



**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

**I.A. No. 609 of 2022
IN
CP (IB) No. 1191/(MB) 2021**

Under Section 10A of the Insolvency and
Bankruptcy Code, 2016.

Deserve Exim Private Limited
Having address at: Deserve, CST Road
Junction, Opposite University of
Mumbai Premises, Kalina, Santacruz
(East), Mumbai- 400 098.

.....Applicant

In the matter of

YES Bank Limited

... Financial Creditor

Vs

Deserve Exim Private Limited

... Corporate Debtor

Order delivered on: 10.02.2023

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Applicant/ Corporate Debtor : Senior Advocate N.H. Seervai

For the Financial Creditor : Senior Advocate Gaurav Joshi

ORDER

Per: Justice P.N. Deshmukh, Member Judicial

1. This is an Application filed by the Applicant, Deserve Exim Private Limited, the Corporate Debtor in C.P. No. 1191 of 2021, seeking dismissal of the said Petition filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) and praying for the following reliefs:

- a. This Hon’ble Tribunal be pleased to allow this application and dismiss the above Company Petition in view of the provisions of Section 10A of the Insolvency and Bankruptcy Code, 2016*
- b. for costs of the present Application and;*
- c. for such further reliefs as this Hon’ble Tribunal may be pleased to grant in the facts and circumstances of the present case.*

2. The Financial Creditor filed a Petition being C.P. No. 1191 of 2021 under Section 7 of the Code against the Corporate Debtor for initiating Corporate Insolvency Resolution Process (CIRP) as the Corporate Debtor defaulted in making repayment of an **aggregate amount of Rs. 888,94,94,865/- Only** (Rupees Eight Hundred and Eighty-Eight Crores Ninety-Four Lakhs Ninety-Four Thousand Eight Hundred and Sixty-Five Only). A brief background of the case is as follows. The Financial Creditor advanced Term Loans to two borrowers namely, (i) Radius & Deserve Builders LLP (“Borrower 1”) and (ii) Raghuleela Builders Pvt Ltd (“Borrower 2”) (both collectively called “the Original Borrowers”). A combined amount of Rs. 800,00,00,000/- (Rupees Eight Hundred Crores) was advanced to the Original Borrowers. The

Corporate Debtor in the instant case executed two **Deeds of Guarantee dated 2nd June 2015** thereby guaranteeing the due repayment of the loans sanctioned to the Original Borrowers. Subsequently, the Borrower 1 and Borrower 2 committed defaults in making repayments on 1st August 2019 and 1st February 2019 respectively and the Financial Creditor declared their accounts as Non-Performing Asset (NPA) on 31st October 2019 and 2nd May 2019 respectively. As a result of this, the Financial Creditor invoked the Guarantee of the Corporate Debtor on 7th August 2020 and 26th June 2020 respectively. Yet the outstanding amounts remained unpaid by the Corporate Debtor and hence, the Financial Creditor filed the said Petition on **24th November 2021**.

3. The Applicant i.e. the Corporate Debtor submits that the Deeds of Guarantee were invoked on 7th August 2020 and 26th June 2020 respectively and that the date of default with respect to the Applicant has to be reckoned as the date of invocation of the Corporate Guarantees. Therefore, any purported default of the loans advanced would be squarely covered by Section 10A of the Code. Furthermore, the two guarantees in question are explicitly 'on demand' guarantees, i.e. they require a demand to be made on the guarantor. The relevant portion of the guarantees (both having identical wordings) is reproduced hereinbelow:

“1. The Guarantors foth hereby irrevocably and unconditionally guarantee the due repayment to the bank at its Chanakyapuri Branch at New Delhi on demand without demur and/or contestation and notwithstanding any dispute between the bank and the Borrower of all the amounts including the principal sum of INR 5,000,000,000/- under the said credit facility...”

The Applicant submits that demands were admittedly made on the Guarantor, through the invocations issued by the Financial Creditor on 26th June 2020 and 7th August 2020.

4. The Applicant argues that a Contract of Guarantee is an independent and distinct contract. It records the guarantor's liability and/or obligation to indemnify the recipient in the event that a third party does not perform its obligations. While the **liability** of a guarantor may be co-extensive with that of the borrower, it is absurd to suggest that the guarantor under an on-demand guarantor falls into default even before he is called upon/demanded/invoked to make good on the guarantee. Therefore, **default** under a guarantee only occurs when the guarantor, after being called upon/demanded/invoked to pay thereunder, does not do so.

5. To buttress this argument, the Applicant relies upon *Syndicate Bank v. Channaveerappa Baleri [(2016) 11 SCC 506]* passed by the Hon'ble Supreme Court of India. The relevant findings are extracted below:

“9. A guarantor's liability depends upon the terms of his contract... There is also a difference between a guarantee which stipulates that the guarantor is liable to pay on a demand by the creditor, and a guarantee which does not contain such a condition... The liability to pay may arise, on the principal debtor and guarantor, at the same time or at different points of time...the question as to when the liability of a guarantor will arise, would depend purely on the terms of the contract.”



“11 ...In a case where the guarantee is payable on demand, as held in Bradford and Hartland, the limitation begins to run when the demand is made and the guarantor commits breach by not complying with the demand.”

“13. ...The guarantee bond states that the guarantors agree pay and satisfy the Bank “on demand”. ...In this case, the contract was broken and the right to sue accrues, if payment is not made or is refused within 15 days. If while making the demand for payment, no period is stipulated within which the payment should be made, the breach occurs or right to sue accrues when the demand is served on the guarantor.”

The Applicant hence submits that it is beyond doubt that, particularly for an ‘on demand’ guarantee as is the case in the present Petition, a demand/invocation is absolutely necessary. The breach/default / right to sue qua the guarantor only occurs when this demand is not honoured. On the basis of the above grounds, the Applicant prays for dismissal of the Company Petition on the ground of it being barred under Section 10A of the Code.

6. The Financial Creditor replied to these contentions by stating that it is the right of the Financial Creditor to file a Petition under Section 7 of the Code against the Corporate Debtor when there has been a default in payment of a financial debt. The default in payment of the financial debt in the instant case has occurred on 1st August 2019 and 1st February 2019 and these dates are not disputed by both, the Corporate Debtor and the Applicant. It is further pointed out that Section 10A of the Code was introduced to protect the interests of those Corporate Debtors which have been affected by the unprecedented outbreak of the COVID-19 pandemic and therefore, the Corporate Debtor in this case

will not benefit from the shelter of Section 10A since the date of defaults predate both, the pandemic and the amendment of the Code.

7. The Financial Creditor further submits that it is settled law that the liability of the Corporate Debtor is co-extensive with that of the Borrowers and therefore the date of default with respect to the Applicant who is the Corporate Guarantor also starts to run from such date. The Financial Creditor places reliance on Section 128 of the Indian Contract Act, 1872 which states the following:

"128. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided in the contract."

The Financial Creditor therefore submits that the entire argument of the Applicant is based on the dates of invocation of the guarantees which is only a consequential action by the Financial Creditor for the defaults already committed by the Corporate Debtor and not the triggering point for filing the Petition under Section 7. In fact, the Corporate Guarantor metamorphoses into a debtor and the liability and the obligation to pay will arise co-extensively with the Borrower and the Guarantor and the right to file a Petition under Section 7 of the Code shall also accrue co-extensively. To augment their contentions, the Financial Creditor relies on the case of *S Elangovan vs. ARSEC (India) Limited & Anr.* passed by the Hon'ble NCLAT, Chennai Bench. On the basis of the above grounds, the Financial Creditor prays for dismissal of the present Application.

FINDINGS

8. We have heard the Counsel appearing for the Applicant and the Counsel appearing for the Financial Creditor at great length. On perusal of the documents annexed to this Application, it is noted that the primary issue for consideration before us is whether this Petition is barred under Section 10A of the Code. Section 10A of the Code reads thus:

“10A. Notwithstanding anything contained in sections 7,9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six, months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.”

Keeping in view the subsequent notifications, the period under Section 10A started from 25th March 2020 and ended on 24th March 2021.

9. With respect to the facts and circumstances in the instant case, we observe that liability of the Corporate Debtor is definitely co-extensive with that of the Corporate Guarantor. However, an obligation to pay arises only when a demand is made on the Corporate Guarantor. And accordingly, a default occurs only when such a demand by the Financial Creditor is not honoured by the Corporate Guarantor



according to the terms of the contract of guarantee. Thus, the liability of the Corporate Guarantor crystallises when the Financial Creditor invokes the Guarantee.

10. Coming to the instant case, it is seen that there is no dispute over the dates of invocation of the guarantees being 7th August 2020 and 26th June 2020. Thus, the date of default in respect of the Applicant who is the Corporate Guarantor in this case shall be deemed as the dates of invocation of the guarantees. Since these dates fall within the time frame mentioned in Section 10A of the Code, this Bench finds that the captioned Company Petition is barred under Section 10A.

11. In view of the foregoing reasons, we find it fit to allow the Application. With the above observations, **I.A. No. 609 of 2022 is accordingly allowed** and **CP (IB) 1191/MB/2021 is dismissed** as non-maintainable without going into merits.

Sd/-

SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

Sd/-

JUSTICE P. N. DESHMUKH
(MEMBER JUDICIAL)