69,375.19 (Rupees Ninety four crore nine lakh sixty nine thousand three hundred and seventy five and paise nineteen only) together with interest from 01.04.2012 till date of payment within 60 days from the date of this notice issued under Section 13(2) failing which Bank will be constrained to exercise its right of enforcement of security interest without any further reference to you under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest, 2002. If you fail to discharge your liabilities in full within 60 days from the date of the notice, we shall be exercising our enforcement rights under Section 13(4) of the Act as against the secured assets given in the schedule hereunder.

On the expiry of 60 days from the date of this Notice and your failure to comply with the demand, you are advised to hand over the possession of immovable property more fully given in the schedule hereunder. If you fail to hand over the possession, we shall take necessary steps to take possession for exercising our right under the Act."

Therefore, the guarantee was invoked vide Notice **Annexure G dated 30.04.2012** which became effective after the expiry of 60 days from the date of issuance of notice, and not by issuing notice **Annexure L dated 22.07.2022**.

8. As the guarantee is a continuing guarantee and the guarantor was supposed to discharge the liability once the demand is made in writing, the limitation will start after the expiry of 60 days of the notice **Annexure G dated 30.04.2012.** Here, we want to refer to Clause Nos. 3 & 17 of the Guarantee Deed **Annexure D dated 11.08.2009**, which are reproduced below:

"Clause 3 - The Guarantor(s) hereby declare/s that this guarantee shall be continuing guarantee and could not be considered as cancelled or in any way affected by the fact that at any time the said accounts may show no liability

against the Borrower or may even show a credit in borrower's account, but shall continue to be a guarantee and remain in operation in respect of the subsequent transactions.

Clause 7 - Any notice by the Bank in writing under this guarantee or a demand in writing shall be defined to have been duly given to the Guarantor(s) by sending the same by post addressed to them at the address hereunder written and shall be effectual notwithstanding any change of residence or death and notwithstanding the notice therefore to the Bank and such demand shall be deemed to have been received by the Guarantor(s) Twenty Four hours after the posting thereof and shall be sufficient to prove that the letter containing the demand was properly addressed and sent to the Post Office."

- 9. It is no more res-integra that an agreement between the guarantor and creditor is separate and collateral contract distinct from the contract of debt between the principal debtor and creditor. The contractual terms dictate the nature and magnitude of said liability. Hence, the creditor may initiate legal proceedings against both the corporate debtor and its personal guarantor simultaneously, or separately. Proceedings against the personal guarantor may be either to recover the entire amount, or the remaining amount. Here, we also rely upon the judgment of the Hon'ble Supreme Court in Ansal Engineering Projects Limited v. Tehri Hydro Development Corporation Limited and Another 1996 (5) SCC 450, Syndicate Bank v. Channaveerappa Beleri and ors. (2006)11 SCC 506, State Bank of India v. Index Port Registered and ors (1992)3 SCC 159, Industrial Finance Corporation of India Ltd. v. Cannanore Spinning and Weaving Mills and others (2002) 5 SCC 54 and Margaret Lalita Samuel v. The Indo Commercial Bank Ltd. AIR 1979 SC 102.
- 10. Therefore, the liability of the principal debtor and the liability of the guarantor, i.e., respondent are separate liabilities although arising out of the same transaction and that the liability of guarantor did not arise simultaneously, but on demand for repayment of loan amount. In the

present case, it has arisen simultaneously as as is clear from clause No. 7 of the Guarantee Agreement **Annexure D dated 11.08.2009.**

- 11. Accordingly, the limitation will start to run after the expiry of 60 days from the date of notice **Annexure G dated 30.04.2012** which shall be 30.07.2012 and the limitation will come to end on 29.04.2015.
- 12. However, during the subsistence of limitation period, Indian Bank, which was succeeded by the petitioner, filed OA No.463 of 2012 before the Debt Recovery Tribunal, Hyderabad and the recovery certificate Annexure I was issued on 04.10.2018. Therefore, the limitation will start from 04.10.2018 and on this point, we want rely upon the decisions of the Hon'ble SC in Dena Bank v. C. Shivakumar Reddy & Anr.' (2021) 10 SCC 330, Sesh Nath Singh and Ors. v.Baidyabati Sheoraphuli Cooperative Bank Ltd. and Ors. (2021)7 SCC 313 and Asset Reconstruction Company Ltd. v. Hotel Poonja International Pvt. Ltd. (2021)7 SCC 352.
- 13. The present petition has been filed on 17.11.2022 and for computing 3 years from the date of the issuance of the recovery certificate dated 04.10.2018, the Covid Period w.e.f., 15.03.2020 till 28.02.2022 is to be excluded in view of the Hon'ble Apex Court decision in *Misc Application No.21 of 2022 in Suo Motu Writ Petition (C) No. 3 of 2020.* As such, the present Petition is within the limitation period.
- 14. In view of the above said position, we come to the conclusion that the grounds taken to challenge the legality and maintainability of the petition are without any merit. The debt of Rs.3,09,95,76,683.08 was due as on

09.09.2022, as reflected from the calculation sheet **Annexure J** and other documents.

- 15. Hence, we admit this Company Petition and order initiation of Corporate Insolvency Resolution Process against the Corporate Debtor, M/s.A.P.F.Estates Private Limited under Section 7 of the Insolvency and Bankruptcy Code, 2016. There shall be the following directions: -
 - A. We hereby prohibit 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 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 Securitization 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 possession of the corporate Debtor.
 - B. The supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
 - C. Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority,

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Date of Order: 28.08.2024

sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.

- D. The provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- E. The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.
- F. The the public announcement of the initiation of Corporate Insolvency Resolution Process shall be made immediately as prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.
- G. According, this Tribunal appoints Mr.Vijay Pitambar Lulla, having registration No.IBBI/IPA-001/IP-P00323/2017-18/ 10593 with validity up to 18th December, 2024, Mob No.9920279899, email id: vijayplulla@rediffmail.com as IRP. The aforesaid IRP has no disciplinary proceedings pending

against him. Proposed IRP filed Form-B issued by the Institute of Insolvency Professional. This information is also available in IBBI Website. Thus, there is compliance of Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016, as amended. Therefore, the proposed IRP is fit to be appointed as IRP since the relevant provision is complied with and further registry is directed to inform the order of admission of CIRP against the Corporate Debtor to the concerned parties.

- H. The IRP shall perform all is functions as contemplated, interalia, by Sections 17,18, 20 & 21 of the IBC, 2016. 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 IBC, 2016 to extending every assistance and cooperation to the IRP. 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 the IRP is at liberty to make appropriate application to the Adjudicating Authority with a prayer for passing an appropriate order.
- I. The IRP shall be under duty to protect and preserve the value of the property of the Corporate Debtor and manage the operations of the Corporate Debtor as a going concern as a part of obligation imposed by Section 20 of the IBC, 2016.
- J. Registry of this Tribunal is directed to send a copy of this order to RoC, Hyderabad for marking appropriate remarks against the Corporate Debtor on MCA site as being under CIRP.

16. Accordingly, for the reasons as discussed above, **CP(IB) No.400 of 2022** is allowed.

Sd/-Sanjay Puri Member (Technical) Sd/ Rajeev Bhardwaj Member (Judicial)

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