

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

C.P. No. (IB) 1048/MB/C-III/2022

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

In the matter of

Phoenix Arc Private Limited

Having office at:

5th Floor, Dani Corporate Park, 158, C.S.T. Road, Kalina, Santacruz (East), Mumbai - 400098

...Financial Creditor/Petitioner

Versus

Transparent Food Technologists Private Limited

Having office at:

Pushpa Heights, 1st Floor, Bibewadi Corner, Satara Road, Pune - 411037

...Corporate Debtor/Respondent

Order pronounced on: 12th June 2024

Coram:

Hon'ble Ms. Lakshmi Gurung, Member (Judicial)

Hon'ble Sh. Charanjeet Singh Gulati (Technical)

Appearances:

For the Financial Creditor: Adv. Charles D Souza a/w Adv. Nishant Rana, Adv. Chinmayee Ghag i/b Zastriya

For the Corporate Debtor: Adv. Prakhar Tandon a/w Agam H. Maloo



Per: Ms. Lakshmi Gurung, Member (Judicial)

1. This Petition has been filed by Phoenix Arc Private Limited (**“Petitioner/ Financial Creditor”**) to initiate Corporate Insolvency Resolution Process (**“CIRP”**) against Transparent Food Technologists Private Limited (**“Respondent/Corporate Debtor”**) being the Corporate Guarantor of Yatra Jaggery Works LLP (**Borrower**), under **Section 7** of the Insolvency and Bankruptcy Code, 2016 (**“the Code”**) for the default in repayment of debt of **Rs. 8,72,87,699/-** by the Borrower from Janata Sahakari Bank Limited (**JSBL/Original Financial Creditor**).

Brief Facts:

2. Various loan facilities were sanctioned (hereinafter referred to as **“loan facilities”**) to the Borrower by Original Financial Creditor details of which are as follows:
 - a) Term Loan facility of Rs. 65,00,000/- on 24.10.2016;
 - b) Hypothecation Loan facility of Rs. 3,10,00,000/- on 24.10.2016;
 - c) Hypothecation Loan facility of Rs. 25,00,000/- on 24.10.2016;
 - d) Cash Credit facility of Rs. 45,00,000/- on 07.12.2016;
 - e) Hypothecation Loan facility of Rs. 6,40,000/- on 11.05.2017;
 - f) Personal Loan – Partnership facility of Rs. 62,25,000/- on 25.05.2017.
3. To secure the above loan facilities, the Respondent had executed a Deed of Guarantee dated 25.05.2017 in favour of the Original Financial Creditor/JSBL, *inter alia* guaranteeing repayment of all the loan facilities given to the Borrower.
4. However, the Borrower failed to repay the said amounts and consequently, the loan account of the Borrower was declared as a Non-Performing Asset (NPA) on 29.08.2018 by JSBL. Thereafter, JSBL issued demand notice dated 30.10.2018 under section 13(2) of the SARFAESI Act, 2002 to the Borrowers and the Guarantors. However, despite receipt



of the said demand notice, the Borrowers and Guarantors defaulted in paying the outstanding loan amount.

5. On 30.03.2019, the Loan Facilities sanctioned to the Borrower, together with all the rights, title and interest therein were assigned to the Petitioner vide an Assignment Agreement dated 30.03.2019. Pursuant to the said assignment, the Petitioner invoked the Corporate Guarantee by sending a demand notice on 01.12.2020 calling upon the Corporate Debtor to repay the outstanding amount. However, the Corporate Debtor failed to repay the said amount. Consequently, the present Petition has been filed by the Petitioner.

Reply of the Corporate Debtor

6. The Corporate Debtor had filed its Reply dated 01.02.2023 challenging the maintainability of the Petition on the following grounds:
 - i) The Petitioner invoked the guarantee deed dated 25.05.2017 vide demand letter dated 01.12.2020 and provided a period of 7 days for repayment of the loan. Thus, the date of default falls in the suspension period provided under Section 10A of the I&B Code.
 - ii) The Petitioner had not stated the date of default in Part IV of the Petition whereas only the NPA date is specified which indicates that the Petitioner is referring to the date of NPA as the date of default which is incorrect. The date of NPA has no relevance to the date of default. The date of default will always be before the date of NPA. Therefore, the date of default is admittedly 29.05.2018, and the limitation period of 3 years would expire on 29.05.2021. The present Petition was filed on 02.01.2022 and thus, the Petition is also barred by limitation. Further, since the Petition does not mention the date of default, it is also liable to be dismissed on the ground that the Petition is incomplete.



- iii) The Corporate Debtor and its two directors are partners of the Borrower, and the Corporate Guarantee is not in compliance with section 185 of the Companies Act, 2013 which prohibits any company to give guarantee in connection with any loan taken by a partnership firm in which any director of the Company is a partner.
- iv) Guarantees of multiple guarantors were created by way of a single document. Pertinently, the guarantee advanced by every guarantor is a single and separate transaction irrespective of the document by which it is created. However, JSBL tried to circumvent payment of stamp duty for all guarantee transactions by including them in one single document and paying stamp duty only for one transaction. Thus, the Guarantee Deed is insufficiently stamped and thus, cannot be relied upon.
- v) The Petitioner, in its letter dated 08.02.2022, addressed to the Respondent, stated that *“as admitted by you in your letter under response, Phoenix representatives had contacted your office to try and find an amicable resolution, which did not yield any result, leaving no other option, but **to take such steps for recovery of the dues, including but not limited to initiating insolvency proceedings against you.**”* Thus, it is clear that the present Petition is not filed for insolvency resolution of the Respondent but only for recovery of dues.
- vi) There are no tangible assets which can be revived or maximized by way of its CIRP. Further, the Corporate Debtor which is an MSME is willing to furnish an amount more than its liquidation value which may be ascertained by a Chartered Accountant appointed by this Tribunal. Thus, in view of the discretionary powers granted in **Vidharbha Industries Power Limited vs. Axis Bank Limited**,

this Tribunal may dismiss this Petition considering the facts and circumstances in the present case.

ANALYSIS & FINDINGS

7. Heard Ld. Counsel for the parties and perused the record.
8. Considering the factual matrix given in the Petition and the contents of the Reply, it is an undisputed and admitted facts are:
 - i) The Corporate Debtor has given guarantee in favour of Janata Sahakari Bank Limited (JSBL/ Original Financial Creditor) for loan facilities aggregating to Rs. 5,13,65,000/- provided to Yatra Jaggery Works LLP (Borrower). The Guarantee Deed dated 25.05.2017 is annexed to the Petition.
 - ii) A demand notice dated 30.10.2018 under section 13(2) of the SARFAESI Act, 2002 was addressed to the Borrowers as well as the Guarantors.
9. On 30.03.2019, JSBL had assigned the loans disbursed to the Borrower in favour of the Petitioner. On perusal of the Deed of Assignment dated 30.03.2019, it is ascertained that the loans assigned to the Petitioner is inclusive of the underlying security interests, pledges and/ or guarantees in respect of such loans.
10. Accordingly, the Petitioner had also sent a demand notice dated 01.12.2020 thereby invoking the Guarantee dated 25.05.2017. However, the Corporate Debtor failed to repay the outstanding dues, leading the Petitioner to file the present Petition.
11. On examination of the contents of the Reply by the Corporate Debtor, it is noted that the Corporate Debtor has not denied the facilities provided by JSBL to the Borrower and that the Corporate Debtor has issued guarantee in favour of JSBL. The Corporate Debtor also had not denied

the receipt of the demand notice dated 30.10.2018 under section 13(2) of the SARFAESI Act, 2002, however, challenged the maintainability of the Petition on the following grounds:

- i) The Petition is barred by Section 10A of the I&B Code since the Guarantee was invoked by the Petitioner on 01.12.2020 which is expressly excluded under Section 10A of the I&B Code.
- ii) The Petition is barred by limitation since according to the Corporate Debtor, the date of default is 29.05.2018 and the present Petition is filed after the expiry of the limitation period of three years.
- iii) Date of Default is not specified in the Petition and only the NPA date is mentioned.
- iv) The guarantee deed is not in compliance of section 185 of the Companies Act, 2013.
- v) The guarantee deed is insufficiently stamped.

12. We have examined the documents evidencing the transaction of loans and other security documents. The Guarantee Deed dated 25.05.2017 is a continuing one and repayable on demand. Relevant clauses of the said Guarantee Deed are reproduced below:

*“1. In consideration of the loan detailed herein sanctioned by the BANK in favour of the borrower i.e. all Guarantors, hereby irrevocably and unconditionally guarantees to repay on demand the sum on account of **Term loan [L.A.E.P.] of Rs. 62,25,000/- (Rupees Sixty-Two Lakh Twenty-Five Thousand Only) & Machinery loan of Rs. 6,40,000/- (Rupees Six Lakh Forty Thousand Only) and previous loan availed by Borrower i.e. cash credit facility of Rs. 45,00,000/- (Rupees Forty-Five Lakhs Only), Term Loan of Rs. 65,00,000/- (Rupees Sixty-Five Lakhs Only), Machinery Loan of Rs. 3,10,00,000/- (Rupees Three Crore Ten Lakhs Only) and other Term Loan of Rs. 25,00,000/- (Rupees Twenty-Five Lakhs only) together with interest and other charges occurring***

thereon as per terms and conditions agreed the BANK and the against the Company.

7. That the BANK shall be free to invoke this guarantee and the Company undertaken to pay the loan amounts together with interest and other charges to the BANK secured under this guarantee immediately **from the date of receipt of demand in writing from the Bank.**

That a demand in writing shall be deemed to have been duly made to the Company if sent by post under registered cover and shall be deemed to have been received by the Company six days after posting thereof and shall be sufficient to prove that the letter containing the demand was properly addressed and send under registered cover.

14. That notwithstanding any meaning or import or otherwise in any clauses heretofore this guarantee shall be full, complete perfect and **continuing one** and shall remain in force and bind the Company till the Loans secured under this guarantee is/are fully liquidated /adjusted along with interest and other charges of the Bank.

15. That in case default is made in the payment by the Company to the Bank of the lawful claim or demand held or made by the Bank against the Company, the executants hereby covenant, promise and agree to pay the same to the BANK, its successors in interest and assign **on demand.**”

13. We note that though the guarantee was invoked by the Petitioner i.e. the assignee financial creditor on 01.12.2020 calling upon the Corporate Debtor to repay the loan, this is not the first time that the said Corporate Guarantee was invoked for payment of the outstanding dues. The Original Financial Creditor i.e. JSBL had already invoked the said guarantee provided by the Corporate Debtor vide a demand notice dated 30.10.2018 under Section 13(2) of SARFAESI Act, 2002 calling upon the Borrowers and the Guarantors including the Corporate Debtor to repay



the outstanding loan within 60 days from the date of the demand notice. This fact was also mentioned in the demand notice dated 01.12.2020 sent by the Petitioner which is reproduced below:

“7. In view of the continuing defaults in repaying the principal, interest and other charges due in respect of the above-mentioned Loan facilities availed by the Borrower, the Assignor Bank issued demand notices under Section 13(2) of the SARFAESI Act, 2002 upon the Borrower/Mortgagors/Guarantors dated 30.10.2018 and demanded a sum of Rs. 74,37,993/- (Rupees Seventy-Four Lakhs Thirty-Seven Thousand Nine Hundred and Ninety-Three Only) and Rs. 4,62,02,362.08 (Rupees Four Crores Sixty-Two Lakhs Two Thousand Three Hundred Sixty-Two and Eight Paise only) as on 30.09.2018 along with further interest and other costs, charges and expenses be paid in terms of the said demand notices, failing which necessary consequences as stipulated under the SARFAESI Act would apply. However, despite repeated requests, the Borrower has failed to repay the dues till date.”

14. Despite the demand notice dated 30.10.2018, the Corporate Debtor failed to make the payment, thus, default occurred on 30.12.2018 i.e. the expiry of period provided for paying the outstanding due i.e. 60 days from the date of demand notice. Thus, the date of default stands at 30.12.2018. The mere assignment of the loan by JSBL to the Petitioner will not affect the date of default. Thus, the Corporate Debtor cannot now take recourse of the exclusion under section 10A of the I&B Code, 2016 since default had occurred prior to the period barred thereunder.
15. As already stated above, the date of default is 30.12.2018 and the Petition was filed on 02.01.2022, thus considering the exclusion granted by the Hon'ble Supreme Court in **Re: Cognizance for Extension of Limitation in Suo Moto Writ Petition (C) No. 3 of 2020**, we hold that the present Petition is within the limitation period. The Corporate Debtor



had also contended that the Petition did not mention the date of default but only the NPA date which cannot be construed as the default date. However, we are of the view that non-mentioning or incorrect mention of date of default are merely procedural defects which do not warrant *prima facie* dismissal of the Petition.

16. The Corporate Debtor has also challenged the validity of the Guarantee Deed dated 25.05.2017 on two grounds viz. violation of section 185 of the Companies Act, 2013 and insufficient stamping. As regards violation of section 185 of the Companies Act, we shall refer to ***Kalpesh Ramniklal Shah vs. Mundara Estate Developers Limited, Company Appeal (AT) (Insolvency) No. 71 of 2023*** wherein the Hon'ble NCLAT has held as follows:

“Further the submission of learned Counsel for the Appellant that loan transaction was in violation of Section 295 of the Companies Act, 1956, does not help the Appellant to deny the loan transaction and the disbursement of the amount. Even if, the allegation of violation of Section 295 of the Companies Act, 1956 may be there, that does not in any manner inhibit filing of Section 7 Application and take appropriate proceedings under the IBC. The purpose and object of the IBC is entirely different. The violation of provisions of Companies Act, 1956, for example Section 295 has different consequences, which consequences in law can take effect and remedial measures can be taken under Section 295, when the ingredients of Section 295 are proved, but that itself cannot be a ground to reject Section 7 Application filed by the Financial Creditor, where debt and default is proved.”

17. In view of the settled legal position that contravention of section 185 of the Companies Act, 2013 will not make the loan transaction *void ab-initio*, we reject the objection raised by the Corporate Debtor.



18. The next objection of the Corporate Debtor is in relation to inadequate stamping of the Guarantee Deed dated 25.05.2017. As regards stamping issues, the Hon'ble Supreme Court in **N. N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd. [Curative Petition (C) No. 44 of 2023 in Review Petition (C) No. 704 of 2021 in Civil Appeal No. 1599 of 2020]** observed as follows:


“48. Section 35 of the Stamp Act is unambiguous. It stipulates, “No instrument chargeable with duty shall be admitted in evidence...” The term “admitted in evidence” refers to the admissibility of the instrument. Sub-section (2) of Section 42, too, states that an instrument in respect of which stamp-duty is paid and which is endorsed as such will be “admissible in evidence.” The effect of not paying duty or paying an inadequate amount renders an instrument inadmissible and not void. Non-stamping or improper stamping does not result in the instrument becoming invalid. The Stamp Act does not render such an instrument void. The non-payment of stamp duty is accurately characterised as a curable defect. The Stamp Act itself provides for the manner in which the defect may be cured and sets out a detailed procedure for it. It bears mentioning that there is no procedure by which a void agreement can be “cured”.”

19. Thus, the settled legal position is that insufficient stamping does not make an instrument void but merely renders it to be inadmissible. In the present case, even if we treat the Guarantee Deed dated 25.05.2017 to be inadmissible as evidence, there are other documents such as the Loan Agreements, the Hypothecation Deed, the Disbursement orders issued by JSBL, the acknowledgment letters by the Borrowers and the demand notice dated 30.10.2018 issued by JSBL under section 13(2) of the SARFAESI Act, 2002, etc. which establish beyond doubt that the Corporate Debtor stood as Guarantor to the loan facilities availed by the Borrower. Thus, the Petitioner's claim is corroborated by other evidence.



20. Further, the NeSL Report dated 04.10.2021 is also annexed to the Petition which strengthens the case of the Petitioner. Moreover, we also see from the records placed before us that the Corporate Debtor is not only a corporate guarantor by virtue of the Guarantee Deed dated 25.05.2017 but is also a co-borrower of the said loans. The Loan Agreements, Hypothecation Deeds, Disbursement orders as well as the demand notice dated 30.10.2018 issued under section 13(2) of the SARFAESI Act, 2002 specify the Corporate Debtor as a borrower as well as a guarantor. Thus, this Petition is maintainable against the Corporate Debtor in the capacity of both a guarantor and a borrower with respect to the outstanding loan amounts.
21. The Corporate Debtor has also raised some allegations against one of the partners of Yatra Jaggery Works LLP (Borrower), Mr. Mohan Yadav for suppression of certain facts relating to the loan transactions and other facts incidental thereto and also on some litigations pending against the land which is a part of the mortgage deed. However, we are of considered view that this Tribunal is not the appropriate forum to adjudicate on such issues, in summary jurisdiction under the I&B Code. The Adjudicating Authority has to merely examine whether there is debt and default.
22. The Corporate Debtor also pleaded that no revival or maximization can be achieved by way of its insolvency resolution process and that the Corporate Debtor is willing to furnish an amount which shall be more than the liquidation value. In this regard, we are conscious that this Tribunal is not a recovery forum and settlement cannot be directed. Reference shall be made to the observations of Hon'ble Supreme Court in **E. S. Krishnamurthy & Ors vs. M/s Bharath Hi Tech Builders Pvt. Ltd. [Civil Appeal No. 3325 of 2020]**:

“29. The IBC is a complete code in itself. The Adjudicating Authority and the Appellate Authority are creatures of the statute. Their



*jurisdiction is statutorily conferred. The statute which confers jurisdiction also structures, channelises and circumscribes the ambit of such jurisdiction. Thus, **while the Adjudicating Authority and Appellate Authority can encourage settlements, they cannot direct them by acting as courts of equity.***

(Emphasis Provided)

23. It is a well-settled position that the Adjudicating Authority has to determine whether there is debt and default and if it is satisfied that a default has occurred, then the application under section 7 of the Code must be admitted unless it lacks other necessities as mandated thereunder. We are supported by the decision of Hon'ble Supreme Court in **Innoventive Industries Limited vs. ICICI Bank and Anr [(2018) 1 SCC 407]** wherein it was held as follows:

“28. ... 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 receipt of a notice from the adjudicating authority.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a 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 a default has occurred. It is of no matter that the debt is disputed so 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.”



24. In view of the discussions above, this Tribunal is of considered view that debt and default has been established. The Petition is filed within the limitation period and the default amount is also in excess of the minimum amount stipulated in section 4(1) of the Code. Accordingly, we are satisfied that the present Petition is maintainable.


25. In view of the facts and circumstances of the case and discussions hereinabove, the Company Petition bearing no. 1048 of 2022 is **admitted** and ordered as follows:

ORDER

i) The above Company Petition No. (IB) 1048 (MB)/2022 is hereby **allowed** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Transparent Food Technologists Private Limited**.

ii) The Petitioner has proposed the name of **Mr. Mayank Rameshchandra Jain**, Registration No. IBBI/IPA-001/IP-P01055/2017-2018/11748, to be appointed as an Interim Resolution Professional (IRP) of the Corporate Debtor. The proposed IRP has filed his Written Communication dated 16.11.2021 in Form 2 as required under Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Written Communication is accompanied by AFA dated 08.04.2021. Accordingly, **we appoint Mr. Mayank Rameshchandra Jain (jainmayankr@gmail.com) as the Interim Resolution Professional (IRP)** to carry out the functions as per the Insolvency & Bankruptcy Code, 2016.

iii) The Financial Creditor shall deposit an amount of Rs. 5 Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional (IRP) appointed herein, immediately upon communication of this Order. The IRP shall



spend the above amount towards expenses and not towards fee till his fee is decided by the Committee of Creditors.

- iv) There shall be a moratorium under section 14 of the Code prohibiting the following:
- 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.
- v) 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.
- vi) 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.
- vii) The order of moratorium shall have effect from the date of pronouncement 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, as the case may be.

- viii) The public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- ix) During the CIRP period, the management of the corporate debtor will vest in the IRP/RP in terms of section 17 of the Code. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- x) The Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.
- xi) The Registry is further directed to communicate this order to the Financial Creditor, the Corporate Debtor and the IRP immediately.
- xii) The Registry is also directed to send a copy of this order to the Insolvency and Bankruptcy Board of India (IBBI) for their record.
- xiii) A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

26. The Company Petition No. 1048 of 2022 is accordingly **admitted**.

Sd/-

Charanjeet Singh Gulati
Member (Technical)

Sd/-

Lakshmi Gurung
Member (Judicial)

Uma, LRA