



IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH – IV

C.P. (IB) No. 647/MB-IV/2023

Under Section 7 of the *Insolvency and Bankruptcy Code, 2016* r/w. Rule 4 of the *Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016*.

In the matter of

State Bank of India

...Financial Creditor

v/s.

Advantage Oils Private Limited

(CIN: U11200MP2013PTC031416)

...Corporate Debtor

Order Pronounced on: 11.01.2024

Coram:

Ms. Anu Jagmohan Singh
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Petitioner : Mr. Gaurav Joshi, Ld. Counsel for the
Petitioner
For the Respondent : Ms. Nidhi Singh, Ld. Counsel for the
Respondent



ORDER

1. This is a Company Petition filed under Section 7 of the Insolvency & Bankruptcy Code, 2016 (“IBC, 2016”) by **State Bank of India** (“Financial Creditor”) seeking initiation of Corporate Insolvency Resolution Process (“CIRP”) in the matter of **Advantage Oils Private Limited**, the Corporate Debtor herein.

1.1 The present petition is filed on 18.07.2023 and, the total default as on 31.03.2023 amounts to INR 2769,18,40,353.24/- (Rupees two-thousand seven-hundred and sixty-nine crores, eighteen-lakhs, forty-thousand, three-hundred fifty-three only), along with further interest under the Corporate Guarantee *dated* 12.05.2016 as claimed to be executed by the Corporate Debtor. The Date of Default as specified in Part-IV of the present petition is 22.12.2018.

Submissions by Financial Creditor

2. The Financial Creditor submits that it was approached by the Principal Borrower *viz.* Advantage Overseas Private Limited (“**Personal Borrower**”) for availment of financial facilities, in *circa* November of 2012. Pursuant to the same, a Letter of Arrangement *dated* 15.03.2013 was executed *inter alia* between the Financial Creditor and the Principal Borrower, on the basis of which, the latter was granted facilities to the tune of INR 10,00,00,000 (Rupees Ten-crores only; “**Initial Facility**”). As against the said Initial Facility, an Agreement of Loan-cum-Hypothecation *dated* 23.03.2013 and a Guarantee Agreement *dated* 23.03.2013 were duly executed between the Financial Creditor and the Personal Borrower.

3. Subsequently, the Personal Borrower approached the Financial Creditor for enhancement of the said Initial Facility and pursuant to the same, a Letter of Arrangement *dated* 17.12.2014 was executed whereby the said Initial



Facility was increased to an aggregate amount of INR 51,00,00,000/- (Rupees Fifty-one crores only; “**Revised Facility**”). As against the said Revised Facility, a Loan Agreement *dated* 29.12.2014 was duly executed. To secure the amounts granted under the Revised Facility, the following documents were executed:

- a.* Agreement of Hypothecation of Goods and Assets executed by the Personal Borrower in favor of Financial Creditor.
- b.* 3 (three) Deeds of Guarantee for Overall Limit executed by Directors of Personal Borrower.
- c.* Deed of Guarantee for Overall Limit (“**Original Guarantee**”) executed by M/s. Asian Business Connections Private Limited (“**ABCPL**”).

4. Further, the Financial Creditor submits that it was approached by the Personal Borrower seeking a renewal and an enhancement in the said Revised Facility. Accordingly, a Letter of Arrangement was issued by the Financial Creditor *dated* 07.04.2016 (“**Facility**”) to the Personal Borrower, sanctioning facilities aggregating to INR 6249.50 Crores. A Board Resolution *dated* 02.05.2016 was thereby passed by Directors of the Corporate Debtor to the effect of extending the Corporate Guarantee as against the said Facility in favor of the Financial Creditor herein. Subsequently, the Deed of Guarantee *dated* 12.05.2016 was executed as against the afore-mentioned Facility by the Corporate Debtor. To secure the amounts granted under the Facility, the following documents were executed:

- a.* Supplemental Agreement of Hypothecation of Goods and Assets executed by the Personal Borrower in favor of Financial Creditor.
- b.* 3 (three) Supplemental Deeds of Guarantee for Overall Limit executed by Directors of Personal Borrower.
- c.* Supplemental Deed of Guarantee for Overall Limit (“**Supplemental Guarantee**”) executed by M/s. Asian Business

Connections Private Limited (“**ABCPL**”).

Furthermore, a Mortgage was created on immovable properties of the Personal Borrower and the Corporate Debtor, to secure repayment of the Facility.

5. The Financial Creditor submits that a Revival Letter *dated* 30.11.2017 was executed by the Personal Borrower and the Corporate Debtor, expressly admitting that (i) the Personal Borrower was in receipt of amount extended under the Facility; (ii) the said amount was secured by a guarantee extended by the Corporate Debtor; (iii) the Personal Borrower and the Corporate Debtor acknowledge their liability towards the Financial Creditor; and (iv) the Personal Borrower and the Corporate Debtor acknowledged that they were liable to the Financial Creditor for the payment of all outstanding amounts with interest costs, charges and expenses and other monies due in relation to the Facility.
6. The Financial Creditor submits that the Personal Borrower failed to comply with the terms of the Facility and on account of its inability to repay the amounts due under the NFB WC (LC) Limit for Merchant Trading Facility and under the NFB Credit Exposure Limit for Merchanting Trade; The Loan Account of Personal Borrower was classified as NPA *w.e.f.* 08.08.2018. Pursuant to which, various letters were sent by the Personal Borrower acknowledging its liability and assurance(s) to settle the outstanding dues thereof. The Financial Creditor however submits that, the Personal Borrower failed to do so.
7. Consequently, the Financial Creditor sent two notices to the Personal Borrower and the Corporate Debtor as mentioned hereinafter:



| Notice(s) | Particulars |
|---------------------------------|---|
| First Notice dt. 07.12.2018 | The Financial Creditor called upon the PERSONAL BORROWER and the Corporate Debtor to repay the outstanding amount as on 04.12.2018, along with further interest from 01.12.2018, amounting to INR 1390,78,02,690/-. |
| Second Notice dt. 07.01.2019 | The Financial Creditor called upon the PERSONAL BORROWER and the Corporate Debtor to repay the outstanding amount as on 30.11.2018, along with further interest from 01.12.2018, amounting to INR 1388,87,38,968/-. |

8. The Financial Creditor submits that neither of the afore-mentioned two notices were responded to, nor were the outstanding dues cleared. Pursuant to which, O.A. No. 107 of 2019 (“**OA**”) was filed by the Financial Creditor *inter alia* against the Corporate Debtor and Personal Borrower before the Debts Recovery Tribunal, Jabalpur (“**DRT**”) *u/s.* 19 of the Debts Due to Banks and Financial Institutions Act, 1993 for recovery of an amount of INR 1408,57,30,754/-.
9. During pendency of the said OA, Personal Borrower sent two letters to the Financial Creditor, *dated* 11.03.2020 and 05.05.2020, requesting for settlement of its dues. Subsequently, the Financial Creditor *vide* Letter *dated* 05.09.2020, provided a One Time Settlement Offer (“**OTS**”) to the Personal Borrower whereby the outstanding amount was proposed to be paid in 05 (five) tranches across a period of 03 (three) years, amounting to a compromise amount of INR 426.07 Crores. Board Resolutions of the Personal Borrower and Corporate Debtor *dated* 15.09.2020 were consequently passed to the same effect. An Undertaking *dated* 11.05.2021 was consequently issued by the Corporate Debtor and others in compliance with the terms of the proposed OTS.




10. The Financial Creditor further submits that an Application was filed jointly between the parties for a Consent Decree to be passed by the DRT in the said OA. Pursuantly, a Judgement was passed by the DRT *dated* 26.04.2022, wherein it was agreed that the Defendants to OA (which included the Personal Borrower and Corporate Debtor) would pay an amount of INR 425 Crores to the Financial Creditor. Additionally, the said Judgement by DRT recorded that (i) the counter-claim filed *inter alia* by the Personal Borrower would stand withdrawn and the same would not be revived in event of any failure; and (ii) in event of failure to adhere to the terms of the OA, the entire outstanding amount would be payable.
11. The Financial Creditor submits that on failure of realization of aforesaid terms recorded in the said Judgement by DRT *dated* 26.04.2022; It sent a Legal Notice to the Personal Borrower, Corporate Debtor and other Guarantors *dated* 02.01.2023, highlighting the entire outstanding amount becoming due and payable on account of Personal Borrower's failure to clear the outstanding amount and its failure to abide by the terms of the said OTS.
12. In light of the aforesaid submissions, the Financial Creditor contends that till date the Corporate Debtor has failed to repay the outstanding dues and has thus breached the terms of the Facility.
Hence, the present Petition.

Submissions by Corporate Debtor

13. At the outset, the Respondent herein *viz.* Corporate Debtor disputes the Financial Creditor's averments with regards to the nature of financial assistance involved herein and submits that the commercial dealings between the said parties were for the benefit of the Financial Creditor itself involving an arrangement regarding truncation of Deposits made by the

Principal Borrower pursuant to its merchanting trade operations.

14. The Corporate Debtor submits that the Date of Default mentioned in the Legal Notice issued by the Financial Creditor *dated* 02.01.2023, *viz.* 04.03.2021, falls during the moratorium period as notified u/s. 10A of the IBC, 2016 and is thereby barred under the same. The Corporate Debtor further submits that no notice has been issued to it on or after the alleged Date of Default *viz.* 04.03.2021 for invocation of the Corporate Guarantee *dated* 12.05.2020.
15. The Corporate Debtor submits that the said Corporate Guarantee *dated* 12.05.2020, upon which the Financial Creditor places reliance on, is no longer valid or subsisting as it has neither been renewed nor revived after the OTS *dated* 05.09.2020 was entered into. Additionally, the Corporate Debtor submits that the default as recorded under the said OTS was superseded by the Consent Decree *dated* 26.04.2022 passed by the DRT and that, there is no provision in the said Consent Decree for revival or extension of the said Corporate Guarantee.
16. The Corporate Debtor contends that the two Invocation Notices sent by the Financial Creditor, *dated* 07.12.2018 and 07.01.2019, do not satisfy the mandatory legal requirements of Invocation of a Guarantee and, are time-barred by Law of Limitation. The Corporate Debtor further contends that the afore-mentioned Invocation Notices are much prior to both, the OTS *dated* 05.09.2020 and the Consent Decree *dated* 26.04.2022, and as such have automatically lapsed and thereby have no validity in the eyes of law.
17. The Corporate Debtor further submits that in addition to the non-fulfilment of terms in OTS *dated* 05.09.2020 by the Financial Creditor; the Date of Default relied upon by the Financial Creditor is *ex facie* an incorrect date



and that, the true nature of transactions in relation to the financial/ credit facilities has been suppressed.

Findings

18. Heard the Learned Counsel(s) for the Financial Creditor and the Corporate Debtor.

19. Upon perusal of the record files, we are of the considered view that:


19.1. The principal issue in the present petition is regarding Invocation of Guarantee. To constitute a valid invocation, the corporate guarantee has to be expressly invoked. We find that the Financial Creditor's contention regarding Invocation of the said Guarantee being supposedly triggered *via* Demand Notices, *dated* 07.12.2018 and 07.01.2019, is without any factual basis. Upon perusal of the terms in the said Corporate Guarantee *dated* 12.05.2016, Clause (20) therein expressly casts an obligation upon the Financial Creditor to serve a duly addressed Demand Notice upon the Corporate Debtor calling upon the Guarantor to make the payment in terms of the said guarantee. We place reliance on the positions adopted by the Hon'ble Supreme Court in *Syndicate Bank vs. Channaveerappa Beleri & Ors.* [(2006)11 SCC 506; Paras (9), (13), (14) and (16)], and the Hon'ble NCLAT in *J.C. Flowers Asset Reconstruction Pvt. vs. Deserve Exim Pvt. Ltd.* [Comp. App. (AT) (Ins.) No. 486/2023; Para (9)] in holding that neither of the two afore-mentioned demand-notices constitute a valid invocation in so far as the alleged "Default" pertaining to the said "On-Demand Guarantee" is concerned, and therefore no "Demand" as such was validly made upon the Guarantor *viz.* Corporate Debtor herein.



19.2. Without prejudice to the afore-stated fact that a valid invocation of the said guarantee has not been made out in the present case, the Financial Creditor in Part-IV of the present petition claims the Date of Default to be 22.12.2018. This, however is contrary to the last date-of-default claimed via the Legal Notice *dated* 02.01.2023 *i.e.* 04.03.2021 (which is based on the default in part-payment of the 2nd tranche of OTS *dated* 05.09.2020). The admissibility of the present petition, in so far as either of the afore-mentioned date-of-defaults are concerned *i.e.* 22.12.2018 or 04.03.2021, are bad in law as the latter date *viz.* 04.03.2021 falls squarely under the period covered by Section 10A of the Code. To contextualize the aforesaid, the Date of filing the present petition is 18.07.2023, whereas the Date of Default mentioned in Part-IV of the present petition *viz.* 22.12.2018. We place reliance on the position adopted by the Hon'ble Supreme Court in *B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates [(2019) 11 SCC 633]* as stated hereinafter:

“It is thus clear that since the Limitation Act is applicable to applications filed under Section 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. “The right to sue”, therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases wherein, in facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.”

In light of the aforesaid, the present petition is clearly barred by Law of Limitation.



19.3. Further, it is the Financial Creditor's own admitted position that the Loan Agreement with the principal borrower and the bank, as well as the Deed of Guarantee between the bank and the guarantor, are two different transactions and that "*the guarantor's liability has to be read from the Deed of Guarantee*". Therefore, the Financial Creditor's averment over the nature and existence of alleged default in light of the said Corporate Guarantee is devoid of any merits.

20. In light of the afore-said, this bench is of the considered view that in such circumstances, the present case deserves to be dismissed under Section 7 of the Insolvency and Bankruptcy Code, 2016.

ORDER

21. The petition bearing CP (IB) No. 647/MB/2023 filed by State Bank of India, the Financial Creditor seeking initiation of CIRP in the matter of Advantage Oils Private Limited, the Corporate Debtor herein is **Rejected**.

22. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)
11.01.2024

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)