



**IN NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, COURT- V**

**C.P. 543/IB/MB/2021**

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

*In the matter of*

**State Bank of India**

State Bank Bhavan, Madame Cama Road, Nariman Point, Mumbai – 400021

**..... Financial Creditor/  
Petitioner**

**Vs**

**Essel Infraprojects Limited**

513/A, 5<sup>th</sup> Floor, Kohinoor City, Kirol Road, L.B.S. marg, Kurla West, Mumbai – 400070

**..... Corporate Debtor**

**Order Reserved On: 03.01.2023**

**Order Pronounced On: 01.03.2023**

**Coram:**

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

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

***Appearances (Through video conferencing): -***

**For the Petitioner:** Ms. Fatema Kachwalla a/w Mr. Virgil Braganza i/b J. Sagar Associates

**For the Respondent:** Mr. Ashish Kamat a/w Adv. Harsh Moorjani a/w Adv. Tasneem Zariwala a/w Adv. Saurabh Nikalje i/b Vidhii Partners



*Per: Shri. Kuldip Kumar Kareer, Member (Judicial)*

**ORDER**

1. The above Company Petition is filed by State Bank of India, hereinafter called as the (“**Financial Creditor**”) seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred to as “**CIRP**”) against Essel Infraprojects Limited hereinafter referred to as the (“**Corporate Debtor**”) under the Corporate Guarantee (“**Corporate Guarantee**”) provided by the Corporate Debtor on behalf of SND Limited (“**Principal Borrower**”) by invoking the provisions of Section 7 of Insolvency and Bankruptcy Code (hereinafter referred to as “**Code**”) read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a Resolution of Financial Debt of Rs. 177,37,02,868.74/- inclusive of interest and penal interest.
2. The Petitioner is a body corporate constituted under the State Bank of India Act, 1955, having its address at Corporate Centre at State Bank Bhavan, Madam Cama Road, Nariman Point, Mumbai -400021.
3. The listed documents annexed by the Petitioner on which the Petitioner relied are as follows:
  - i. A copy of the Form C-5 (Letter regarding the grant of individual limits within the term loan limit dated 25.02.2013)
  - ii. A copy of the Form C-4 (Deed of Guarantee for the term loan limit dated 25.02.2013)
  - iii. A copy of the First Supplemental Term Loan Consortium Agreement dated 10.07.2013.
  - iv. A copy of the Form C-1 (Agreement of Loan for Working Capital Limit)
  - v. A copy of the Form C-4 (Deed of Guarantee for Working Capital Limited)



- vi. A copy of the Statement of Account of SND Limited dated 09.03.2021.
- vii. A copy of the Certificate under Section 2A(e) of the Banker's Book Evidence Act, 1891 as amended dated 10.05.2021.
- viii. A copy of the Balance Confirmation as on 31.03.2014, 31.03.2015, 31.03.2016, 31.03.2017, 31.03.2018 and 31.03.2019.

**BRIEF FACTS:**

4. The Petitioner submits that the Principal Borrower, borrowed the amounts from the Financial Creditor, under Term Loan Facility vide Memorandum of Agreement, dated 25.02.2013, for an amount not exceeding Rs. 80,00,00,000/- and Working Capital Facility vide Memorandum of Agreement dated 01.03.2013 for an amount not exceeding Rs. 78,75,00,000/-. The aforesaid term loan and working capital facilities (hereinafter referred to as "**Facilities**") were secured by the Corporate Guarantees issued by the Corporate Debtor and Essel Utilities Distribution Company Limited ("**EUDCL**") dated 25.02.2013 and 01.03.2013 respectively in favour of the Petitioner.
5. The term loan was revised vide First Supplemental Term Loan Consortium Agreement, dated 10.07.2013, wherein the Term Loan limit was revised to Rs. 75,00,00,000 and the First Supplemental Working Capital Consortium Agreement dated 13.05.2013 was executed between the Financial Creditor and the Borrower, wherein the Working Capital limit remained unchanged at Rs. 78,75,00,000. It is further submitted that the Financial Creditor was the lead bank of the consortium of banks, which had granted the Borrower the term loan facilities and the working capital facilities.
6. The facilities were also secured by the Deed of Guarantee, dated 17.07.2018 and 17.05.2019, for the repayment of dues not exceeding



Rs. 185.27 Crores and Rs. 186.60 Crores respectively, issued by the Corporate Debtor and EUDCL in favour of the Petitioner.

7. It is further submitted that from the year 2019 onward, the borrower started defaulting in making payments to the Financial Creditor, causing a breach of the contractual arrangement between the Financial Creditor and the Corporate Debtor. As a result, an **event of default** occurred on **05.09.2019** and the account of the Principal Borrower was declared as non-performing asset ("**NPA**") on **05.12.2019**. A demand notice dated 01.10.2020, was issued by the Financial Creditor to the Borrower with respect to the non-payment of dues. However, despite repeated reminders, the Borrower and the Corporate Debtor have failed to cure the default and the aforesaid Facilities remain unpaid. Hence the present Petition is filed to initiate CIRP under Section 7 of the Insolvency and Bankruptcy Code, 2016 against the Corporate Debtor.

**REPLY OF THE CORPORATE DEBTOR:**

8. The Corporate Debtor vide its Affidavit in reply ("**Reply**") dated 28.03.2022 and Additional Affidavit in reply dated 08.04.2022 ("**Further Reply**"), submits that the petitioner has relied upon a Gazette Notification dated 02.05.1987 to file the present petition. The said notification does not empower Mr. Narayan Panda (Authorized officer of the Financial Creditor) to initiate Corporate Insolvency Resolution Process against the Corporate Debtor and Mr. Narayan Panda is not a proper authorized person as required under rule 2(6) of NCLT rules read with Section 432 and 176 of the Companies Act, 1956. Hence, the present Company Petition is not maintainable.
9. It is further submitted that the Petitioner has proposed the name of Mr. Kairav Anil Trivedi to act as the Interim Resolution Professional, once the present Company Petition is admitted. However, the



Petitioner has failed to produce the Certificate of Registration of the proposed Interim Resolution Professional, confirming his eligibility for appointment as a Resolution Professional in accordance with the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which is mandatory under Rule 9 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for filing a Company Petition under Section 7 of the IBC.

10. It is further submitted that the Petition has been filed on the basis of Corporate Guarantees. The said Corporate Guarantees and principal documents are insufficiently stamped and are not in accordance with the Maharashtra Stamp Act, 1958.
11. It is submitted that the total amount sanctioned by the Financial Creditor to SND Ltd i.e. the Principal Borrower was Rs. 178 Crores but the total amount disbursed was Rs.95 Crores as on 05.05.2015. Vide Memorandum of Agreement dated 25.02.2013, the Financial Creditor agreed to grant term loan to SND Ltd. i.e. Principal Borrower not exceeding Rs.80 Crores. The term loan limit was further revised to Rs.75 Crores vide first supplement term loan consortium agreement dated 10.07.2013. The Financial Creditor granted working capital credit facility vide Memorandum of Agreement dated 01.03.2013 for an amount not exceeding Rs.78,75,00,000/- and the first supplemental working capital consortium agreement dated 13.05.2013 was executed between the Financial Creditor and SND Ltd. i.e. Principal Borrower. Further the working capital was secured by providing corporate guarantee by the Corporate Debtor. Therefore at no stretch of imagination, the Corporate Debtor is liable for an amount of Rs.178,00,00,000/-.
12. The Corporate Debtor further submits that the Petitioner has not approached the Tribunal with clean hands and has suppressed the material facts. The Petitioner has filed the Company Petition bearing No. 544 of 2021 against Principal Borrower i.e. SND ltd. before the



Hon'ble Tribunal under Section 7 of Insolvency and Bankruptcy Code, 2016 which is pending before court the NCLT Mumbai bench – IV. The Corporate Debtor is not a principal borrower, but a guarantor and the present petition is filed against the guarantor.

13. The Corporate Debtor has further raised certain objections which are as follows:

- a) No documents are annexed to substantiate the claim made under Term Loan-1 of Rs. 20 crores.
- b) The Financial Creditor ought not have charged interest during the Moratorium of the Term Loan-2 of Rs. 75 crores.
- c) The Statement of Accounts is not supported by the Bankers Book Evidence Certificate in accordance with the Bankers Book Evidence Act, 1981
- d) The Financial Creditor has failed to file the record of default with the Information Utility and the Credit Information Company.
- e) Claim made under the Working Capital facility of Rs. 78.75 crores are not maintainable.
- f) Computation of amounts and date of default are not provided in the Petition.

14. Therefore, the Corporate Debtor submits that the present petition is totally misconceived, misleading malicious and liable to be dismissed.

**REJOINDER OF THE PETITIONER:**

15. In response to the above, the Petitioner has filed an Affidavit in Rejoinder ("**Rejoinder**") dated 26.04.2022.

16. The Petitioner with regards to the contention of the Corporate Debtor that Mr. Narayan Panda is not a proper authorised person, as required under Rule 2(6) of the NCLT Rules, read with section 432 and 176 of the Companies At, 1956 to affirm the petition, submits that the State



Bank of India is constituted under the State Bank of India Act, 1955, to carry on the business of banking and other business and for the purpose of taking over the undertaking of the Imperial Bank. The State Bank of India General Regulations, 1955 contemplates, the authorisation for signing powers under Regulation 76 thereof and provides for issuance of notification in the Gazette of India for this purpose. Regulation 77 specifically pertains to signing of Plaints, etc. In terms of the Gazette Notification issued, pursuant to the aforesaid Regulations, persons holding specified designations have been so authorized. The Application has been signed by the Assistant General Manager (who is within the Grades of Scale V), is authorised to execute the Petition.

17. With regard to the contention of the Corporate debtor that the Certificate of Registration of the Interim Resolution Professional is not annexed to the Petition, the Petitioner submits that the Petition admittedly provides for (i) the registration number of the proposed interim resolution professional evidencing his eligibility to act as an interim resolution professional; and (ii) his consent in Form 2 (Written Communication from the proposed interim resolution professional), which are the sole requirement to be provided for the interim resolution professional as per the prescribed format (under Form 1 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016) for filing an application under section 7 of the Insolvency and Bankruptcy Code, 2016 (Code").
18. The Petitioner in response to the defence adopted by the Corporate Debtor that the financing documents are insufficiently stamped, submits that in case of **SpiceJet Limited v. Credit Suisse AG (Order dated January 11, 2022)**, the Hon'ble Madras High Court has held as under, in relation to the winding up petition, which is similar to the present Section 7 petition:



*"So far the first point that the documents relied by the petitioner Credit Suisse, Switzerland are not stamped and therefore the Courts in India will not take cognisance thereof is concerned, we find that it needs to be noted that the Company Court has taken note of the decision of the Division Bench of this Court, so also that of the Bombay High Court, which takes the view that, **at the time of admission of the winding up petition, the point at issue is not whether the document sought to be relied by the petitioner is sufficiently stamped or stamped at all. The only point to be verified is whether the debt is bonafide disputed and whether the said defence is a substantial one. Applying this test, keeping in view the binding decision in this regard, which is referred to by the Company court in the impugned order, independent of the satisfaction recorded by the Company court, we also hold that such a defence can not be said to be bonafide defence and at the stage of admission of the petition, it need not be gone into. The argument therefore needs to be rejected"***

19. With regard to the contention of the Corporate debtor that the Financial Creditor ought not have claimed the amount during the moratorium of Term Loan-2 of Rs. 75 crores, the Petitioner had denied that the any claim of the principal amount was made during the moratorium period. The first disbursement for the term loan limit of Rs. 75 crores was on February 27, 2013. In accordance with clause 3 of the Term Loan Agreement (page 34 of the Petition) and the moratorium thereunder, the repayment was to commence from the 27th month from the 1<sup>st</sup> disbursement. Therefore, in the present case, the repayment of principal was due from May 27, 2015. However, the repayment of principal amount in the present case started from June 30, 2015. Therefore, it is clear that the Financial Creditor has not claimed any principal amounts during the moratorium period and the allegation of the Corporate Debtor ought to be rejected



**SUR-REJOINDER OF THE RESPONDENT:**

20. The Corporate Debtor submits that the Petitioner has bought new document on record which is not permissible under the Code as the Form -1/Petition has to complete in all sense and the Financial Creditor cannot rely upon a Rejoinder to substantiate its case in the Petition. Any additional documents may be brought on record by an amendment to the Form 1/Petition and not by way of an affidavit.
  
21. The Corporate Debtor has denied that the Principal Borrower has defaulted in repaying the alleged loan to the Financial Creditor. It states that the account of the Principal Borrower was wrongly declared as NPA on 05.12.2019 and further deny that the Corporate Debtor has received the notice for non-payment of dues on 01.10.2020. The Corporate Debtor submits that according to the alleged Corporate Guarantee dated 17.05.2019, the demand notice has to be delivered by actual delivery or by despatch by registered post or by certificate of posting and the said service shall be sufficient if the same is signed by the officer of the Bank. The notice dated 01.10.2020 does not prove that the said notice was received by the Guarantor.
  
22. The Corporate Debtor further submits that the Adjudicating Authority is not only required to see that the default has occurred but also has to see that the Application filed by the Financial Creditor is complete in all respect. If the calculation of claim itself is wrong or does not match with the information given in the Petition, then the said form/ Application cannot be said to be complete and the Adjudicating Authority cannot admit such Petition. The filing of a complete Form/ Application is condition precedent for the admission of the Petition under Section 7 of the IBC. It states that the Company petition is incomplete as there is miscalculation of amounts, incorrect date of NPA has been mentioned, there is a violation of RBI guidelines. Therefore, the Petition cannot be admitted in view of such inconsistencies and infirmities.



**FINDINGS:**

23. We have heard the Counsel for the Parties and have gone through the records.
24. During the course of arguments, the Counsel for the Respondent has argued that as per the contract between the parties, more particularly, the Deed of Guarantee dated 17.05.2019, the liability of the Guarantor could arise only when a demand was made by the Financial Creditor, as is evident from Clause (1) of the said Deed. The Counsel for the Respondent has further referred to the notice, dated 01.10.2020, (Annexure I(L)) issued on 01.10.2020 and in the notice, it has been pointed out in Para No. 8 that the account of the Principal Borrower became NPA on 04.12.2019, so far as the loan granted by the Petitioner-Bank is concerned. The learned counsel for the Respondent mentioned that since the invocation of guarantee was made on 01.10.2020, the date of default is deemed to be 01.10.2020 which is covered within the period provided under Section 10A and, therefore, the instant Petition is not maintainable and is clearly barred under Section 10A of the Code.
25. On the other hand, the Counsel for the Petitioner has argued that the date of default is to be considered and determined as per the contract, more particularly, the terms of the Guarantee. In this regard, the Counsel for the Petitioner has referred to the Guarantee Deed dated 17.05.2019, executed by the Corporate Debtor, wherein it is clearly mentioned in Clause (7) that the Bank shall be entitled to act as if the Guarantors were Principal Debtors to the Bank for all payments guaranteed by them and further as per Clause (8), the Guarantee is stated to be continuing for all amounts advanced by the Bank to the Borrower including costs and other money which may become due and remain unpaid to the Bank. According to the Counsel for the Petitioner, as per Clause (1) of the Guarantee Deed dated 17.05.2019,



no invocation of guarantee was required. The Counsel for the Petitioner has further referred to Clause (14) of the Guarantee Deed which provides that the Guarantors shall be deemed to have become liable on the date or dates on which the borrower shall become liable to pay the amounts under the Agreement of loan and/or any of the said security documents as a result of variation and composition of the Agreement. The Counsel for the Petitioner has further referred to the Board Resolution passed by the Respondent/Guarantor on 22.04.2019, whereby the Respondent precluded itself from raising any question regarding limitation for the payment of outstanding amounts under the loan documents executed by the Principal Borrower, i.e. SND Limited. The Counsel for the Petitioner has further relied upon **“Laxmi Pat Surana Vs. Union of India & Anr. (2021) 8 SCC 481”** whereby it has been held by the Hon’ble Supreme Court that liability of the Guarantor is co-extensive with that of the Principal Borrower and further that the remedy under Section 7 is not for recovery of the amount but for re-organization and Insolvency Resolution of the Corporate Debtor who is not in a position to pay its debt and commits default in this regard and further that it is open to the Corporate Debtor to pay off the debt which is become due and payable and not paid by the Principal Borrower to avoid the rigors of Chapter-II of the Code in general and Section 7 in particular. According to the Counsel for the Petitioner, Section 10A of the Code cannot be invoked by the Respondent considering the fact that once the Principal Borrower committed default in repayment of loan facilities, the default on the part of the Guarantor shall be equal and simultaneous and it was not obligatory on the part of the Financial Creditor to give a notice separately or subsequently to invoke Guarantee against the Corporate Guarantor. In this regard, the Counsel for the Financial Creditor has further pointed out that in the order dated 29.09.2022 passed by the NCLT Mumbai Bench-IV, a Petition under Section 7 has been admitted against the Principal Borrower treating the date of default is 05.09.2019.



26. We have thoughtfully considered the contentions raised by the Counsel for the Parties and have gone through the records.
27. So far as the applicability of Section 10A of the Code is concerned, to determine as to whether the Petition is barred under the said Section or not would depend upon the date of default. If the date of default occurs during the period excluded under Section 10A of the Code, then the Petition under Section 7 of the Code cannot be maintained. In this case, the Corporate Guarantor has claimed that in the context of the present case, the date on which the Guarantee was invoked by raising a demand asking the Corporate Guarantor to pay the amount should be treated as the date of default. In this regard, the Counsel for the Corporate Debtor has referred to the Deed of Guarantee dated 17.05.2019 wherein Clause (1), it is stated that the Guarantor shall forthwith on demand pay to the Bank the whole of such principal sum not exceeding Rs. 186,60,00,000/- crores together with interest etc. It has been claimed on behalf of the Corporate Debtor that the demand notice whereby the Guarantee was invoked was issued on 01.10.2020. Therefore, the date of default is 01.10.2020 which is covered under the period mentioned in Section 10A of the Code.
28. To ascertain whether the aforesaid contention of the Counsel for the Corporate Debtor/Guarantor is correct or not, a reference has to be made to the terms and conditions of the documents, more particularly, the Deed of Guarantee dated 17.05.2019 executed by the Corporate Guarantor which are being reproduced as under:-

*Clause (1)- If at any time default shall be made by the Borrower in payment of the principal sum (not exceeding Rs.186,60,00,000/- together with interest, costs, charges, expenses and/or other monies for the time being due to the Bank in respect of or under the aforesaid credit facilities or any of them the Guarantors shall forthwith on demand pay to the Bank the whole of such principal sum (not exceeding*



*Rs.186,60,00,000/- together with interest, costs, charges, expenses and/or any other monies as may be then due to the Bank in respect of the aforesaid credit facilities and shall indemnify and keep indemnified the Bank against all losses of the said principal sum, interest or other monies due and all costs charges and expenses whatsoever which the Bank may incur by reason of any default on the part of the Borrower.*

Clause (6)- *The Guarantee herein contained shall be enforceable against the Guarantors notwithstanding the securities aforesaid or any of the them or any other collateral securities that the Bank may have obtained or may obtain from the Borrower or any other person shall at the time when proceedings are taken against the Guarantors hereunder be outstanding and/or not enforced and or remain unrealised.*

Clause (7)- *In order to give effect to the Guarantee herein contained the Bank shall be entitled to act as if the Guarantors were principal debtors to the Bank for all payments guaranteed by them as aforesaid to the Bank.*

Clause (8)- *The Guarantee herein contained is a continuing one for all amounts advanced by the Bank to the Borrower in respect of or under the aforesaid credit facilities as also for all interest costs and other monies which may from time to time become due and remain unpaid to the Bank there under and shall not be determined or in any way be affected by any account or accounts opened or to be opened by the Bank becoming nil or coming into credit at any time or from time to time or by reason of the said account or accounts being closed and fresh account or accounts being opened in respect of fresh facilities being granted within the overall limit sanctioned to the Borrower.*



Clause (11)- *The Guarantee shall be irrevocable and enforceable against the Guarantors notwithstanding any dispute between the Bank and the Borrower.*

Clause (12)- *The Guarantors affirm, confirm and declare that any balance confirmation and/or acknowledgment of debt and /or admission of liability given or promise or part payment made by the Borrower or the authorised agent of the Borrower to the Bank shall be deemed to have been made and /or given by or on behalf of the Guarantors themselves and shall be binding upon each of them.*

Clause (13)- *The Guarantors shall forthwith on demand made by the Bank deposit with the Bank such sum or security or further sum or security as the Bank may from time to time specify as security for the due fulfilment of their obligations under this Guarantee and any security of deposited with the Bank may be sold by the Bank after giving to the Guarantors a reasonable notice of sales and the said sum or the proceeds of sale of the securities may be appropriated by the Bank in or towards satisfaction of the said obligations and any liability arising out of non-fulfilment thereof by the Guarantors.*

Clause (14)- *The Guarantors hereby agree that notwithstanding any variation made in the terms of the said Agreement of loan and / or any of the said security documents including reallocation / interchange of the individual limits within the principal sum variation in the rate of interest, extension of the date for payment of the instalments, if any, or any composition made between the Bank and Borrower to give time to or not to sue the Borrower, or the Bank parting with any of the securities given by the Borrower, the Guarantors shall not be released or discharged of their obligation under this Guarantee provided that in the event of any such variation or composition or agreement the liability of the Guarantors*



*shall not withstanding anything herein contained be deemed to have accrued and the Guarantors shall be deemed to have become liable on the date or dates on which the borrower shall become liable to pay the amount/amounts due under the said Agreement Loan and/or any of the said security documents as a result of such variation or composition or agreement”.*

29. From a perusal of the above quoted terms and conditions of the Guarantee Deed, it is evident that the Guarantee executed by the Corporate Guarantor is a continuing one and is also co-extensive. It is unequivocally mentioned in Clause (6) that the Guarantee shall be enforceable against the Guarantors notwithstanding the securities aforesaid or any of them or any other collateral securities that the Bank may have obtained from the Borrower. Similarly, Clause (7) indicates that in order to give effect to the Guarantee, the Bank shall be entitled to act as if the Guarantors were Principal Borrowers to the Bank for all payments guaranteed by them. Further, Clause (8) clearly provides that the Guarantee is a continuing one for all amounts advanced by the Bank to the Borrower which may from time to time become due and remain unpaid. Clause (12) further provides that any balance confirmation or acknowledgement or admission of liability made by the Borrower shall be deemed to have been made by the Guarantors as well and shall be binding. Over and above this, Clause (14) clearly says that the Guarantors shall be deemed to have become liable on the date or the dates on which the Borrower shall become liable to pay the amount/ amounts due under the Agreement Loan and /or any of the said security documents as a result of variation or composition or agreement of the loan documents.

30. Thus, it is abundantly clear from the above quoted terms of the Guarantee Deed that the liability of the Guarantor comes into play, the moment a default is committed by the Principal Borrower, which automatically triggers the default on the part of the Corporate Guarantor as well. Therefore, it cannot be said that there can be two



separate dates of default for the Principal Borrower or the Borrower. Even in Clause (1) of the Guarantee Deed, it is stated that if at any time default shall be made by the Borrower in payment of Rs. 186,60,00,000/-, the Guarantor shall forthwith on demand pay to the Bank the whole of the principal sum not exceeding Rs. 186,60,00,000/-. The word 'on demand' mentioned in Clause (1) cannot be read in isolation to claim that a demand notice or a notice to invoke Guarantee is a pre-requisite or a condition precedent to enforce the terms of the Guarantee against the Corporate Guarantor. Therefore, in our considered view, the word 'on demand' figuring in Clause (1) cannot be interpreted to mean a demand notice or notice of Invocation of Guarantee was mandatory before proceeding against the Guarantor. Besides, Clause (14) of the Guarantee Deed further fortifies our view that no such demand notice or for invocation of guarantee was required as it clearly provides that the Guarantors are deemed to have become liable on the date or dates on which the Borrower shall become liable to pay. Therefore, in no way, the date of the notice dated 01.10.2020 can be said to be the date of default.

31. A perusal of the notice dated 01.10.2020 further reveals that it was addressed by the Financial Creditor to the Principal Borrower as well as to the Guarantors and in Para 9 of the said notice, it is clearly stated that the account became irregular w.e.f. 05.09.2019 following which it was declared Non-Performing Asset (NPA) on 05.12.2019. Therefore, even if the demand notice was subsequently issued on 01.10.2020 would not change the date of default nor on the basis of the fact that the demand notice was issued on 01.10.2020 can it be said that the Petition is hit by Section 10A of the Code. Here, we cannot be unmindful of the fact that the initial date of default never changes. In this regard, a reference can also be made to the order dated 29.09.2022 (Annexure-A) whereby the CIRP was commenced against the Principal Borrower, i.e., SND limited under Section 7 of the Code and in the said order also, the date of default was 05.09.2019.



32. The Counsel for the Respondent has relied upon “**Syndicate Bank Vs. Channaveerappa Beleri (2006) 11 SCC 506**” whereby it has been held that where the Guarantee is payable on demand, the limitation begins to run when the demand is made and the Guarantor commits breach by not complying with the demand. It has further been held in this very case that the terms of Guarantee make it clear that the liability to pay would arise only when demand is made and the time would begin to run when the contract is broken.
33. We have gone through the cited case carefully but in our considered view, the case law laid down in the cited cannot be squarely applied to the facts and circumstances of the instant case, considering the fact, as noted above, in this case as per the terms and conditions of the Guarantee Deed, no demand notice to invoke Guarantee was required to be given to the Corporate Debtor/Guarantor and the liability of the Guarantor was to come into play the moment default was committed by the Borrower. Therefore, the contention that the present Petition is hit by Section 10A of the Code cannot be sustainable in the eyes of law, and is hereby rejected.
34. So far as the objection with regard to the loan documents not been sufficiently stamped, it is notable that the question of insufficiently stamped loan documents is not relevant while adjudicating upon the admissibility of a Petition under Section 7 of the code. This position is also settled in **SpiceJet Limited v/s Credit Suisse AG 2022 SCC OnLine Mad 112**, wherein the Hon’ble Madras High Court has held as under:

“... the point at issue is not whether the document sought to be relied by the petitioner is sufficiently stamped or stamped at all. The only point to be verified is whether the debt is bonafide disputed and whether the said defence is a substantial one. Applying this test, keeping in view the binding decision in this regard, which is referred to by the Company Court in the impugned order, independent of the satisfaction recorded by the Company Court, we also hold that such a defence can not be said to be a bonafide defence



and at the stage of admission of the petition, it need not be gone into. This argument therefore needs to be rejected.”

35. Considering the above facts, we come to conclusion that the nature of Debt 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 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.
36. As a consequence, keeping the aforesaid facts in mind, it is found that the Petitioner has not received the outstanding Debt from the Corporate Debtor and that the formalities as prescribed under the Code have been completed by the Petitioner, we are of the conscientious view that this Petition deserves ‘**Admission**’ by passing the following:

### **ORDER**

- a. The above Company Petition No. 543/IBC/MB/2021 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Essel Infraprojects Limited**.
- b. The Petitioner has proposed the name of Insolvency Professional. The IRP proposed by the Petitioner, **Mr. Kairav Anil Trivedi**, having Email ID- kairavtrivedi2002@yahoo.co.in, having address – 23 A 5th Floor Jyoti Building, Barquatali Dargah Marg, Wadala East, Mumbai City, Maharashtra ,400037 and having registration No.



IBBI/IPA-002/IP-N00728/2018-2019/12332, 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 prohibits 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 supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. 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.



- g. 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.
- 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 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.
- 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. 543/IBC/MB/2021 is **admitted**.
- l. 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)**