NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.301 of 2023

[Arising out of order dated 24.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court IV in CP (IB) No. 1093/MB-IV/2020]

IN THE MATTER OF:

Archana Deepak Wani
455, Saroj Villa, New Colony,
Nagpur – 440 001,
Maharashtra.

...Appellant

Vs.

1. Indian Bank (erstwhile Allahabad Bank)
Having its Corporate Office at:
254-260, Avvai Shanmuan Salai,
Royapettah, Chennai,
Tamil Nadu – 600 014.
And having its SAM Branch office at:
73, 7th Floor, Mittal Chambers,
Nariman Point, Mumbai – 400 021.
Through its representative
Mr. Manoj Kumar Mishra

2. N Kumar Housing and Infrastructure Pvt. Ltd.
1st Floor, B Wing, Poonam Chambers,
Byramji Town, Chhindwara Road
Nagpur – 440 013.
Through
Ms. Minita Dhirajlal Raja
Interim Resolution Professional
Plot No. 138, Charukeshi Apartments
3rd Floor, Flat No.18, Khare Town
Dharampeth, Nagpur – 440 010.

...Respondents

Present:

For Appellant:	**Mr. Vivek Chib, Sr. Advocate with Mr. Anirudh Wadhwa, Mr. Keshav Gulati, Mr. Shaishir Divatia, Mr. Kanishk Garg, Ms. Unnati Jhunjhunwala and Ms. Mansi Gupta, Advocates.**
For Respondents:	**Mr. Debal Kumar Banerji, Sr. Advocate with Ms. Reema Khorana and Mr. Vikash Kumar, Advocates for R-1.** **Mr. Sandeep Bajaj, Ms. Aakanksha Nehra, Ms. Sakshi, Advocates for R-2 (IRP).**

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J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by the Suspended Director of the Corporate Guarantor has been filed challenging the order dated 24.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court IV by which application under Section 7 filed by Indian Bank has been admitted. Brief facts of the case necessary to be noted for deciding this Appeal are:

i. Principal Borrower – 'M/s Poonam Resorts Ltd.', a sister concern of the Corporate Guarantor (N Kumar Housing and Infrastructure Pvt. Ltd.) obtained financial facility from the Indian Bank (erstwhile Allahabad Bank). A Term Loan Agreement dated 23.03.2011 entered between the Principal Borrower and the Bank. The Term Loan was secured by the Corporate Guarantee dated 23.03.2011 issued by the Corporate Guarantor in favour of the Indian Bank (erstwhile Allahabad Bank) (hereinafter referred to as 'Bank'). The Principal Borrower also executed an escrow agreement dated 23.03.2011 with the Bank.

ii. The Principal Borrower wrote to the Bank on 07.03.2012 that the project is being delayed due to reasons beyond its control and the Principal Borrower would be unable to meet the original COD (April 2012).

iii. Till April 2012, the Bank has only disbursed a principal sum of Rs.25 Crores out of the total loan amount of Rs.62 Crores to the Principal Borrower.

iv. On 31.03.2017, the Bank declared the Principal Borrower as NPA.

v. On 03.04.2017, the Bank issued a demand notice under Section 13(2) of the SARFAESI Act, 2002 claiming an amount of Rs.45,05,22,863/- due against the Corporate Guarantor. The Corporate Guarantor issued its objection to Section 13(2) notice through its reply dated 17.11.2017. The Bank also took action under Section 13(4) of the SARFAESI Act. The Corporate Guarantor approached the Debts Recovery Tribunal against the action of the Bank by filing S.A. No. 43 of 2018. The DRT passed order dated 03.04.2018 restraining the Bank from taking any further steps in respect of the land or the project of the Corporate Guarantor under the provisions of the SARFAESI Act.

vi. On 05.09.2018, the Bank filed an application under Section 7 before the Adjudicating Authority seeking initiation of Corporate Insolvency Resolution Process against the Principal Borrower. Proceedings under RDDBFI Act, 1993 were also initiated by the Bank against the Corporate Guarantor before the DRT Nagpur on 11.09.2018 for recovery of amount.

vii. On 05.02.2020, the Bank filed an application under Section 7 against the Corporate Guarantor being C.P. (IB) No. 1093/2020. The Corporate Guarantor filed an I.A. in the Company Petition challenging the maintainability of the petition. The Adjudicating Authority, on 23.12.2022, posed a question to counsel for the Bank regarding exact date of default and limitation aspect. Written submissions were filed by the Corporate Guarantor before the Adjudicating Authority. On 24.02.2023, Adjudicating Authority passed order admitting Section 7 application filed by the Bank. This Appeal has been filed challenging the order dated 24.02.2023.

2. We have heard Shri Vivek Chib, learned counsel for the Appellant and Shri Debal Kr. Banerjee, learned counsel appearing for the Bank. We have also heard learned counsel appearing for the Interim Resolution Professional.

3. Learned counsel for the Appellant challenging the order admitting Section 7 application submits that the application filed under section 7 by the Bank being barred by time ought not to have been admitted. It is submitted that according to the case of the Bank the account of the Principal Borrower declared NPA on 31.03.2017, hence, the default within the meaning of the Code has to be treated to taken place on 31.12.2016. Limitation for filing Section 7 application under Article 137 of the Limitation Act is three years from date of default. The application filed by the Bank in February, 2020 is beyond three years, hence, ought to have been dismissed on the ground of

limitation. It is submitted that entire Term Loan was never disbursed to the Principal Borrower and only an amount of Rs.25 Crores was disbursed and rest of the amount was disbursed/released in the Escrow Account only to be transferred in loan account to be used as repayment. It is submitted that default on the part of Corporate Guarantor shall be on the same date on which Principal Borrower committed default i.e. 31.12.2016. Limitation for filing Section 7 application against the Corporate Guarantor commence w.e.f. date of default i.e. 31.12.2016 came to an end on 31.12.2019, the application filed in 17.03.2020 was clearly barred by time. It is submitted that the Adjudicating Authority committed error in coming to the conclusion that right to file Section 7 application will commence from post 60 days of the recall notice dated 03.04.2017. The liability of Corporate Guarantor is coextensive with that of the Principal Borrower. It is submitted that present is a fit case where the Adjudicating Authority ought to have exercised its discretion in not admitting Section 7 application on the principle as laid down by the Hon'ble Supreme Court in ***"Vidarbha Industries Power Ltd. vs. Axis Bank Ltd., (2022) 8 SCC 352"***.

4. Shri Debal Banerjee, learned counsel appearing for the Bank refuting the submissions of learned counsel for the Appellant submits that application filed by the Bank was well within three years period. It is submitted that although the liability of Corporate Guarantor is coextensive with the Principal Borrower and the debt became due when the default was committed by the Principal Borrower i.e. on 31.12.2016 but there was no default on the part of Corporate Guarantor since the notice by the Bank for

the first time was issued on 03.04.2017 asking the Corporate Guarantor to make payment within 60 days. The limitation against the Corporate Guarantor shall thus run from the date when it committed default. It is further submitted that liability to pay the Bank by the Corporate Debtor shall arise only when account becomes NPA prior to which date there can be no default on the part of Corporate Guarantor. Ordinarily, on the date of when loan account was declared NPA is taken as date of default for computing limitation. In the present case, date of NPA being 31.03.2017, application under Section 7 filed on 17.03.2020 was well within three years from the date of NPA and the Adjudicating Authority did not commit error in admitting Section 7 application filed by the Bank. Learned counsel submits that the Deed of Guarantee executed by the Corporate Guarantor on 23.03.2011 itself contemplated issue of demand notice by the Bank to the Corporate Guarantor. Thus, before demand notice is issued to the Corporate Guarantor limitation against Corporate Guarantor shall not start running.

5. Learned counsel for both the parties have relied on various judgments of the Hon'ble Supreme Court and this Tribunal which shall be referred hereinafter while considering the submissions in detail.

6. We have considered the submissions of learned counsel for the parties and perused the record.

7. From the submissions of the parties and material on the record following are the issues which arise for consideration in the present appeal:

I. Whether default in payment of guaranteed amount by the Corporate Debtor is the same default as is committed by the Principal Borrower and the period of limitation for both the Principal Borrower and the Corporate Guarantor shall be same for the purposes of filing Section 7 application for the Bank?

II. Whether in the facts of the present case, the application filed by the Bank on 17.03.2020 was barred by limitation against the Corporate Guarantor?

III. Whether the order of the Adjudicating Authority admitting Section 7 application is unsustainable?

Issue No. I

8. We, in the present case, are concerned with filing of Section 7 application of the I&B Code. We need to first notice the statutory scheme under I&B Code regarding limitation when application under Section 7 is filed against a Corporate Person. Article 137 of the Limitation Act, 1963 is applicable in an application under Section 7, which provides as follows:

"***PART II***

Other applications

137.	*Any other application for which no period of limitation is provided elsewhere in this Division.*	*Three years*	*When the right to apply accrues.*

9. As per Article 137, time from which period begins to run is "when the right to apply accrues". Section 7 of the Code Sub-Section (1) provides that the Financial Creditor may file an application for initiating CIRP against the Corporate Debtor "when the default has occurred". In the present case, the Corporate Debtor being a Corporate Guarantor the question is to be considered is as to when the default is occurred on the part of the Corporate Guarantor. The 'Corporate Guarantor' is defined under Section (5A) in following manner:

> *"(5A) "corporate guarantor" means a corporate person who is the surety in a contract of guarantee to a corporate debtor;"*

10. Section 3 of the Code is a definition clause. Section 3(11) defines 'debt' in following words:

> *"3(11) "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;"*

11. Section 3(12) defines 'default':

> *"3(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;"*

12. When we look into the definition of 'debt' and 'default' under Section 3(11) and 3(12), it is clear that debt is a liability or obligation in respect of a claim which is **due** from any person and default is committed when debt

which has become due and payable and is not paid by the debtor. Section 3(12) uses two additional words i.e (i) "payable"; and (ii) "is not paid by the debtor". The expression 'debtor' as used in Section 3(12), in the present case, is to be read as 'Corporate Guarantor'. The Indian Contract Act, 1972 contains provisions in Chapter VII- 'of Indemnity and Guarantee'. Section 126 defines "Contract of guarantee, surety, principal debtor and creditor" and Section 128 deals with "Surety's liability", Section 129 deals with "Continuing guarantee". Sections 126, 128 and 129 of the Indian Contract Act are as follows:

> *"**Section: 126. "Contract of guarantee", "surety", "principal debtor" and "creditor".***
> *A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.*
>
> ***Section: 128. Surety's liability.***
> *The liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract.*
>
> ***Section: 129. "Continuing guarantee".***
> *A guarantee which extends to a series of transactions, is called a "continuing guarantee"."*

13. As per Section 128, the liability of the Surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. Law, thus, contemplates liability of the Surety i.e. Guarantor co-extensive with that of the Principal Debtor.

14. The question of start of period of limitation against the Guarantor when the default committed by the Guarantor in non-fulfilment of its obligation as contained in the guarantee deed has come for consideration before the Hon'ble Supreme Court in several cases. Learned counsel for the both the parties have relied on judgments of Hon'ble Supreme Court in the above context, which we need to notice before proceeding any further. The judgment which has been relied by learned counsel for the Respondent Bank is ***"Margaret Lalita Samuel vs. Indo Commercial Bank Ltd, (1979) 2 SCC 396"***. In the above case, a continuing guarantee was executed by the Appellant 'Margaret Lalita Samuel' in which she guaranteed to the Bank for repayment of all money which shall at any time shall be due to the Bank by the Company. Bank has filed his suit for recovery of amount by the Guarantor in which one of the defence was raised of the limitation. The Hon'ble Supreme Court in the above judgment while considering the question of limitation made following observations in Para 10:

> *"10. The guarantee is seen to be a continuing guarantee and the undertaking by the defendant is to pay any amount that may be due by the company at the foot of the general balance of its account or any other account whatever. In the case of such a continuing guarantee, so long as the account is a live*

account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, we do not see how the period of limitation could be said to have commenced running. Limitation would only run from the date of breach, under Article 115 of the schedule to the Limitation Act, 1908. When the Bombay High Court considered the matter in the first instance and held that the suit was not barred by limitation, J. C. Shah, J., speaking for the Court said:

> *"On the plain words of the letters of guarantee it is clear that the defendant undertook to pay any amount which may be due by the Company at the foot of the general balance of its account or any other account whatever ..... We are not concerned in this case with the period of limitation for the amount repayable by the Company to the bank. We are concerned with the period of limitation for enforcing the liability of the defendant under the surety bond ..... We hold that the suit to enforce the liability is governed by Article 115 and the cause of action arises when the contract of continuing guarantee is broken, and in the present case we are of the view that so long as the account remained a live account, and there was no refusal on the part of defendant to carry out her obligation, the period of limitation did not commence to run."*

15. The Hon'ble Supreme Court in Para 11 has further observed:

> *"11. We agree with the view expressed by Shah, J. The intention and effect of a continuing guarantee such as the one with which we are concerned in this case was considered by the Judicial Committee of the Privy Council in* ***Wright and Anr. v. New Zealand Farmers Cooperative Association***

of Canterbury Ltd. *The second clause of the guarantee bond in that case was in the following terms:*

> *"This guarantee shall be a continuing guarantee and shall apply to the balance that is now or may at any time hereafter be owing to you by the William Nosworthy and Robert Nosworthy on their current account with you for goods supplied and advances made by you as aforesaid and interest and other charges as aforesaid."*

A contention was raised in that case that the liability of the guarantor was barred in respect of each advance made to the Nosworthys on the expiration of six years from the date of advance. The Judicial Committee of the Privy Council expressed the opinion that the matter had to be determined by the true construction of the guarantee. Proceeding to do so, the Judicial Committee observed (at p. 449):

> *"It is no doubt a guarantee that the Association will be repaid by the Nosworthys advanced made and to be made to them by the Association together with interest and charges; but it specifies in col. 2 how that guarantee will operate-namely, that it will apply to (i.e. the guarantor guarantees repayment of) the balance which at any time thereafter is owing by the Nosworthys to the Association. It is difficult to see how effect can be given to this provision except by holding that the repayment of every debit balance is guaranteed as it is constituted from time to time, during the continuance of the guarantee, by the excess of the total debits over the total credits. If that be true construction of this document, as their Lordships think it is, the number of years which have expired since any individual debit was incurred is immaterial. The question of limitation could only arise in regard to the time*

> *which had elapsed since the balance guaranteed and used for had been constituted".*

Later it was again observed (at p. 450):

> *"That document, in their opinion, clearly guarantees the repayment of each debit balance as constituted from time to time, during the continuance of the guarantee, by the surplus of the total debits over the total credits, and accordingly at the date of the counterclaim the Association's claim against the plaintiff for payment of the unpaid balance due from the Nosworthys, with interest, was not statute-barred."*

16. The Hon'ble Supreme Court in the above case has observed that cause of action arises when the contract of continuing guarantee is broken i.e. breach is committed by the Guarantor to the guarantee given.

17. The next judgment on which reliance has been placed is judgment of Hon'ble Supreme Court in ***"Syndicate Bank vs. Channaveerappa Beleri & Ors., (2006) 11 SCC 506"***. Hon'ble Supreme Court in the above case had occasion to consider the provisions of Section 128 and 129 of the Contract Act. Hon'ble Supreme Court in the above case has laid down that the limitation of the guarantor will depend purely on the terms of the contract. In the above case, the Bank had filed suit against the guarantors for recovery of credit facilities extended to the company. The Hon'ble Supreme Court held that the guarantor's liability depends on terms of his contract. In Para 9, 10 and 11 following was held:

> *"9. A guarantor's liability depends upon the terms of his contract. A 'continuing guarantee' is different from an ordinary guarantee. There is also a difference*

between a guarantee which stipulates that the guarantor is liable to pay only on a demand by the creditor, and a guarantee which does not contain such a condition. Further, depending on the terms of guarantee, the liability of a guarantor may be limited to a particular sum, instead of the liability being to the same extent as that of the principal debtor. The liability to pay may arise, on the principal debtor and guarantor, at the same time or at different points of time. A claim may be even time-barred against the principal debtor, but still enforceable against the guarantor. The parties may agree that the liability of a guarantor shall arise at a later point of time than that of the principal debtor. We have referred to these aspects only to underline the fact that the extent of liability under a guarantee as also the question as to when the liability of a guarantor will arise, would depend purely on the terms of the contract.

10. Samuel (supra), no doubt, dealt with a continuing guarantee. But the continuing guarantee considered by it, did not provide that the guarantor shall make payment on demand by the Bank. The continuing guarantee considered by it merely recited that the surety guaranteed to the Bank, the repayment of all money which shall at any time be due to the Bank from the borrower on the general balance of their accounts with the Bank, and that the guarantee shall be a continuing guarantee to an extent of Rs.10 lakhs. Interpreting the said continuing guarantee, this Court held that so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation,

the period of limitation could not be said to have commenced running.

11. But in the case on hand, the guarantee deeds specifically state that the guarantors agree to pay and satisfy the bank on demand and interest will be payable by the guarantors only from the date of demand. In a case where the guarantee is payable on demand, as held in the case of Bradford (supra) and Hartland (supra), the limitation begins to run when the demand is made and the guarantor commits breach by not complying with the demand."

18. It is to be noted that in Para 10 of the above judgment, the Hon'ble Supreme Court had referred to earlier case of **'Margaret Lalita Samuel'** and the issue of **'Margaret Lalita Samuel'** was noticed in following words:

"…this Court held that so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, the period of limitation could not be said to have commenced running."

19. In Para 15, the Hon'ble Supreme Court further laid down following:

"15. The respondents have tried to contend that when the operations ceased and the accounts became dormant, the very cessation of operation of accounts should be treated as a refusal to pay by the principal debtor, as also by the guarantors and, therefore the limitation would begin to run, not when there is a refusal to meet the demand, but when the accounts became dormant. By no logical process, we can hold

> *that ceasing of operation of accounts by the borrower for some reason, would amount to a demand by the Bank on the guarantor to pay the amount due in the account or refusal by the principal debtor and guarantor to pay the amount due in the accounts."*

20. The judgment which has been referred by learned counsel for both the parties is the judgment of Hon'ble Supreme Court in ***"Laxmi Pat Surana vs. Union of India & Anr., (2021) 8 SCC 481"***. In the above case the Hon'ble Supreme Court had occasion to consider the provisions of I&B Code and the question of limitation for filing application under Section 7 of the Code. The two questions which arose of consideration has been noticed in Para 1 of the judgment, which is to the following effect:

> *"**1.** Two central issues arise for our determination in this appeal, as follows:*
>
> ***1.1** (i) Whether an action under Section 7 of the Insolvency and Bankruptcy Code 2016 (for short "the Code") can be initiated by the financial creditor (Bank) against a corporate person (being a corporate debtor) concerning guarantee offered by it in respect of a loan account of the principal borrower, who had committed default and is not a "corporate person" within the meaning of the Code?*
>
> ***1.2** (ii) Whether an application under Section 7 of the Code filed after three years from the date of declaration of the loan account as Non-performing Asset (for short "NPA"), being the date of default, is not barred by limitation?"*

21. In the above case, the Bank has extended credit facility to the Principal Borrower – M/s Surana Metals Ltd., for which the Appellant has offered Guarantee. Loan accounts were declared NPA on 30.01.2010. The Financial Creditor issued recall notice dated 19.02.2010. The Financial Creditor thereafter filed a Section 19 application under the RDDBFI Act, 1993 against the Principal Borrower. The Principal Borrower has repeatedly assured to pay the outstanding amount. Thereafter the Bank filed an application on 13.02.2019 against the Corporate Debtor - M/s Surana Metals Ltd., which was resisted on several grounds including that the Principal Borrower is not a corporate person; and further it is barred by limitation, as the date of default was 30.01.2010 and application has been filed on 13.02.2019 i.e. beyond the period of three years, which submissions were negatived by the Adjudicating Authority. The order of the Adjudicating Authority was also affirmed in appeal. Thereafter, the Corporate Debtor i.e. Guarantor filed an appeal in the Hon'ble Supreme Court. In the above context, the Hon'ble Supreme Court has occasion to consider the scheme of IBC. The Hon'ble Supreme Court in the above context has held that the liability of the Guarantor is co-extensive with that of the Principal Borrower and the Guarantor is also a Corporate Person and the Guarantor metamorphoses into a Corporate Debtor the moment the Principal Borrower makes default in payment of debt. In Para 30, 31 and 32 following was laid down while answering question no. (i), as noted above:

*"**30.** The expression "corporate debtor" is defined in Section 3(8) which applies to the Code as a whole. Whereas, expression "corporate guarantor" in Section 5(5A), applies only to Part II of the Code. Upon harmonious and purposive construction of the governing provisions, it is not possible to extricate the corporate person from the liability (of being a corporate debtor) arising on account of the guarantee given by it in respect of loan given to a person other than corporate person. The liability of the guarantor is coextensive with that of the principal borrower. The remedy under Section 7 is not for recovery of the amount, but is for reorganisation and insolvency resolution of the corporate debtor who is not in a position to pay its debt and commits default in that regard. It is open to the corporate debtor to pay off the debt, which had become due and payable and is not paid by the principal borrower, to avoid the rigours of Chapter II of the Code in general and Section 7 in particular.*

***31.** In law, the status of the guarantor, who is a corporate person, metamorphoses into corporate debtor, the moment principal borrower (regardless of not being a corporate person) commits default in payment of debt which had become due and payable. Thus, action under Section 7 of the Code could be legitimately invoked even against a (corporate) guarantor being a corporate debtor. The definition of "corporate guarantor" in Section 5(5A) of the Code needs to be so understood.*

> ***32.*** *A priori, we find no substance in the argument advanced before us that since the loan was offered to a proprietary firm (not a corporate person), action under Section 7 of the Code cannot be initiated against the corporate person even though it had offered guarantee in respect of that transaction. Whereas, upon default committed by the principal borrower, the liability of the company (corporate person), being the guarantor, instantly triggers the right of the financial creditor to proceed against the corporate person (being a corporate debtor). Hence, the first question stands answered against the appellant."*

22. The observations made by the Hon'ble Supreme Court in the above paragraphs were in reference to question no. (i) and the proceedings were initiated by the Bank treating the date of declaration of NPA as date of default for the Corporate Guarantor.

23. Learned counsel for both the parties have again referred to Para 43 of the judgment on which heavy reliance has been placed. In Para 43, Hon'ble Supreme Court has occasion to examine the expression 'default' as used in Section 7. Para 43 of the judgment is as follows:

> *"43. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 of the Code. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" — not the date of notifying*

the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean non-payment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to non-payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for

institution of the proceedings under Section 7 of the Code. Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under Section 7 of the Code"

24. It is submitted that the Hon'ble Supreme Court in the above para has held that in cases where the corporate person had given a guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to non-payment of debt. We may notice that the above observations are founded by next stipulation i.e. thus, when the principal borrower and/or the corporate guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. The Hon'ble Supreme Court in the above case had considered the acknowledgement given by the Principal Borrower when it undertook to make the payment. It was observed by the Hon'ble Supreme Court that acknowledgement under Section 18 shall extend the period of limitation and hence it was held that the application was not barred by limitation.

25. We may further notice Para 44 of the judgment in which it was held that the liability of the guarantor being coextensive with the principal borrower under Section 128 of the Contract Act, it triggers the moment

principal borrower commits default in paying the acknowledged debt. This is a legal fiction. Para 44 of the judgment is as follows:

> *"44. In the present case, the NCLT as well as the NCLAT have adverted to the acknowledgments by the principal borrower as well as the corporate guarantor - corporate debtor after declaration of NPA from time to time and lastly on 08.12.2018. The fact that acknowledgment within the limitation period was only by the principal borrower and not the guarantor, would not absolve the guarantor of its liability flowing from the letter of guarantee and memorandum of mortgage. The liability of the guarantor being coextensive with the principal borrower under Section 128 of the Contract Act, it triggers the moment principal borrower commits default in paying the acknowledged debt. This is a legal fiction. Such liability of the guarantor would flow from the guarantee deed and memorandum of mortgage, unless it expressly provides to the contrary."*

26. The scheme of I&B Code clearly indicate that both the Principal Borrower and the Guarantor become liable to pay the amount when the default is committed. When default is committed by the Principal Borrower the amount becomes due not only against the Principal Borrower but also against the Corporate Guarantor, which is the scheme of the I&B Code. When we read with as is delineated by Section 3(11) of the Code, debt becomes due both on Principal Borrower and the Guarantor, as noted above. The definition of default under Section 3(12) in addition to expression 'due' occurring in

Section 3(11) uses two additional expressions i.e "payable" and "is not paid by the debtor or corporate debtor". The expression 'is not paid by the debtor' has to be given some meaning. As laid down by the Hon'ble Supreme Court in ***"Syndicate Bank vs. Channaveerappa Beleri & Ors." (supra)***, a guarantor's liability depends on terms of his contract. There can be default by the Principal Borrower and the Guarantor on the same date or date of default for both may be different depending on the terms of contract of guarantee. It is well settled that the loan agreement with the Principal Borrower and the Bank as well as Deed of Guarantee between the Bank and the Guarantor are two different transactions and the Guarantor's liability has to be read from the Deed of Guarantee.

27. Now we need to look into the Deed of Guarantee which was executed by the Corporate Guarantor in favour of the Bank to find out as to when the default on the part of the Guarantor shall be treated to be committed in particular as per the Deed of Guarantee. Para 2 of Deed of Guarantee states that the guarantee restricted to the sum of Rs.62 Crores, which was a continuing guarantee to the Bank. Para 2 of the Deed of Guarantee is as follows:

> *"2. I/We declare that my/our liability under this guarantee shall be limited and restricted to the sum of Rs. 62,00,00,000/- (Rupees. Sixty Two Crore Only) with Interest at the rate aforesaid but subject to such limit shall nevertheless be a continuing guarantee to the Bank as hereinafter specified for all sums whatsoever which may at any time be or become*

payable by the Principal to the Bank with Interest at the rate aforesaid till repayment together with commission Bank charges, legal and other expenses which the Bank may incur in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment for all or any part of the money hereby guaranteed or otherwise in respect of this agreement.

28. Para 9 of the Deed of Guarantee uses expression "continue to be enforceable". Intent is clear that the Deed of Guarantee need to be enforced by the Bank. Para 9 is as follows:

"9. I/We further agree and declare that this guarantee shall remain in full force and continue to be enforceable further period of twenty four months from the date preceding the day of its becoming unenforceable and/or discharged and for that purpose the lability either of the Principal and/or myself/ourselves shall remain in full force even after the extinction of liability on my/our part on account of acknowledgment of debt and/or the last part payment of principal and/or payment of interest as herein-before mentioned or otherwise and that this guarantee shall not be revoked till expiry of the said twenty four months notwithstanding the envisaged extinction of lability which may be deemed to have occurred on the aforesaid events and after the expiry of said twenty four months this guarantee shall be deemed to be discharged."

29. Para 11 is also relevant where Bank is required to give effect to the guarantee. Para 11 is as follows:

> *"11. In order to give effect to this guarantee I/We declare that the Bank shall be at liberty to act as though I/We were the principal and I/We hereby waive all and any of my/our rights surety/s which may at any time be inconsistent with any of the above provisions."*

30. Para 12 of the Deed of Guarantee contemplate 'demand signed by Bank or its Manager' with expression 'sufficiently served'. Thus, the demand and served both are contemplated in Para 12. Para 12 is as follows:

> *"12. A statement or demand signed by the Bank or its Manager or its any other authorised official showing that any sum is due to the Bank hereunder shall be conclusive evidence that such sum is in fact due and any demand or legal proceedings shall be sufficiently served if sent by prepaid post to my/our address last known to the Bank or stated hereon and shall be deemed to have reached me/us in course of post."*

31. When we look into the above clauses of Deed of Guarantee, it is clear that although the Guarantor immediately become liable on any default committed by the Principal Borrower but for initiating any action against the Guarantor, a demand is to be made. Without there being any demand to the Guarantor, it cannot be accepted that period of limitation against the Guarantor shall commence. In the present case, Section 7 application filed by the Bank has been brought on the record as Annexure A-49. When we

look into the Part IV of the application, the date of NPA i.e. 31.03.2017 has been mentioned in Part IV and total amount in default as on 31.12.2019 has been computed. The Application under Section 7 thus proceeds on date of NPA. The notice dated 03.04.2017 is also on the record as Annexure A-21, which notice was issued by the Bank to the Guarantors – M/s N. Kumar Housing and Infrastructure Pvt. Ltd. and its Directors. Para 3 mentions about the Guarantee Deed dated 23.03.2011 executed by the Corporate Guarantor and in Para 7, the Corporate Guarantor was called upon to discharge the entire liabilities. Para 3 and 7 of the notice dated 03.04.2017 are as follows:

> *"3. In consideration of the above loan/ credit facilities to the said borrower you have executed a guarantee agreement/ letter/ deed dated 23/03/2011 in favour of the Bank and to secure repayment of the said loan/ credit facilities you have executed various documents whereby and where under you created charge/ mortgage/ hypothecation/ assignment over your movable/ Immovable properties/ assets in favour of the Bank, details of which are given hereunder:-*
>
> ***Details of securities charged/ mortgaged/ hypothecated/ assigned/ assigned etc. by the guarantor/third party to be given***

Security:-

Primary- • *The hotel & Clubhouse Project with buildings of Clubhouse, Banquet hall & accommodation*

buildings under construction on the plot of Land admeasuring about 13,310 Hectare (32.890 acres) out of Kh No. 61, 62, 63/1, 63/2,63/3, 63/4, 63/5, 67/1, 67/2, 67/3 at Mouza: yerkheda, Tahsil: Kamptee, District Nagpur, situated near Delhi Public School on Nagpur-Jabalpur highway, Yerkheda area, within the jurisdiction of Grampanchayat Yerkheda, Tah-Kamptee & Distt-Nagpur, belonging to M/S N Kumar Housing and Infrastructure Pvt Ltd, Formerly known as, M/S Nandakumar Harchandani & Co (India) Pvt Ltd),

Boundaries of the property:-
East: Road and land out of Kh no.64, 65, & 66
West: Land and Delhi Public School
North: Road & land out of Kh no.68
South: Nagpur-Jabalpur Highway & Land out of Kh no. 60

- *Hypothecation of all movable/other Immovable fixed assets of the Company (both present and future).*

x...x...x

"7. By this notice you are hereby called upon to discharge the entire liabilities as on date with future Interest along with cost, charge and expenses, thereon in the above account to us as secured creditor, within 60 days from the date of this notice, failing which we shall be constrained to exercise all or any of our rights conferred under Section 13(4) and other provisions of the above Act."

32. The above notice was issued to the Guarantor in reference to the Deed of Guarantee and the Corporate Guarantor was called upon to discharge their dues and the time was granted for 60 days to make the payment. We, thus, are of the view that default on the part of the Guarantor cannot be treated to be on 31.12.2016, when the Principal Borrower committed Default. It is also relevant to notice that the Corporate Debtor did not file any reply in Section 7 application despite giving opportunity by the Adjudicating Authority and right to reply was also forfeited. The Corporate Debtor, however, had filed an I.A. questioning the maintainability of the application. The application under Section 7 filed against the Principal Borrower was also noted to be pending before the Adjudicating Authority. In the facts of the present case, where the Corporate Debtor did not file any reply and also did not file application for recall of order dated 23.11.2021 forfeiting right to file reply, the Adjudicating Authority did not commit any error in admitting Section 7 application. The Adjudicating Authority also noted in the order that the disbursement of Rs.25 Crores was not even disputed.

33. In view of our discussion on Issue No. I, Issue Nos. II & III are answered as follows:

Issue No. II: In the facts of the present case, application filed by the Bank on 17.03.2020 was not barred by limitation.

Issue No. III: The order of the Adjudicating Authority admitting Section 7 application is sustainable.

34. The submission made by learned counsel for the Appellant that there has been no disbursement to the Principal Borrower as per the sanction and apart from Rs.25 Crores no amount was disbursed and the amount which was disbursed in the Escrow Account was adjusted by the Bank towards repayment and there has been no disbursement of the entire sanctioned amount, need no further consideration since disbursement to the extent of Rs.25 Crores is not disputed either in this Appeal or before the Adjudicating Authority.

35. The submission of the learned counsel for the Appellant is that present was a case where the Adjudicating Authority ought to have exercised its discretion in not admitting Section 7 application as per the law laid down by the Hon'ble Supreme Court in ***"Vidarbha Industries Power Ltd. vs. Axis Bank Ltd." (supra).*** The Appellant cannot claim the assistance of ***"Vidarbha Industries Power Ltd."*** in the present case due to the reason that the basis on which it was held that application under Section 7 need not to have been admitted for the reasons indicated in the judgment of the Hon'ble Supreme Court itself clearly distinguishes it from the present case.

36. We, thus, are of the view that the application filed by the Bank under Section 7 cannot be said to be barred by time and no error has been committed by the Adjudicating Authority in admitting Section 7 application. We, thus do not find any ground to interfere with the order of the Adjudicating Authority admitting Section 7 application.

37. In the present Appeal, we had passed an interim order staying the constitution of Committee of Creditors which order is still continuing. The Appellant before us as well as the Adjudicating Authority has made a statement that Appellant is ready to pay amount of Rs.25 Crores to the Financial Creditor which amount was received and utilised by the Corporate Debtor. In the facts of the present case, we are of the view that an opportunity be given to the Appellant to negotiate with the Financial Creditor to come to a settlement, if any, before the Committee of Creditors is constituted. We for the above purpose allow one month time to the Appellant to make efforts for settlement. The Committee of Creditors be not constituted for period of one month to enable the Appellant to take steps. In event, no settlement takes place within the period of one month from today, it shall be open for the IRP to constitute Committee of Creditors and proceed further in accordance with law. Subject to as directed above, the Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

26th April, 2023

Archana