IN THE NATIONAL COMPANY LAW TRIBUNAL AHMEDABAD

COURT - II

CP (IB) 338/NCLT/AHM/2020

(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:

BANK OF BARODA **APPLICANT/ FINANCIAL CREDITOR**

Versus

SUBI CHEMICALS PRIVATE LIMITED **RESPONDENT/ CORPORATE DEBTOR**

Order Pronounced on: 25/11/2022

CORAM:

DR. DEEPTI MUKESH
HON'BLE MEMBER (JUDICIAL)
AJAI DAS MEHROTRA
HON'BLE MEMBER (TECHNICAL)

MEMO OF PARTIES

Bank of Baroda
Regional Stressed Assets Recovery Branch
Baroda Sun Complex
Ghod Dod Road
SURAT 395 007 **…** **Applicant/Financial Creditor**

Versus

Subi Chemicals Private Limited
509, Jeevan Deep Complex
Near Sub-Jail
Ring Road
SURAT 395 003
Gujarat State **…** **Respondent/Corporate Debtor**

Appearance:

For the Applicant : Mr. Sudhir Mehta, Advocate
a.w. Mr. Virendrasinh Gohil, Advocate
For the Respondent : Mr. Pavan Godiawala, Advocate

ORDER

Per Se : Dr. Deepti Mukesh, Member (Judicial)

1. The Present Application is filed on 11.09.2020 under section 7 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by the financial creditor **Bank of Baroda** (for brevity 'Applicant'), with a prayer to initiate the Corporate Insolvency process against **Subi Chemicals Private Limited** (for brevity 'Corporate Debtor').

2. The applicant is a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 having CIN: U99999MH1911PLC007676 and having its Head Office at Baroda Bhavan, Alkapuri, R.C. Dutta Road, Vadodara, Gujarat and a Branch Office amongst other places known as Regional Stressed Assets Recovery Branch, Baroda Sun Complex, Ghod Dod Road, Surat 395 007. The applicant is in the Banking business providing various types of financial facilities including business loans, personal loans, consumer loans, loan against property, home equity loans, term loan etc.

3. The corporate debtor is a private limited company, incorporated under the provisions of The Companies Act, 1956 on 19.08.1992, duly registered with Registrar of Companies, Ahmedabad with CIN: U24231GJ1992PTC018170 and having registered office at 509, Jeevan Deep Complex, Nr. Sub-Jail, Ring Road, Surat 395 003, Gujarat State. The Authorized share capital of the corporate debtor is Rs. 2,00,00,000/- and paid up share capital is Rs. 1,79,85,000/-.

4. It is submitted by the applicant that various credit facilities were sanctioned to M/s. Sarthak Creation Private Limited (hereinafter referred to as "Borrower") in the year 2008 which were renewed/extended/enhanced from time to time on the strength of the security documents not only executed by the Borrower but also the guarantors who executed guarantee deeds dated 28.06.2010 in the name of the corporate debtor and M/s. Subi Dyestuff Private Limited. Due to default in payment of loan amount to the applicant, the account of Borrower was declared as NPA (non-performing asset) in the Books of the applicant on 11.12.2013 and the said default continues thereafter, till date. Total amount claimed to be in default as on 29.02.2020 is Rs. 122,57,11,577/-. The amount of loan extended by the applicant from time to time to the Borrower was guaranteed from

time to time by way of execution of corporate guarantees by two separate corporate entities 1) M/s. Subi Dyestuff Private Limited & 2) M/s. Subi Chemicals Private Limited as corporate guarantors. The two above named companies came to be amalgamated under the provisions of Section 391 to 394 of the Companies Act, 1956 by order dated 04.03.2013 and 25.03.2013 in Company Petition No. 254/2012 connected with Company Petition No. 363/2012 passed by Hon'ble High Court of Gujarat, copy of the said order in scheme of Amalgamation is filed.

After amalgamation of both the above companies, single entity by the name M/s. Subi Chemicals Private Limited (corporate debtor) continues to exist. Before amalgamation, Resolutions were passed by board of directors of both the guarantor companies to execute the corporate guarantee against sanction letter issued in the name of the Borrower, M/s. Sarthak Creation Private Limited. Accordingly, corporate guarantees dated 28.06.2010, 24.06.2011, 02.01.2012, 21.08.2012 and 22.02.2013 were executed. One resolution dated 03.12.2013 was also passed by board of directors of the Borrower M/s. Sarthak Creation Private Limited after sanction letter dated 30.11.2013 was issued by the applicant. Corporate guarantee dated 06.12.2013 is the final corporate guarantee document executed by the corporate guarantor, M/s. Subi Chemicals Private Limited on behalf of the original Borrower M/s. Sarthak Creation Private Limited.

5. It is further submitted by the applicant that the term "Financial Debt" which is envisaged under Section 5 (8) of the Insolvency and Bankruptcy Code, 2016 is an inclusive definition which means "a debt along with interest, if any, which is disbursed against the consideration for time value of money". It includes any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5 (8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5 (8), and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h). In the instant case, the applicant is having direct engagement in the functioning of the Borrower, M/s. Sarthak Creation Private Limited. While the Borrower had passed resolution dated 06.12.2013 resolving that the present corporate debtor, M/s. Subi Chemicals Private Limited stands as guarantor providing guarantee in favour of the applicant for securing financial assistance to be disbursed by the applicant to the Borrower and further resolving that the corporate guarantee is to secure the aggregate of credit facilities sanctioned to the Borrower. The corporate guarantee dated

06.12.2013, in point 3, the present corporate debtor unconditionally, absolutely and irrevocably guarantees as under:

3. *In the event of any default on the part of the borrower in payment/repayment of any of the moneys referred, or in the event of any default on the part of the borrower to comply with or perform any of the terms, conditions and covenants contained in the loan agreements, the guarantors shall, upon demand, forthwith pay to the BoB without demur all the amounts payable by the borrower under the loan agreements.*

Further, point No. 13 of the said corporate guarantee prescribes that:

13. This guarantee shall not be wholly or partially satisfied or exhausted by any payments made to or settled with the BoB by the borrower and shall be valid and binding on the guarantors and operative until repayment in full of all moneys due to the BoB under the loan agreements.

It is further stated that, the terms in this clause clearly covers the debt as "a debt along with interest, if any, which is disbursed against the consideration for time value of money".

Further, it is submitted that as per para 4.3.3. of Bankruptcy Legislative Reforms Commission Report, the term financial contract by financial creditor reads as under:

> *"Financial contracts involve an exchange of funds between the entity and a counterparty which is a financial firm or intermediary. This can cover a broad array of*

> *types of liabilities: "loan contracts secured by physical assets that can be centrally registered; loan contracts secured by floating charge on operational cash flows; loan contracts that are unsecured; debt securities that are secured by physical assets, cash flow or are unsecured."*

The report at another place reads as under:

> *"Financial creditors are those whose relationship with the entity is a pure financial contract, such as a loan or a debt security."*

In the present case, the corporate guarantor owes an obligation in respect of claim, which is due from the Borrower M/s. Sarthak Creation Private Limited.

Section 2 (11) of the Insolvency and Bankruptcy Code, 2016 defines debt – "means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt". Therefore, corporate guarantor stands in the shoes of the Borrower to discharge the burden of paying the financial debt to financial creditor in lieu of the Borrower failing to comply the same.

As per Section 5 (8) clause (h) which defines the financial debt to include: "Any counter indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution".

Clause (i) of Section 5 (8) of Code which includes the financial debt to be: "the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause"

It is further submitted that since the corporate debtor has duly executed the corporate guarantee as per their company board resolution with board of directors resolving that they are liable to pay money in the default of the Borrower, M/s. Subi Chemicals Private Limited, the present corporate debtor cannot now look back and refute the liability in respect of guarantee.

6. It is submitted by the applicant that a total sum of Rs. 66.17 crores were granted to the Borrower, M/s. Sarthak Creation Private Limited details of which are given below:

Type of Facility	Rupees in crores
Cash Credit (hypo stock & book debts)	26.20 Original sanction limit in 2008 was Rs. 2.50 crores, which remained at the same level in the year 2009, thereafter enhanced upto Rs. 6.00 crores in the year 2010, thereafter, enhanced upto Rs. 11.00 crores in the year 2011, thereafter enhanced upto Rs. 25.00 crores in the year 2013, thereafter enhanced/ reviewed/ restructured the said facility upto Rs. 26.20 crores in the year 2013. Since this was a running account, with consecutive credit and debit, no single date of disbursement. Hence date of sanction from time to time may be treated as date of disbursement.

Term loan I	Rs. 1.46 Date of Sanction 30.11.2013 Date of disbursement 30.11.2013
Term loan II	Rs. 1.88 Date of Sanction 30.11.2013 Date of disbursement 30.11.2013
Term loan III	Rs. 4.78 Date of Sanction 30.11.2013 Date of disbursement 30.11.2013
Term loan IV	Rs. 18.00 Date of Sanction 30.11.2013 Date of disbursement 30.11.2013
WCTL (Fresh)	Rs. 15.00 Date of Sanction 30.11.2013 Date of disbursement 11.12.2013
FITL – I (Fresh)	Rs. 6.50 Date of Sanction 30.11.2013 Date of disbursement 11.12.2013
FITL – II (Fresh)	Rs. 3.75 Date of Sanction 30.11.2013 Date of disbursement 11.12.2013

7. On account of non-payment of secured debts, the financial creditor issued a notice dated 19.11.2015 under Section 13 (2) of the SARFAESI Act, 2002 calling upon Borrower, M/s. Sarthak Creation Private Limited and the corporate guarantor, M/s. Subi Chemicals Private Limited to pay Rs. 65,71,89,119.32 including interest upto 30.09.2015. Thereafter, the applicant issued legal notice dated 27.01.2016 to the Borrower, M/s. Sarthak Creation Private Limited, personal guarantors and corporate guarantor, present corporate debtor M/s. Subi Chemicals Private Limited.

8. The corporate debtor filed affidavit in reply inter alia stating that:

- Alleged claim does not fall within the four corners of the financial debt and the respondent does not owe any such debt.
- The date of default is the date of declaration of account of the original Borrower Sarthak Creation Private Ltd. (now in liquidation) as non-performing account and the NPA was declared on 11.12.2013 while the present application is filed on 11.09.2020, hence, the present application is barred by law of limitation.
- The application is filed for alleged recovery and as an arm twisting process. Therefore, proceedings to be initiated against the applicant under Section 65 of the IB Code, 2016.
- The present application is filed essentially for recovery of alleged debt and the averments as made in the application and affidavit clearly demonstrate that the applicant has undertaken different alleged measures including SARFAESI, 2001 against the Borrower company, filed original application before DRT, Ahmedabad for recovery against the Borrower and alleged corporate guarantor, which is pending.
- The account of the original Borrower company which is now in liquidation was declared as Non Performing since 11.12.2013, hence the date of default is 11.12.2013.

9. The applicant filed rejoinder inter alia stating that:

- The applicant had extended credit facilities to M/s. Sarthak Creation Pvt. Ltd. (borrower) initially in the year 2008 which were renewed/extended/enhanced from time to time at the request of the Borrower and on the strength of the security documents executed not only by the Borrower but also by the corporate guarantors namely; M/s. Subi Chemicals Pvt. Ltd. and M/s. Subi Dyestuff Pvt. Ltd.
- The corporate debtor herein (resultant merger of company upon M/s. Subi Dyestuff Pvt. Ltd. with it) was a corporate guarantor and in that capacity of corporate guarantor, it was called upon by the applicant to repay the debt guaranteed by it on behalf of the borrower repayable to the applicant. As the corporate guarantor raised unsustainable objections, the applicant was compelled to initiate the present insolvency proceedings. In the meantime, the Borrower M/s. Sarthak Creation Pvt. Ltd. submitted an application under Section 10 of the IB Code, 2016 bearing No. CP No. (IB) 85/10/NCLT/AHM/2017 wherein this Tribunal passed order dated 30.08.2017, inter alia, granting moratorium under Section 13 (1) (a) of the IB Code which is on record. In the said proceedings the above named corporate

guarantor, M/s. Subi Chemicals Private Limited was not made a party. The above named corporate guarantor, M/s. Subi Chemicals Private Limited continued to serve as corporate guarantor right from the year 2010 wherein the corporate guarantees were executed on 28.06.2010, 24.06.2011, 02.11.2012, 21.08.2012, 22.02.2013 and 06.12.2013 for various limits wherein corporate guarantee dated 06.12.2013 was in respect of an amount of Rs. 66.17 crores supported by Board Resolutions dated 03.12.2013, which are on record.

- The corporate debtor M/s. Subi Chemicals Pvt. Ltd. is a merged/ amalgamated resulting company where another entity corporate guarantor namely M/s. Subi Dyestuff Pvt. Ltd. which too executed corporate guarantees on the above referred dates got merged in present corporate debtor vide Hon’ble High Court of Gujarat order dated 04.03.2013 and 25.03.2013, which are on record.
- In light of above, the two companies as a single amalgamated company known as M/s. Subi Chemicals Pvt. Ltd., corporate guarantee dated 06.12.013 was executed by M/s. Subi Chemicals Pvt. Ltd. for the entire loan amount of Rs. 66.17 crores as on 06.12.2013 repayable together with interest and other charges, copy of which is on record.
- Corporate guarantee dated 06.12.2013, under point No. 11 clearly brings out that “The Guarantors shall not in the event of the liquidation

of the Borrower prove in competition with Bank of Baroda in liquidation proceedings". Further, under point No. 13, it is brought out that "This guarantee shall not be wholly or partially satisfied or exhausted by any payments made to or settled with Bank of Baroda by the Borrower and shall be valid and binding on the guarantors and operative until repayment in full of all moneys due to Bank of Baroda under the loan agreements".

- Point No. 3 of the corporate guarantee stipulates that "in the event of any default on the part of the Borrower in payment/repayment of any of the moneys referred to above, or in the event of any default on the part of the Borrower to comply with or perform any of the terms, conditions and covenants contained in the loan agreements, the guarantors shall, upon demand, forthwith pay to Bank of Baroda without demur all of the amounts payable by the borrower under the loan agreements"
- Point No. 15 of the guarantee stipulates that "This guarantee shall be a continuing one and shall remain in full force and effect till such time the Borrower repays in full the loans together with all interest, liquidated damages, commitment charges, premia on prepayment or on redemption, cost expenses and other moneys that may from time to time become due and payable and remain unpaid to Bank of Baroda under the loan agreement".

- It is thus abundantly clear that the corporate guarantor virtually acquired the status of the corporate Borrower upon commitment of default after demand/legal notice was served amongst others on the corporate guarantor by the advocate of the applicant vide notice dated 27.01.2016.

10 The applicant filed written submissions inter alia reiterating the contentions raised in the application.

11. The corporate debtor has not filed written submissions.

12. As per directions of the Bench, the applicant filed chronology of each document executed by the borrower namely Sarthak Creation Pvt. Ltd. and corporate debtor herein namely Subi Chemicals Pvt. Ltd. in order to show the extension of limit from time to time.

Sr. No.	Date	List of events
01	05.01.2008	Sanction letter issued to Sarthak Creation P. Ltd. for an amount of Rs. 766.00 lacs
02	25.01.2008	Resolution passed by Sarthak Creation P. Ltd.
03	29.01.2009	Sanction letter issued to Sarthak Creation P. Ltd. of Rs. 816.00 lacs
04	16.03.2009	Resolution passed by Sarthak Creation P. Ltd.
05	22.06.2010	Sanction letter issued to Sarthak Creation P. Ltd. of Rs. 17.56 crores
06	25.06.2010	Resolution passed by Sarthak Creation P. Ltd.
07	25.06.2010	Resolution passed by Subi Chemicals P. Ltd.
08	28.06.2010	Corporate guarantee executed by Subi Chemicals P. Ltd.
09	21.06.2011	Sanction letter issued to Sarthak Creation P. Ltd. of Rs. 28.27 crores

10	23.06.2011	Resolution passed by Sarthak Creation P. Ltd.
11	23.06.2011	Resolution passed by Subi Chemicals P. Ltd.
12	24.06.2011	Corporate Guarantee executed by Subi Chemicals P. Ltd.
13	02.01.2012	Sanction letter issued to Sarthak Creation P. Ltd. of Rs. 32.23 crores
14	02.01.2012	Resolution passed by Sarthak Creation P. Ltd.
15	02.01.2012	Resolution passed by Subi Chemicals P. Ltd.
16	02.01.2012	Corporate guarantee executed by Subi Chemicals P. Ltd.
17	13.08.2012	Sanction letter issued to Sarthak Creation P. Ltd.
18	16.08.2012	Resolution pseed by Sarthak Creation P. Ltd.
19	14.08.2012	Resolution passed by Subi Chemicals P. L:td.
20	21.08.2012	Corporate guarantee executed by Subi Chemicals P. Ltd.
21	15.02.2013	Sanction letter issued to Sarthak Creation P. Ltd. of Rs. 57.18 crores
22	19.02.2013	Resolution passed by Sarthak Creation P. Ltd.
23	19.02.2013	Resolution passed by Subi Chemicals P. Ltd.
24	22.02.2013	Corporate guarantee executed by Subi Chemicals P. Ltd.
25	30.11.2013	Sanction letter issued to Sarthak Creation P. Ltd. of Rs. 67.17 crores
26	03.12.2013	Resolution passed by Sarthak Creation P. Ltd.
27	03.12.2013	Resolution passed by Subi Chemicals P. Ltd.
28	06.12.2013	Corporate guarantee executed by Subi Chemicals P. Ltd.
29	19.04.2010 28.06.2010 31.12.2011 21.08.2012 22.02.2013 06.12.2013 & 25.05.2015	Letter of acknowledgement of debt by borrower and guarantor
30	30.08.2017	Order passed by NCLT, Ahmedabad in respect of application filed by the borrower namely Sarthak Creation P. Ltd. u/s. 10 of IB Code, 2016 bearing CP No. (IB) 85/10/NCLT/AHM/2007 against financial creditor
31	30.09.2019	Proposal for One-time Settlement submitted by Subi Chemicals P. Ltd.
32	11.09.2020	Petition filed before NCLT, Ahmedabad by the applicant

13. The applicant filed additional affidavit enclosing therewith copies of the following documents:

(i) Copy of reply of borrower dated 11.01.2016 on behalf of itself and also on behalf of guarantor, M/s. Subi Chemicals Pvt. Ltd inter alia objected the demand notice dated 19.11.2015 issued by the applicant. In the last para, borrower for itself and on behalf of guarantor mentioned as under:

"Without prejudice to hereinabove stated, without surrounding any of our right, we wise to state that we are interested in an amicable settlement without indulging into unwarranted litigations, which is a win-won proposition in our mutual interest. We seek an early date appointment with you to discuss and decide the matter, which please note"

(ii) In reply to legal notice dated 28.01.2016 issued by advocate of the applicant, which was also served on borrower (M/s. Sarthak Creation Pvt. Ltd.) and corporate guarantor (M/s. Subi Chemicals Pvt. Ltd.), the borrower on behalf of itself and also on behalf of guarantor M/s. Subi Chemicals P. Ltd. submitted its reply on 29.02.2016. In the reply, in the last para, borrower mentioned as under:

In view of above, you may advice your client to desist from any legal proceeding against the company. We may jointly decide the strategies for turnaround or else explore possibilities of One Time Settlement, which is a win-win situation for both of us.

(iii) To rebut the claim of the corporate debtor that the present application is barred by Law of Limitation, the applicant has submitted copies of three one-time settlement proposals submitted (1) by the borrower Sarthak Creation P. Ltd. dated 28.03.2016, (2) by guarantor M/s. Subi Chemicals P. Ltd. dated 11.09.2018 and (3) by guarantor M/s. Subi Chemicals P. Ltd. dated 27.12.2018 which inter alia acknowledged not only their status as corporate guarantor but also pleading the applicant to allow concession and accept the proposal for one-time settlement.

14. The corporate debtor filed additional affidavit inter alia stating that the applicant has failed to show that the application is within limitation period. Acknowledgement of debt cannot extend the limitation period. Application filed under Section 10 cannot be considered as acknowledgement of debt. The applicant is a going concern and is discharging its obligation towards statutory and contractual dues in the ordinary course of business and the accounts of the respondent is regular with its bankers and there is no reasons or justification to trigger CIRP.

15. As per order of the Bench, the corporate debtor filed short note on limitation stating that:

- The credit facilities sanctioned to the borrower, M/s. Sarthak Creation Private Limited in the year 2008 and thereafter upon enhancement in the limits, documents were executed in the year 2010, 2011, 2012, and 2013 were guaranteed by the corporate guarantor, M/s. Sub Chemicals Private Limited.
- The corporate guarantor passed a Board Resolution dated 03.12.2012 and resultantly executed corporate guarantee deed dated 06.12.2013

being the final corporate guarantee document on behalf of the borrower.

- The borrower as well as the corporate guarantor both executed and acknowledged the debt on 19.04.2010, 28.06.2010, 31.12.2011, 21.08.2012, 22.02.2013, 06.12.2013 and lastly they had executed and acknowledged the debt on 25.05.2015.
- After execution of the deed of guarantee dated 06.12.2013, the account classified as NPA on 11.12.2013 whereafter the applicant in its capacity as a lender crystallised the liability and issued demand notice dated 19.11.2015 under Securitisation Act, 2002. Against the said notice borrower for itself and also on behalf of guarantor filed objection on 11.01.2016 also showing interest in an amicable settlement. Thereafter, the applicant issued legal notice through advocate on 28.01.2016, which was also replied by the borrower for itself and on behalf of the corporate guarantor on 29.02.2016 inter alia exploring possibilities of one-time settlement proposal (OTS). Thereafter, on 13.12.2016, the applicant filed Original Application No. 67/2017 before DRT, Ahmedabad against the borrower and also against the corporate guarantor showing them as the defendants therein responsible to pay the crystallised debt of Rs. 61,85,23,199/- with other related amounts as narrated therein jointly and severally which is pending for adjudication.

- Well within the period of three years commencing from 25.05.2015 as stated above, the borrower submitted an application under Section 10 of IB Code, 2016 against the financial creditor being CP No. 85/10/NCLT/AHM/2017 which came to be decided by NCLT, Ahmedabad on 30.08.2017.

16. The applicant has separately filed copies of the following judgements relied upon by it during the arguments.

Sr. No.	Authority	Relied upon the paragraph of judgement
1	R. Lilavati v/s. Bank of Baroda, Citation : 1986 Law Suit (Kar) 206	
2	K Paramsivam v/s. The Karur Vysys Bank Ltd. & Another. Citastion : [2022 Live Law (SC) 742]	
3	Asset Reconstruction Company (India) Ltd. v/s. Bishal Jaishwal & Anr. Citation : (2021 Law Suit (SC) 276)	
4	Tejas Khandhar v/s. Bank of Baroda Citation: [NCLAT in Company Appeal (AT) (Insolvency) No. 371 of 2020]	Page 67. Para 12, 13 & 14
5	Gauri Prasad Goenka v/s. Punjab National Bank. Citation: [(2020) 119 Taxmann.com 452 (NCLAT)]	Page 11, para 10
6	Laxmipat Surana vs. UOI (SC)	Para 41, 42

17. As per Form 1, part IV, the corporate debtor is in default of total Rs. 122,57,11,577/- (Rupees one hundred twenty-two crores fifty-seven lacs eleven thousand five hundred seventy-seven only) as on 29.02.2020. Taking into consideration the date of classification of the account as non-performing asset in the books of the financial creditor and subsequent developments like one-time settlement proposals moved by the borrower and corporate guarantor, the last such acknowledgement of debt being 27.12.2018, the present application filed on 11.09.2020 is within limitation.

18. The registered office of the corporate debtor is situated in Surat, Gujarat State and, therefore, this Tribunal has jurisdiction to entertain and try this application.

19. Heard the submissions and perused the documents on record. The points of consideration are:

    (a) Issue: Whether the alleged claim falls within the four corners of the financial debt?

On perusal of the records it is found that the applicant had extended credit facilities to M/s. Sarthak Creation Pvt. Ltd. (borrower) initially in the year 2008 which were renewed/extended/enhanced from time to time at the request of the borrower and on the strength of the security documents executed not only by the borrower but also by the corporate guarantors namely; M/s. Subi Chemicals Pvt. Ltd. and M/s. Subi Dyestuff Private Ltd. The corporate guarantor, M/s. Subi Chemicals Private Limited continued to serve as corporate guarantor right from the year 2010 wherein the corporate guarantees were executed on 28.06.2010, 24.06.2011, 02.11.2012, 21.08.2012, 22.02.2013 and 06.12.2013 for various limits wherein corporate guarantee dated 06.12.2013 was in respect of an amount of Rs. 66.17 crores. It is pertinent to mention here that point No. 11 of corporate guarantee dated 06.12.2013 stipulates that "The Guarantors shall not in the event of the liquidation of the borrower prove in competition with Bank of Baroda in liquidation proceedings". Further, point No. 13 of the corporate guarantee stipulates that "This guarantee shall not be wholly or partially satisfied or exhausted by any payments made to or settled with Bank of Baroda by the borrower and shall be valid and binding on the guarantors and operative until repayment in full of all moneys due to Bank of Baroda under the loan agreements". Similarly, Point No. 3 of the corporate guarantee stipulates that "in the event of any default on the part of the Borrower in payment/repayment of any of the moneys referred to above, or in the event of any default on the part of the borrower to comply with or perform any of the terms, conditions and covenants contained in the loan agreements, the guarantors shall, upon demand, forthwith pay to Bank of Baroda without demur all of the amounts payable by the borrower under the loan agreements". Point No. 15 of the guarantee stipulates that "This guarantee shall be a continuing one and shall remain in full force and effect till such time the borrower repays in full the loans together with all interest, liquidated damages, commitment charges, premia on prepayment or on redemption, cost expenses and other moneys that may from time to time become due and payable and remain unpaid to Bank of Baroda under the loan agreement".

From the above it is clear that the corporate guarantor virtually acquired the status of the corporate borrower upon commitment of default after demand/legal notice was served on the corporate guarantor.

(b) Issue: Whether the debt is time barred?

The corporate debtor's submission is that the date of default is the date of declaration of account of the original borrower Sarthak Creation P. Ltd. (now in liquidation) as non-performing account and the NPA was declared on 11.12.2013 while the present petition is dated 11.09.2020, hence, the present application is barred by law of limitation.

The chronology of each document executed by the borrower and the corporate guarantor and taking into consideration three one-time settlement proposals submitted (1) by the borrower Sarthak Creation P. Ltd. dated 28.03.2016, (2) by guarantor M/s. Subi Chemicals P. Ltd. dated 11.09.2018 and; (3) by guarantor M/s. Subi Chemicals P. Ltd. dated 27.12.2018 which inter alia acknowledged not only their status as corporate guarantor but also pleading the applicant to allow concession and accept the proposal for one-time settlement clearly depicts that the corporate guarantor has acknowledged the debt from time to time. Therefore, the application filed by the applicant on 11.09.2020 is within limitation.

We are supported by the judgement of Hon'ble National Company Law Appellate Tribunal (NCLAT) in CIRP petition filed in May 2018 by *Gauri Prasad Goenka v/s. Punjab National Bank* vide order dated 08.11.2019 in Company Appeal (AT) (INSOLVENCY) No. 28 of 2019 under para 10 has clearly held as under:

> *"That apart, there is acknowledgement of the outstanding debt on the part of the corporate debtor, a fact not disputed by the corporate debtor. This comes to fore from the letter dated 04.08.2018 emanating from the corporate debtor and addressed to the financial creditor wherein the corporate debtor agreed to settle all outstanding dues of the financial creditor on One-Time Settlement (OTS) basis (refer pages 692-693 Vo. III of the appeal paper book). This is a clear acknowledgement of the outstanding debt in writing and the corporate debtor cannot wriggle out of the liability so acknowledged. It is not in controversy that on the date of such acknowledgement of the debt was not time barred and the Insolvency Resolution Process was triggered within the period of limitation in terms of Article 137 of the Limitation Act, computed from such date. Admittedly, the OTS proposal was rejected by the financial creditor on 30.10.2018. Superadded to it is the fact emerging from the impugned order that the corporate debtor was ready to settle the dispute for a sum of Rs. 31 crores on the basis of value of the security held by the financial creditor. This offer, reflected in para 15 of that impugned order, was not entertained having regard for the fact that the previous OTS proposal approximately to the tune of Rs. 51 crores had already been rejected by the financial creditor. Viewed in this context, it is manifestly clear that the financial debt in respect whereof default was committed by the corporate debtor, was not barred by limitation. Contention raised on this score is accordingly rejected."*

The facts of debt by the original borrower and the existence of corporate guarantee are not denied by the respondent corporate guarantor. The acknowledgement of debt and OTS proposals bring the debt within limitation.

20. In light of the above discussions, it is evident that the debt is due and payable and default has occurred. The present application is complete in terms of Section 7 (5) of the Code. The applicant is entitled to claim its dues, establishing the default in payment of the financial debt beyond doubt. In light of the above facts and records, the present application is admitted and CIRP is ordered to be initiated against the corporate debtor.

21. The applicant has proposed the name of Mr. Nimai Shah as Insolvency Resolution Professional, who is hereby appointed as IRP of corporate debtor having registration number IBBI/IPA-001/IP-P-00154/2017-18/10323 having office at 605-606-607, Silver Oaks, Near Mahalaxmi Char Rasta, Paldi, Ahmedabad 380 007, Gujarat State subject to the condition that no disciplinary proceedings are pending against him. Specific consent of the IRP in Form 2 along with disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is filed, which is on record.

22. We direct the Financial Creditor to deposit a sum of Rs. 2.00 lacs (Rupees two lacs only) with the Interim Resolution Professional, namely Mr. Nimai Shah to meet the expenses for performing functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Financial Creditor.

23. As a consequence of the application being admitted in terms of Section 7(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14 (1) shall follow in relation to the Corporate debtor, prohibiting actions as per clauses (a) to (d) of Section 14 (1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall remain in force.

24. A copy of the order shall be communicated to the applicant, IRP and the corporate debtor. A copy of order along with complete copy of application be served to IRP by the applicant within 7 days of order. In addition, a copy of the order shall also be forwarded to IBBI for its records and taking steps for updating the Master Data of the corporate debtor in MCA portal and shall forward the compliance report to the Registrar, NCLT.

Sd/-

AJAI DAS MEHROTRA
MEMBER (TECHNICAL)

Sd/-

DR. DEEPTI MUKESH
MEMBER (JUDICIAL)

Nair/Abhishek LRA