

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI

CP (IB) No.1282/MB/2022

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

IN THE MATTER OF

State Bank of India

[CIN: AAACS8577K]

Regd. Office: Stressed Assets Management Branch-II

Raheja Chambers, Ground Floor, B-Wing

Free Press Journal Marg

Nariman Point

Mumbai-400021.

....Financial Creditor

Vs.

Navjeevan Tyres Private Limited

[CIN: U34300MH1991PTC061606]

Regd. Office: F-8, MIDC Kalam Road

Latur- 413512

Maharashtra.

....Corporate Debtor

Pronounced: 25.06.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances: Hybrid

For the Applicant(s) : Adv. Ajinkya Kurdukar

For the Respondent(s) : Adv. Aniruth Purusothaman.

ORDER

[PER: SANJIV DUTT, MEMBER (TECHNICAL)]

1. BACKGROUND

- 1.1 This is an Application bearing C.P.(IB) No.1282/MB/2022 filed by State Bank of India, the Financial Creditor on 22.11.2022 under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 through Shri Hiren Kumar Chavah, Assistant General Manager duly authorized in this behalf *vide* a letter of authority dated 12.08.2022 read with Part-III of section 4 of the Gazette of India dated 02.05.1987 for initiating Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of Navjeevan Tyres Pvt. Ltd (hereinafter referred to as “Corporate Debtor”).
- 1.2 From 2007 to 2018, the Financial Creditor provided several credit facilities to the Principal Borrower, M/s. Deogiri Infrastructure Private Limited and various financial documents and security documents were executed between the parties from time to time. The Corporate Debtor tendered corporate guarantee to the Financial Creditor for the repayment of total outstanding dues payable by the Principal Borrower.
- 1.3 Owing to irregularity in repayment of the debt, the Financial Creditor declared the loan account of the Principal Borrower as a Non-Performing Asset (NPA) on 30.10.2018 in accordance with RBI guidelines. Notice under Section 13(2) of the SARFAESI Act, 2002 was issued to the Principal Borrower on 10.04.2019 calling upon it to repay in full the outstanding amount of Rs.33,22,89,448/- plus bank guarantee outstanding of Rs.8,10,50,000/- as on 31.03.2019 within sixty days from the date of said notice.
- 1.4 Since the Principal Borrower defaulted in making payment of both loan accounts, the Financial Creditor filed CP(IB) No.429/2022 against the Principal Borrower

under Section 7 of the Code which is pending. As the Financial Creditor is entitled to initiate simultaneous action against the corporate guarantor under the provisions of the Code, the present Application has been preferred to initiate CIRP in respect of the Corporate Debtor.

2. AVERMENTS OF FINANCIAL CREDITOR

- 2.1 At the request of M/s Deogiri Infrastructure Pvt Ltd (Principal Borrower), the State Bank of Hyderabad (now State Bank of India after its merger *vide* Gazette Notification dated 22.02.2017) provided a loan facility for its Working Capital, totalling Rs.80 lakhs (Cash Credit Rs.60 lakhs and Bank Guarantee Rs.20 lakhs) *vide* Sanction Letter dated 06.11.2007.
- 2.2 Subsequently, the same facilities were extended from time to time. Credit Facilities of Rs.1600 lakhs including bank guarantee of Rs.100 lakhs were sanctioned to the Principal Borrower *vide* Sanction Letter dated 30.06.2014. Further, prior to acquisition of the State Bank of Hyderabad, the State Bank of India, the present Financial Creditor sanctioned new credit facilities of Rs.1500 lakhs including bank guarantee of Rs.1200 lakhs to the Principal Borrower on 17.05.2014 which were extended to Rs.4100 lakhs (Cash Credit amounting to Rs.2800 lakhs and Rs.1300 lakhs Bank Guarantee facility) *vide* Sanction Letter dated 19.01.2018.
- 2.3 The Corporate Debtor availed the facility and utilised it, but failed to make repayment. Both loan accounts of Corporate Debtor were classified as NPA on 30.10.2018. Financial Creditor issued Demand Notice under Section 13(2) of the SARFAESI Act, 2002 on 10.04.2019 and called upon the Principal Borrower to clear the dues within sixty days. The Financial Creditor took symbolic possession of the properties at Aurangabad and Latur under Section 13(4) of the SARFAESI Act on 30.01.2020.
- 2.4 As per Part-IV of the Application, the total amount claimed by the Financial Creditor is Rs.22,55,95,359.95/- (Twenty-Two Crores Fifty-Five Lakhs Ninety-

Five Thousand Three Hundred Fifty-Nine Rupees and Ninety-Five Paise) as on 30.06.2022. Since the Principal Borrower defaulted in making payments on both loan accounts, the Financial Creditor filed Company Petition Bearing CP (IB) No.429 of 2022 against the Principal Borrower i.e., M/S. Deogiri Infrastructure Private Limited under section 7 of the Code. It is submitted that the said Application is still pending for adjudication. Since the Principal Borrower failed and neglected to pay the said amount, the Financial Creditor is entitled to initiate action against the Corporate Guarantor under the provisions of the Code.

- 2.5 In its additional affidavit dated 30.08.2023, the Financial Creditor has placed on record copy of legal notice dated 08.10.2018 issued through its advocate to the Principal Borrower and guarantors including the Corporate Debtor demanding the outstanding amount.
- 2.6 In its written submissions, the Financial Creditor submits that there are documents evidencing the transaction of financial debt; the guarantee agreement acknowledges the liability undertaken by the Corporate Debtor and the issuance of the demand notice and circulation of publication notice and non-payment of the outstanding dues prove that the demand was made and the default was committed by the Corporate Debtor. Hence, the present Application deserves admission.
- 2.7 The Application has been filed well within the limitation period. The date of default is 10.04.2019 and hence, the three-year limitation period ends on 10.04.2022. The Financial Creditor has referred to paragraph 5(IV) of the judgment of Hon'ble Supreme Court in Suo Motu Petition No. 3 of 2020 and claimed that if the period of 715 days (15.03.2020 till 28.02.2022) is removed, the Application filed on 22.11.2022 is well within the limitation period.

3. CONTENTIONS OF CORPORATE DEBTOR

- 3.1 The Corporate Debtor in its Affidavit-in-reply has raised a number of objections as to both the maintainability and the merits of the Application on following grounds:-

- 3.2 Neither any demand for repayment of debt nor any invocation of guarantee has been made qua the present Corporate Debtor. The Financial Creditor claims that the default on part of the Corporate Debtor occurred on 10.04.2019, but the same has not been proved by the Financial Creditor's supporting documents.
- 3.3 Further, Mr. Hiren Kumar Chavah, Chief Manager at State Bank of India, Stressed Assets Management Branch-II, is authorised to initiate and/or defend under the provisions of the Code. However, his authority to initiate CIRP against the Corporate Debtor is not specifically mentioned in the authority letter, making it clear that he lacks the authority to proceed with the CIRP of the Corporate Debtor in the matter. This is supported by the case of **ICICI Bank Limited vs Palogix Infrastructure Limited** [CA (AT) (Ins) No. 30 of 2017].
- 3.4 The cause of action to file Application under Section 7 of the Code against the Corporate Guarantor arises only after invoking the Corporate Guarantee failing which no liability arises qua the Corporate Guarantor. Since the Financial Creditor never invoked the guarantee against the Corporate Debtor, no debt is payable by it to the Financial Creditor as alleged, making the Application premature and not maintainable. Reliance is placed in this regard on the judgement of Hon'ble Supreme Court in **Rai Bahadur Shriram &Co. Ltd. Vs. Rural Electrification Corporation Ltd & Ors.** [Civil Appeal No. 184 of 2019], the Hon'ble NCLAT in **Edelweiss Asset Reconstruction Company Vs. Orissa Manganese and Minerals Ltd & ors.** [CA (AT) (Ins) 437 of 2018] and order of a co-ordinate Bench of this Tribunal in the matter of **Amanjyot Singh Gulati Vs. Arun Chaddha, Resolution Professional of Gulati Retail India Limited and Ors.** [CP (IB) No. 957(PB)/2020].
- 3.5 With regard to the advocate's notice dated 08.10.2018 sent by the Financial Creditor to the Principal Borrower and the Corporate Debtor demanding the outstanding amount, it is claimed that the said notice dated 08.10.2018 was not served on the Corporate Debtor. It can be seen from the postal receipt that the address of the Corporate Debtor is incorrectly mentioned therein to be at PIN CODE '431512' (Basamatnagar in District Hingoli) instead of the correct PIN

CODE i.e., 413512 (Latur). The demand notice aimed at invoking the guarantee was thus not successfully delivered to the CD due to this error, consequently resulting in the non-invocation of the guarantee provided by the Corporate Debtor.

- 3.6 As regards the paper publication of demand notice on 22.04.2019, it is submitted that paper publication is to be done only if proper service has been undertaken and the same was unsuccessful. It is contended that until the primary mode of service is satisfied, substitute service by way of paper publication cannot be undertaken by the Financial Creditor and the same is not valid. Reliance is placed on the judgment of Hon'ble Supreme Court dated 29.10.2018 in the matter of ***Nirja Realtors Private Limited Vs. Janglu (dead) Through Legal Representatives*** [Civil Appeal No. 71 of 2018], wherein it has been held that substituted service is an exception to the normal mode of service.
- 3.7 Further, the Financial Creditor has not complied with the mandatory requirement of submitting a record of default of the alleged loan recorded with the information utility.
- 3.8 Furthermore, the Financial Creditor has annexed copies of the Letter of Arrangement/Sanction Letter dated 06.11.2007 and Letter of Arrangement/Sanction Letter dated 18.02.2009, without paying the proper stamp duty as required by law.
- 3.9 Lastly, the present Application filed on 22.11.2022 is time-barred as per the Limitation Act, 1963. As per Part-IV of the Application, the date of default is stated to be 10.04.2019. Consequently, the Application was filed beyond the prescribed three-year limitation period from the date of default. The Hon'ble NCLAT has time and again held that the benefit in calculating the limitation period as provided by the judgment of Hon'ble Supreme Court Suo Motu Writ Petition till 28.02.2022 with a 90 days grace period in filing of the petition can be availed only if the petition is filed within such period i.e., up to 29.05.2022. In view of this, the present Application is liable to be dismissed as the benefit of COVID exclusion is not applicable to the Financial Creditor since the Application was filed much

after the specified period on 22.11.2022, as clarified in the judgment of Hon'ble NCLAT in **Atul Nathalal Patel Vs. Manish Pardasani & Ors.** [CA(AT) (Ins) No.1008 of 2023]. Therefore, the Application must be dismissed on this ground itself.

3.10 In its written submissions, the Corporate Debtor has referred to the order passed by the coordinate bench of NCLT, Mumbai in the connected matter of *State Bank of India Vs. Shaliwahan Farms Private Limited* [CP No. 1280 of 2022], wherein the petition was dismissed as not maintainable as the financial creditor had not made any demand upon the guarantor and thus no default could be said to have taken place at the end of the guarantor. It is pointed out that State Bank of India filed an Appeal before the Hon'ble NCLAT bearing CA (AT) (Ins.) No. 625 of 2023 against the aforesaid order of coordinate Bench dated 03.03.2023 which was later allowed to be withdrawn *vide* order of Hon'ble NCLAT dated 31.07.2023. It is submitted that an order passed by a coordinate Bench is binding on another coordinate Bench.

4. ANALYSIS AND FINDINGS

- 4.1 Upon hearing the Counsel for both parties and having carefully gone through the materials available on record, our findings in the matter are as under:-
- 4.2 At the outset, it is proposed to deal with the question of maintainability of the Application based on the plea raised by the Corporate Debtor that no demand for repayment of debt or invocation of guarantee has been made by the Financial Creditor qua the present Corporate Debtor which happens to be the corporate guarantor. The judgment of the Hon'ble Supreme Court in ***Syndicate Bank vs. Channaveerappa Beleri & Ors.* [(2006) 11 SCC 506]** has categorically laid down that liability of the guarantor depends on the terms of his contract. In this connection, it is proposed to consider the relevant clauses of the Guarantee Agreements executed between the Financial Creditor and the Corporate Debtor in the present case. For instance, Clause 1 of the

Guarantee Agreement dated 23.05.2014 provides that *“if at anytime default shall be made by the Borrower(s) in payment of the principal sum and /or other monies for the time being due to the Bank in respect of or under the said facilities, the Guarantors shall forthwith pay unconditionally to the Bank **merely on demand by the Bank**, the whole of such principal sum together with interest, costs, charges, expenses, fees, commission and or any other monies as may be then due to the bank without any demur or protest...”* **(emphasis supplied)**. Clause 3 of the Guarantee Agreement, *inter alia*, states that *“...as though between the Guarantors and the Borrower(s), the guarantors are the sureties but as between the Bank and the Guarantors, it is expressly agreed that the guarantors would be the principal debtors jointly with the Borrower(s)...”*. There are identical clauses in the Guarantee Agreements dated 18.12.2014 and 13.03.2015 executed between the Financial Creditor, the Principal Borrower and the guarantors.

- 4.3 From perusal of the aforesaid terms and conditions of the Guarantee Agreement, it clearly emerges that the guarantee in question was unconditionally payable to the Financial Creditor merely on demand. In other words, the guarantee agreement in question encompasses a guarantee on demand and the liability of the Corporate Debtor shall arise only when demand is made by the Financial Creditor on the Corporate Debtor/ Guarantor. In view of the clear stipulation in the Guarantee Agreement, default on the part of the Corporate Debtor/ Guarantor cannot be said to have occurred on 10.04.2019, when it is claimed that the Principal Borrower committed default. Nor can the default at the end of the Corporate Debtor/ Guarantor be said to have been committed on 30.10.2018 when the loan accounts of the Principal Borrower were declared as NPA. It would not be out of place to mention that the Principal Borrower has already been admitted to CIRP at the instance of the Financial Creditor in CP(IB) No.429/2022 vide order of Court-3 of this Tribunal,

Mumbai dated 29.03.2023. It is noticed that the Financial Creditor *vide* additional affidavit dated 30.08.2023 placed on record a legal notice dated 08.10.2018 sent through its advocate to the Principal Borrower and guarantors including the Corporate Debtor demanding payment of the outstanding amount within 10 days from the date of said notice. However, it is noticed on perusal of the said legal notice that it makes no reference at all to the guarantee agreements executed between the parties and hence it can by no stretch of imagination be said to be a notice of demand in terms of the guarantee agreements. Moreover, it is noticed from the record that the said notice was sent to a wrong address having PIN Code 431512 whereas the registered office of the Corporate Debtor is located in Latur having PIN Code 413512. Hence, there was no proper service of the said notice, resulting in the non-invocation of the guarantee provided by the Corporate Debtor.

- 4.4 Further, the Financial Creditor claims that the notice dated 10.04.2019 under Section 13(2) of SARFAESI Act, 2002 was issued to the Corporate Debtor invoking the guarantee. However, such claim is found to be contrary to the materials available on record. A perusal of the said notice dated 10.04.2019 reveals that it was addressed to the Principal Borrower only, calling upon it to repay in full the outstanding dues of the Financial Creditor within 60 days from the date of said notice. Although a copy of the notice was forwarded to each of the six guarantors including the Corporate Guarantor, there is nothing to even remotely suggest therein that the notice was intended to invoke the corporate guarantee executed by the Corporate Debtor/ Guarantor. It is pertinent to note that in the connected matter of *State Bank of India V. Shaliwahan Farms Pvt. Ltd.* (another corporate guarantor to the same Principal Borrower viz. Deogiri Infrastructure Pvt. Ltd.) in CP (IB) No.1280 of 2022, the co-ordinate Bench - IV of this Tribunal, dismissed the petition filed by the same financial creditor under Section 7 of the Code on identical facts holding that the financial creditor had not made any demand upon the corporate guarantor and mere dispatch of notice addressed to the corporate

debtor recalling the facility cannot tantamount to demand upon the guarantor made by the bank.

4.5 Last but not the least, the Financial Creditor pleads that it had undertaken paper publication of Demand Notice dated 22.04.2019 on the Principal Borrower and the guarantors including the Corporate Debtor/ Guarantor which ought to be considered valid service as well as alternative mode of invocation of guarantee. Once again, it is noticed on perusal of the said Demand Notice dated 22.04.2019 that it was essentially meant to be substituted service of notice under Section 13(2) of the SARFAESI Act, 2002 for which acknowledgement of the postal receipt of letters had not yet been received at the end of the Financial Creditor. Not to speak of invoking the guarantee agreements with the Corporate Debtor/ Guarantor, there is not even a whisper about the guarantee agreements in the said Demand Notice. Merely calling upon the Principal Borrower and the guarantors to make payment of the outstanding amount within 60 days from the date of publication of the notice will not convert this notice into one intended to invoke the relevant guarantee agreements or to make demand upon the guarantors in terms of the guarantee agreements. Moreover, as held by the Hon'ble Supreme Court in the case of **Neeraj Realtors Private Limited** (supra), until the primary mode of service is satisfied, substitute service by way of paper publication cannot be undertaken by the petitioner and, thus, the same will not be valid. Therefore, in the present case, paper publication cannot be treated as valid because the Financial Creditor has failed to demonstrate that proper service was undertaken but the same was unsuccessful.

4.6 Hence, we are of the considered view that the Financial Creditor has failed to discharge the onus of proving that it had made demand on the Corporate Debtor/ Guarantor by invoking the guarantee and that the latter had committed default in discharge of its liability in terms of the Guarantee Agreements. The Financial Creditor having failed to establish the occurrence of default on part of the Corporate Debtor, the pre-requisite condition for triggering CIRP under

Section 7 of the Code is not satisfied and hence, the present Application is found to be not maintainable and deserves to be rejected on this ground alone. Having taken this view, we do not deem it necessary to deal with the other issues or objections agitated by the parties. In these circumstances, the present Application under Section 7 of the Code is liable to be dismissed accordingly.

ORDER

This Application bearing **C.P. (IB) No. 1282/NCLT/MB-VI/2022** filed under Section 7 of the Code by State Bank of India, the Financial Creditor for initiating Corporate Insolvency Resolution Process (CIRP) in respect of **M/s Navjeevan Tyers Pvt. Ltd**, the Corporate Debtor, is **rejected**.

However, the rejection of this Application shall not cause any prejudice to the right of the Applicant to pursue such other remedies as may be available in accordance with law.

Sd/-

SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-

K R SAJI KUMAR
MEMBER (JUDICIAL)

Deepa