

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, COURT NO. V**

**CP No. 530/(IB)-MB-V/2021**

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*

**Pegasus Assets Reconstruction Private Limited**

55/56, 5<sup>th</sup> Floor, Free Press House, Nariman Point,  
Mumbai – 400021

... Petitioner/Financial Creditor

V/s

**M/s. Whiz Enterprise Private Limited**

B/10, Gopi Chamber, Link Road, Opposite Citi  
Mall, Andheri West, Mumbai-400053.

... Respondent/Corporate Debtor

**Order Pronounced on: 20.04.2023**

**Coram:**

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

***Appearances (via Video Conferencing):***

For the Petitioner : Mrs. Khushboo Shah Rajani i/b AKR  
Advisors LLP

For the Corporate Debtor : Senior Counsel Mr. Gaurav Joshi

Per: Kuldip Kumar Kareer, Member (Judicial)

**ORDER**

1. This Company Petition is filed by **Pegasus Assets Reconstruction Private Limited** (hereinafter called "**Petitioner**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against **M/s. Whiz Enterprise Private Limited** (hereinafter called "**Corporate Debtor**") alleging that the Corporate Debtor committed default on 01.09.2019 to the extent of Rs. 27,55,51,497/- inclusive of interest to the Petitioner. This Petition has been filed by invoking the provisions of Section 7 Insolvency and Bankruptcy Code, 2016 (hereinafter called "**IBC**") read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
  
2. In the requisite Form-1, under the head "Particulars of Financial Debt" the amount claimed to be in default is Rs. 27,55,51,497/- inclusive of interest. The details of the same are as follows:

<b>Sr. No.</b>	<b>Particulars</b>	<b>Amount (in Rs.)</b>
1.	Principal Outstanding Amount	22,96,54,742
2.	Interest	4,58,96,755
	<b>Total (A)</b>	<b>27,55,51,497</b>

3. List of documents attached to this Petition in order to prove the existence of Financial Debt, the amount and date of default are as follows:
  - a. A copy of application dated 18.08.2016 received from the Corporate Debtor requesting for the credit facility.
  - b. A Copy of Deed of Assignment dated 27.02.2020 executed between SVC Co-operative Bank Limited and the Financial Creditor.

- c. A copy of Original Sanction letter dated 01.02.2010 bearing Reference No. CO/CCC/7008/2348/2009-10 sanctioning the Term Loan of Rs. 12 crores.
- d. A copy of Sanction letter dated 30.09.2016 bearing Reference No. CO/CCC/7012/2016-17/1924 sanctioning the Term Loan of Rs. 23.17 crores.
- e. A copy of Loan Agreement dated 03.10.2016 executed for granting the Term Loan of Rs. 23.17 crores to the Corporate Debtor.
- f. A copy of Deed of Corporate Guarantee dated 03.10.2016.
- g. A copy of Demand Promissory Note dated 03.10.2013.
- h. A copy of entries in the Bankers book in accordance with the Banker's Book Evidence Act, 1891 along with certificates under Banker's Book Evidence Act, 1891
- i. A Copy of NPA Certificate dated 14.05.2021

### **Brief Facts**

- 4. The Petition reveals that the Financial Creditor is a company incorporated under the provisions of Companies Act, 1956 and registered as a Non-Banking Financial Company (**NBFC**) with the Reserve Bank of India as an Asset Reconstruction Company (**ARC**). The Corporate Debtor is involved in the business of Infrastructure Development, Project Management, Asset Management, Business Support Services, property development and technical consultancy and also provide amenities to the lessee of the mortgaged property.
- 5. It is submitted that M/s Laxmi Business Center, proprietary firm of the Director of the Corporate Debtor i.e. Mr. Amrit Rajani ("**Borrower**") had availed credit facilities sanctioned by Shamrao Vithal Co-operative Bank (SVC) ("**Lender**") on the express condition that a part of the repayment of the credit facilities shall be secured by the lease rentals. IndusInd Bank is the lessee of the property kept as security to the Bank. It was agreed between the Borrower and the Lender that repayment shall be directly

credited in the loan account of the Borrower. The Respondent/ Corporate Debtor was the co-borrower in this transaction.

6. The SVC Co-operative Bank had sanctioned a Term Loan of Rs.12 Crores vide its Sanction Letter dated 01.02.2010. Subsequently SVC Co-operative Bank had sanctioned a LRD (Term Loan) of Rs. 23.17 Crores vide Sanction letter dated 30.09.2016.
7. To secure the repayment of the Loan, the Corporate Debtor executed Deed of Guarantee dated 03.10.2016 and the directors of the Corporate Debtor i.e. Mr. Amrit Rajani, Mr. Narendra Rajani and Mr. Pooja Rajani have executed the Letter of Guarantee dated 03.10.2016 to secure the loan availed by Corporate Debtor.
8. However, the Corporate Debtor failed to repay its dues and the loan account of Corporate Debtor was declared as NPA on 02.12.2019.
9. The SVC Co-operative Bank had sent notice under sub-section (2) of Section 13 of the SARFAESI Act, 2002 dated 09.12.2019 to repay the total amount of due aggregating to Rs. 22,96,54,742/-
10. Thereafter, Assignment of Debt Agreement dated 27.02.2020 was executed between SVC Co-operative Bank Limited and the Financial Creditor, by virtue of which the loan and outstanding dues of the Corporate Debtor was assigned to the Petitioner.
11. Due to non-payment of debts, the Petitioner filed this Petition u/s 7 of the IBC, as a Financial Creditor, for initiating the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

### **Reply of the Corporate Debtor**

12. The Corporate Debtor vide its Affidavit in reply (“**Reply**”) dated 04.04.2022 and further Affidavit in reply (“**Further Reply**”) dated 08.06.2022 submitted that the petition is not maintainable and the

Petitioner had concealed and suppressed material facts from this Hon'ble Tribunal.

13. It is submitted that the Corporate Debtor is not a borrower or co-borrower since the Corporate Debtor has not received any amount from the SVC Bank. The financial facilities were sought to have been provided by SVC Bank to M/s. Laxmi Business Center (LBC) and the Corporate Debtor was supposed to be treated as the Guarantor. It is further submitted that the financial statements of the Corporate Debtor do not reflect any outstanding loan payable to SVC Bank and consequently no amount is due and payable to the Financial Creditor. The mere use of words 'co-borrower' cannot evince the existence of the alleged financial debt. It is submitted that the Petitioner had not registered any default with the CIBIL or such other credit agency in respect of the purported loan transaction which is alleged to have been disbursed to the Corporate Debtor.
14. The Respondent has submitted that the Financial Creditor has failed to place on record the document which shows that the Financial Creditor has served upon the Corporate Debtor a notice invoking the Corporate Guarantee. Hence the claim of the Petitioner that the Respondent is a corporate guarantor is not maintainable.
15. It is further submitted that the SVC Bank is a multi-state co-operative Bank registered under the provisions of the Multi State Co-operative societies Act, 2002 (MSCSA, 2002) and Section 66 and 68 of the MSCSA, 2002 deals with the restrictions on loans and other by the society transaction with non-members. The Financial Creditor has failed to place on record any document to show that the principal borrower or the Corporate Debtor was a member of the predecessor assignor i.e. SVC Bank which was a Multi State Co-operative Bank.
16. The Respondent further submits that the Guarantee is void in view of the provisions of Section 186 of the Companies Act, 2013. SVC Bank could

not have obtained guarantee from the Corporate Debtor for an amount exceeding sixty percent of its paid up share capital, free reserves and securities premium account or one hundred per cent of its free reserve and security premium account, whichever is more. In present case the guarantee amount is exceeding the limits set out under Section 186 of the Companies Act, 2013. Therefore, the Petition is liable to be dismissed.

### **Rejoinder of the Petitioner**

17. In response to the above, the Petitioner has filed an Affidavit in Rejoinder (**"Rejoinder"**) dated 08.08.2022. The Petitioner submits that the Corporate Debtor has misconceived the facts. The Application dated 18.08.2016 was made for securing term loan from SVC Co-operative Bank in which the Corporate Debtor is mentioned as Co-borrower. Additionally, the Sanction letter dated 01.02.2010 and 30.09.2016 annexed at "Annexure 8" and "Annexure 9" clearly mentions sanction of term loan to Corporate Debtor and Annexure 9 specifically mentions Corporate debtor's name as Corporate Guarantor for loans granted to Lakshmi Business Center. Thus, the Corporate Debtor is undoubtedly a Co-borrower and the Corporate Guarantor for the loans provided by SVC Co-operative Bank.
18. It is submitted that the notice dated 09.12.2019 under Section 13(2) of SARFAESI Act, issued by the SVC Co-operative Bank to the borrowers and the guarantors including the Respondent invoked the Corporate Guarantee and thus the allegation that no notice invoking the Corporate Guarantee had been issued is false and frivolous.
19. In response of the Respondent that the Corporate Debtor is not the member of the SVC Co-operative Bank. It is submitted that the Board Resolution dated 01.10.2016 annexed at "Annexure 10" of the Company Petition clearly mentioned that the Company was already a member of SVC Co-operative Bank Ltd. Therefore, the Corporate Debtor had itself accepted the fact that being the member of the SCV Co-operative Bank

it could avail the loan facility. The Petitioner has further annexed relevant document as “Exhibit A” with the Rejoinder evidencing that the Corporate Debtor is a member of the Co-operative bank and has also received dividends against 1000 shares bearing Dist. No. 34337101 to 34338100.

**FINDINGS:**

20. We have heard the Counsel appearing for the Petitioner and perused the material available on record.
21. It has been argued on behalf of the Corporate Debtor that the Respondent is not a Borrower or Co-Borrower. However, this Bench is of the view that the SVC Co-operative Bank had sanctioned a term loan of Rs. 12 crores to M/s Laxmi Business Centre (LBC) which is proprietary firm of the Director of the Corporate Debtor namely Amrit Rajani vide Sanction Letter dated 01.02.2010 and subsequently vide Sanction Letter dated 30.09.2016 a term loan of Rs. 23.17 Crores was sanctioned. The above said Sanction Letters were duly signed by the Corporate Debtor as well as by the M/s. Laxmi Business Centre. The sanction letter dated 30.09.2016 clearly mentions the name of the Corporate Debtor as “*Co-Borrower*” and “*the Corporate Guarantor*”. Hence the contention of the Respondent that the Corporate Debtor is not a Borrower or co-Borrower is not tenable.
22. Secondly, it has been argued by the counsel for the Corporate Debtor that the Financial Creditor had not served a notice invoking the Corporate Guarantee and, therefore, the petition is pre-mature and without any cause of action. However, this Bench is of the view that the SVC Co-Operative Bank Ltd had issued a notice dated 09.12.2019 under Section 13(2) of the SARFAESI Act, 2002 (Annexure 20) to the Borrowers and the Guarantors including the Respondent to repay the outstanding dues, thereby invoking the Corporate Guarantee. Even otherwise when the Corporate Debtor is a co-borrower, as is evident from the documents placed on record and, therefore, notice of invocation of guarantee stood

obviated. Hence even this contention of the Corporate Debtor is without any substance.

23. It has also been argued on behalf of the Corporate Debtor that the Original Financial Creditor, i.e. SVC Cooperative Bank was governed under the provisions of Multi Cooperative Societies Act 2002 and as per the provisions of the said Act, the said Bank was not entitled to grant loans to entities which were not members of the society. However, in this regard a reference can be made to Annexure 10 which is an extract of the Minutes of the Meeting of the Corporate Debtor held on 16.10.2016 wherein it is clearly mentioned that the Corporate Debtor is already a member of the SVC Cooperative Bank Limited. Therefore, the contention raised on behalf of the Corporate Debtor is not factually correct and is liable to be repelled.
24. As regards, the contention of the Corporate Debtor that the Corporate Guarantee is void in view of the provisions of Section 186 of the Companies Act, 2013. The Bench is of the view that the Corporate Debtor had itself entered into the Deed of Corporate Guarantee dated 03.10.2016 with the SVC Bank which was duly signed by the Authorised signatory of the Corporate Debtor and this clearly shows that the Corporate Debtor was well aware of the fact that it was entering into a Deed of Corporate Guarantee for the loan disbursed to the Laxmi Business Centre as Principal Borrower. Hence the Corporate Debtor cannot raise this defence at such a belated stage when it has been called upon to pay the dues by invoking the guarantees. Therefore, even this contention of the Corporate Debtor does is liable to be repelled. Even otherwise, in the reply filed on behalf of the Corporate Debtor, no such objection has been raised and therefore this objection is beyond pleadings.
25. It has also been argued on behalf of the Corporate Debtor that the petition is not maintainable considering the fact that the Corporate Debtor cannot be a borrower and the guarantor at the same time. In this regard it has been pointed out by the counsel for the Corporate Debtor that as per section 126 of the Contract Act, in a contract of guarantee there has to be a surety and principal debtor and creditor which were supposed to be



three different entities whereas in the instant case Corporate Debtor is shown to be a borrower as well as a guarantor which is not possible under the law. In support of this contention the counsel for the corporate debtor has relied upon ***R.M.M.S.T Vyravan Chettiar v The Official Assignee of Madras (1932) ILR 55 Mad 949.***

26. We have thoughtfully considered the above contention raised by the counsel for the Corporate Debtor and have also gone through the cited case and in our considered view, the provisions of section 126 of the Contract Act cannot be interpreted to mean that co-borrower and the guarantor cannot be one and the same person. We have also gone through the cited case referred upon by the Corporate Debtor. We are afraid that the facts of the said case stand on a different footing and cannot be applied to the facts and circumstances of the present case. Even otherwise having voluntarily entered into a contract in the capacity of a co-borrower as well as a guarantor, the Corporate Debtor cannot now be heard harping that the contract is hit by the provisions of section 126 of the Contract Act.
27. Considering the above discussion, we come to conclusion that the petitioner has been able to establish that there is a “Financial Debt” as defined under section 5 (8) of the Code. It has also been established that there is a “Default” as defined under section 3 (12) of the Code on the part of the Debtor. The two essential qualifications, i.e., existence of **‘debt’** and **‘default’** for admission of a petition under section 7 of the I&B Code, have been therefore met in this case. Besides, the Company Petition is well within the period of limitation. The Petitioners have also suggested the name of proposed Interim Resolution Professional in Part-3 of the Petition along with his consent letter in Form-2
28. Consequently, the petition is ordered to be admitted in the following order:

**ORDER**

- a. The above Company Petition No. 530/IBC/MB/2021 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **M/s. Whiz Enterprise Private Limited.**
  
- b. The IRP proposed by the Financial Creditor, **Mr. Sandeep Goel**, having registration No. IBBI/IPA-003/IP-N00073/2017-18/10583, having address at 410, Pratap Bhawan 5 Bahadur Shah Zafar Marg, New Delhi - 110002, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process as mentioned under the Insolvency & Bankruptcy Code, 2016.
  
- c. The Petitioner 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 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 CoC.
  
- d. That this Bench hereby declare moratorium in terms of Section 14 of Insolvency and Bankruptcy Code, 2016 prohibiting 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 the Securitization and Reconstruction of Financial Assets and Enforcement of Security

Interest 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.

- e. That 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.
- f. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- g. That 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.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the Corporate Debtor will vest in the IRP/RP. The board of directors of the Corporate Debtor shall stand suspended. The members of the suspended board of directors and the employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

- k. Accordingly, C.P. No. 530/IBC/MB/2021 is **admitted**.
1. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

**SD/-**

**Anuradha Sanjay Bhatia**  
**Member (Technical)**

**SD/-**

**Kuldip Kumar Kareer**  
**Member (Judicial)**