IN THE NATIONAL COMPANY LAW TRIBUNAL BENGALURU BENCH

(Exercising powers of Adjudicating Authority under The Insolvency & Bankruptcy Code, 2016) [Through Physical hearing/VC Mode (Hybrid)]

C.P (IB) No.177/BB/2023

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 4 of Insolvency and Bankruptcy (AAA) Rules, 2016

In the matter of:

Mrs. Rukma Narain

#36, Subbaramachetty Road, Opp. Vysya Bank, Basavanagudi,

Bengaluru -560004 --- Financial Creditor / Petitioner

<u>Versus</u>

M/s. Ibexkayenn Private Limited,

#36, Subbaramachetty Road, Opp. Vysya Bank, Basavanagudi,

Bengaluru -560004 --- Corporate Debtor/ Respondent

Order delivered on: 04th September, 2024

Coram: 1. Hon'ble Shri K. Biswal Member (Judicial)

2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Parties/Counsels Present:

For the Petitioner : Ms. Lakshmi Menon For the Respondent : Ms. Varsha Hittinhalli

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. The present Petition has been filed on 09.10.2023 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC/ Code), read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, by Mrs.Rukma Narain (for brevity

Financial Creditor/Petitioner') interalia seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **M/s. Ibexkayenn Private Limited** (hereinafter referred as 'Corporate Debtor/Respondent) on the ground that the Corporate Debtor has committed a default for a total outstanding amount of Rs.4,21,18,037.39/- (Rupees Four Crores Twenty One Lakh Eighteen Thousand and thirty Seven and Thirty Nine Paise only). In Item No.2 of Part-IV of Form No.1 filed with the application, it is stated that "The amount claimed in default is Rs.4,21,18,037.39/- (Rupees Four Crores Twenty One Lakh Eighteen Thousand and thirty Seven and Thirty Nine Paise only. This figure is inclusive of interest on the principal amount of Rs.4,00,00,000/- (Rupees Four Crores only) such interest being calculated at the rate of 13.82% from 20.05.2023." The date of default is mentioned as 18.07.2023 in Form No.1.

- **2.** Brief facts of the case, which are relevant to the issue in question, and as narrated by the Petitioner as follows:
 - i. The Corporate Debtor is engaged in the manufacturing and sale of security devices controllers, solar energizers and solar fencing system.
 - The Financial Creditor is mother of one of the Directors of the Corporate Debtor who provided a personal guarantee to a term loan taken by the Corporate Debtor from Karnataka Bank Limited. The term loan was secured by a immovable residential property located at #36/2, Subbarama Chetty Road, Basavanagudi, Bengaluru 560004 amounting to Rs.6,00,00,000/- (Rupees six Crore only). The term loan agreement was executed on 01.12.2018 which is attached as Annexure-B at Page-20 of the C.P. Additionally, there was one over draft (OD) facility by sanction letter dated 30.11.2020 which is attached as Annexure-C at Page 24 of the C.P for which also the Petitioner herein was a Personal Guarantor.

- Subsequently, the loan was declared as Non-Performing Asset (NPA) by Karnataka Bank Limited due to default in payment by the Corporate Debtor and consequently, action under Section 13 (2) of SARFAESI Act 2003 was initiated by the Bank against both the Corporate Debtor and the Personal Guarantor/Petitioner herein. Consequently, One Time Settlement (OTS) was proposed by the Corporate Debtor and Personal Guarantor/Petitioner herein jointly and the same was accepted by the Bank by letter dated 23.03.2023 which is attached as Annexure-H (Page-44) of C.P.
- iv. In order to meet the obligation towards the OTS, the Petitioner in her capacity as Personal Guarantor paid the amount of Rs. 1 crore to the Bank and the balance amount of Rs.6 crores was also settled by sale of Personal Guarantor's property and the amount was remitted to the Bank on 24.04.2023. Thus, the entire outstanding amount of the Bank was paid by the Personal Guarantor, the Petitioner herein.
- As against this liability, the Corporate Debtor made part payment υ. to the Petitioner herein by disposing its immovable property that has been pledged to the Bank. The sale of this property realized a sum of Rs.3 crores. Accordingly there remained an outstanding balance of Rs.4,00,00,000/- due from the Corporate Debtor to the Petitioner herein. The present petition has been filed on account of this outstanding amount of Rs.4,00,00,000/- along with the interest of Rs. 21,18,037/- as mentioned in Part-IV of Form No.1 filed with the application. The Petitioner issued two demand notices to the Corporate Debtor on 07.07.2024 and 21.07.2023 which remained un-complied by the Corporate Debtor. The Petitioner recorded date of default with the Information Utility i.e. NeSL as 18.07.2023 which was also mentioned in Record of Default in Form-D issued by NeSL, attached at Page-103 as Annexure-R of the C.P.

- 3. During the course of the proceedings on 12.02.2024 before this Adjudicating Authority, the Petitioner was asked to explain as to how the Petitioner who is an individual/Personal Guarantor can be treated as Financial Creditor under Section 7 of the I & B Code 2016 and was directed to file a justification regarding the maintainability of the petition. Pursuant to the same, Compliance Memo was filed vide Dy.No.1456 dated 05.03.2024 along with judicial precedents relied upon. Subsequently, the Petitioner has also filed written submissions vide Dy.No.4486 dated 29.07.2024.
- **4.** Further, the Respondent/Corporate Debtor has filed reply vide Dy.No.2344 dated 17.07.2024 in which it was stated as under:
 - i. It is admitted that the Financial Creditor in the present petition assisted the Corporate Debtor by clearing the outstanding loan with Karnataka Bank Limited and she stands subrogated in the shoes of the bank, insofar as this Corporate Doctor is concerned, it is also true that the Corporate Debtor has been making genuine efforts to repay the said debt amount to the Petitioner.
 - ii. In partial discharge and acknowledgment of its liability to the Petitioner, the Corporate Debtor transferred one of its immovable properties to the Petitioner vide Sale Deed dated 20.05.2023. It is pertinent to note that the Corporate Debtor expressly acknowledges the debt owed to the Petitioner in the aforementioned registered sale Deed. Having expressly admitted to the existence of the debt towards the petitioner, and since then, genuinely making sincere efforts to repay the amount owed, the Corporate Debtor humbly requests for reasonable time to clear the balance debt.
- **5.** Therefore, basically, the Corporate Debtor has admitted the default and requested for more time to clear the balance debt.
- **6.** Heard the Learned Counsel for the Petitioner and the Counsel for Respondent, and perused the pleadings.

- Guarantor of the Corporate Debtor who had discharged the liability of the debt to the original lender, Karnataka Bank Limited in respect of the loan taken by the Corporate Debtor is eligible to file this petition under Section 7 of the IBC, 2016 as the Financial Creditor. In the submissions and the Memo filed by the Petitioner along with judicial precedents filed on 05.03.2024 as well as the written submissions on 29.07.2024, it is stated that by satisfying the Corporate Debtor's obligation by repaying the debt to the Bank, , the Petitioner has acquired the right of subrogation. For which reliance was placed on following judgements, which have recognized the right of a Guarantor to subrogation and being bestowed with the right of the Creditors under the Contract Act:
 - i. Amrit Lai Goverdhan Laln v. State Bank of Travancore AIR 1968 SC 1432:
 - ii. State of M.P vs Kaluram, AIR 1967 SC 1105;
 - iii. State Bank of India v. Fravina Dyes Intermediate AIR 1989 Bom 95;
- **8.** Moreover, the Petitioner has also filed the decision of the co-ordinate bench of NCLT Kolkata in *CP (IB) No.2046/KB/2019 Orbit Towers Private Limited vs. Sampurna Suppliers Private Limited passed on 27.06.2022*, in which under similar circumstances such a right of the guarantor to step into the shoes of the Financial Creditor was accepted, and petition under Section 7 was admitted. The relevant portion of this order is cited as under:
 - "20. The guarantor who performed the obligations of the Principal Debtor which are subject to his guarantee is entitled to stand in the shoes of the Creditor to enjoy all the rights that the creditor has against the Principal Debtor. Section 140 provides that rights of the surety of payment or performance where a debt has become due on default of the Principal Debtor to perform, the surety upon making payment or performance of all that, is eligible for and is invested with all the rights which the creditor had against the Principal Debtor. The creditor had the

rights to sue the Principal Debtor. The Guarantor may, therefore, sue the principal debtor having got and invested with all rights of the creditor. Section 141 of the Indian Contract Act, 1872 further provides that the surety is entitled to the benefit of every security which the creditor has against the Principal Debtor, at the time when the contract of surety-ship is entered into, whether the surety knows of the existence of such security or not and if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

- 21. In the present case, the Corporate Debtor had borrowed the aforesaid sum, admittedly from the Indian Bank for which, the Financial Creditor stood surety for this Corporate Debtor and once the amount claimed by the Indian Bank had not been paid by the Corporate Debtor, the surety had to liquidate and discharge the liability of the Corporate Debtor towards the Indian Bank. Therefore, under the provisions of the Indian Contract Act, 1872, all the rights of the then Creditor i.e. the Indian Bank, would automatically become the rights of the surety (Financial creditor herein). There can be no doubt that the amount has admittedly been paid by the Financial Creditor on behalf of the principal debtor/Corporate Debtor, to Indian Bank.
- 22. Now the question is when the surety has repaid the amount of financial debt owed by the Corporate Debtor to the Indian Bank, would it make the surety, a "Finance Creditor", eligible for proceeding against the Corporate Debtor (the Principal Borrower) without there being any agreement between the two.
- 23. To our mind, any agreement of guarantee of guarantee between the Indian Bank and the Guarantor is sufficient for the purpose of bestowing all the rights of the Bank/Creditor upon the Financial Creditor herein once the Financial Creditor has discharged all the liability of the Corporate Debtor towards Indian Bank. There may or may not be any agreement between the Financial creditor and the Corporate Debtor......"
- **9.** It was therefore, contended that as established in the aforementioned judgement, by operation of law, the Personal Guarantor becomes the Financial Creditor. The doctrine of subrogation confers upon an individual the capacity to assume the creditor's position, thereby inheriting all associated rights pertaining to the debt. Specifically, the right of subrogation for a guarantor enables them to assume the

position of the creditor upon fulfilling the principal debtor's obligation. Consequently, the guarantor possesses the authority to take legal action against the principal debtor, having acquired all rights vested in the original creditor.

- **10.** Further, reliance is also placed on another judgement of NCLT, New Delhi in the case of *Davindra Ahluwalia and Anr v. Sumit Aviation IB No. (IB)-229 (ND)/2017*, wherein the Tribunal entertained a petition filed by the personal guarantor under Section 7 of the Code. In the said case, the Personal Guarantor had settled the dues of the Corporate Debtor. However, upon unsuccessful attempts to reclaim the outstanding dues from the Corporate Debtor, the Personal Guarantor pursued legal action under Section 7 of the IBC against the Corporate Debtor.
- 11. We have considered the submission of the Petitioner and the ratios of the decision cited above. We are of the opinion that this petition is maintainable under Section 7 of the IBC, 2016 as the original Personal Guarantor as stepped into the shoes of the Financial Creditor, inview of meeting the liabilities of the loan towards the Bank on behalf of the Corporate Debtor. Moreover, there is a debt and default which is also admitted in the reply filed by the Corporate Debtor as discussed above.
- 12. The present petition was filed under section 7 of the IBC to initiate Corporate Insolvency proceedings against the Corporate Debtor on the ground that the Corporate Debtor has committed a default of Rs.4,21,18,037.39/- (Rupees Four Crores Twenty One Lakh Eighteen Thousand and thirty Seven and Thirty Nine Paise only). Therefore, the threshold requirement of Rs.1 Crore at the time of filing the petition is fulfilled. The date of default in Form-1 of the C.P and the Record of Default issued by the NeSL report mentioned the date of default as 18.07.2023 and the instant Company Petition has been filed on 09.10.2023, which is within the period of limitation.

- 13. In view of the above discussion, the existence of the debt and default is established. Therefore, the present petition bearing C.P (IB) No.177/BB/2023 is admitted in respect of the Corporate Debtor M/s.Ibexkayenn Private Limited under section 7 of the I & B Code, 2016. Accordingly, moratorium is declared in terms of Section 14 of the Code. As necessary consequences of the moratorium in terms of Section 14, the following prohibitions are imposed, which must be followed by all and sundry:
 - (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 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;
 - (f) The provisions of Sub-Section 14 (3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a Corporate Debtor;
 - (g) 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 passed an order for liquidation of Corporate Debtor under Section 33 as the case may be;
- 14. In Part-III of Form No.1, the Financial Creditor has proposed the name of Ms.B.Akhila, bearing Registration No. IBBI/IPA-002/IP-N01259/2023-24/14315 as the Interim Resolution Professional (IRP) in respect of the Corporate Debtor. Form-2 dated 30.09.2023, Written Communication by the IRP has been filed along with the C.P is found at Page 179 of the Petition. However, since the Authorisation of Assignment (AFA) shown in Form-B was expired on 01.08.2024, the IRP shall file the copy of renewed AFA within one week from the receipt of this order.
- No.IBBI/IPA-002/IP-N01259/2023-24/14315 having registered address at 17-7-465/550, Brahmanwadi, Yakutpura, Hyderabad Contact No.7386788418, e-mail: ip.akhilabolla@gmail.com as the Interim Resolution Professional to carry the functions as mentioned under the IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The IRP is directed to take the steps as mandated under Section 15, 17, 18, 20 and 21 of the IBC 2016.
- **16.** The Financial Creditor shall deposit a sum of **Rs.2,00,000/-** (Rupees Two Lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors.
- 17. The Interim Resolution Professional shall after collation of all the claims received against the Corporate Debtor and the determination of the financial position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the Committee within seven days for filing the report of Constitution of the Committee. The Interim Resolution Professional is further directed to send regular progress reports to this Tribunal every fortnight.

18. A copy of the order shall be communicated to both the 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 the copy of this order to the Interim Resolution Professional at his e-mail address forthwith.

Sd/- Sd/-

(MANOJ KUMAR DUBEY) MEMBER (TECHNICAL) (K.BISWAL)
MEMBER (JUDICIAL)