

NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT
CHENNAI
(APPELLATE JURISDICTION)
Company Appeal (AT) (CH) (INS) No. 102 of 2022
and IA No. 237 of 2022
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Order dated 04.02.2022 passed in
CP(IB)/82/2021 passed by the ‘Adjudicating Authority’
(National Company Law Tribunal’, Division Bench-I, Chennai)

In the matter of:

S. Elangovan

The Promoter and Erstwhile Managing Director of
Kaveri Gas Power Pvt. Ltd.
Flat No.3, 21/44, Q-Block, 17th Street,
Anna Nagar,
Chennai - 600040

..... Appellant

V

1) ASREC (India) Ltd

Represented by its Authorised Signatory,
Solitaire Corporation Park, Building No.2,
Unit NO.201-202A & 200-202B,
Ground Floor, Andheri Ghatkopar Link Road,
Mumbai – 400093

..... Respondent No.1

2) L. Bhadri

The Interim Resolution Professional of
Corporate Debtor M/s. Kaveri Gas Power Pvt. Ltd.
MMPDA Towers, 2nd Floor,
No.184 (Old No. 214),
Royapettah High Road,
Royapettah,
Chennai – 600014

..... Respondent No.2

Present:

For Appellant : Mr. Ravi Rajagopalan, Advocate

For Respondent No.1 : Mr. P.H. Arvinth Pandian,
Senior Advocate (Caveator)
For Mr. Kumarpal R Chopra, Advocate

For Respondent No.2 : Mr. Ramaswamy Meyyappan, Advocate
(Interim Resolution Professional)

JUDGMENT
(VIRTUAL MODE)

Justice M. Venugopal, Member (Judicial)

IA No. 237 of 2022 in Comp. APP (AT) (CH) (INS) No. 102 of 2022:

According to the Learned Counsel for the Appellant, the Applicant / Appellant has filed the instant appeal before this Tribunal within limitation. In fact, the impugned order in CP(IB)/82/CHE/2021 was passed by the 'Adjudicating Authority', 'National Company Law Tribunal', Division Bench – I, Chennai, on 04.02.2022 and the period of 30 days, as enshrined under Section 61(2) of the I & B Code, 2016 to prefer an 'Appeal' came to an end on 06.03.2022. However, the Hon'ble Supreme Court on 10.01.2022 in M.A.No.21 of 2022 in M.A.No.665 of 2021 in Suo Motu Writ Petition (C) No.3 of 2022 had excluded the period between 15.03.2020 and 28.02.2022 for the purpose of calculating limitation. Hence, the period from 04.02.2022 till 28.02.2022 would stand excluded and the 1st day would run from 01.03.2022.

2. Viewed in the above backdrop, this 'Tribunal' holds that the 'instant Comp. App (AT) (CH) (INS) No.102 of 2022 filed by the

Applicant/Appellant is filed by the Applicant/Appellant in time and accordingly, the IA No. 237 of 2022 stands disposed of. No costs.

Company Appeal (AT) (CH) (INS) No. 102 of 2022:

PREFACE:

The ‘Appellant’/‘Promoter’ and Former Managing Director of the Corporate Debtor (Kaveri Gas Power Pvt. Ltd.) has filed the Instant Company Appeal (AT) (CH) (INS) No.102 of 2022 being dissatisfied with the Order dated 04.02.2022 in CP(IB) No. 82/CHE/2021 passed by the ‘Adjudicating Authority’ (‘National Company Law Tribunal’, Division Bench-I, Chennai).

2. Earlier, the ‘Adjudicating Authority’ (‘National Company Law Tribunal’, Division Bench-1, Chennai) while passing the ‘Impugned Order’ dated 04.02.2022 in CP (IB) No.82/CHE/2021 (filed under Section 7 read with Rule 4 of the Insolvency and Bankruptcy Code, 2016 at paragraph 8 to 13 had observed the following:

“8. Heard the submissions made by the Learned Counsel for the parties. In the present case, the principal borrower viz. Cauvery Power Generation Chennai Pvt. Ltd. availed working capital assistance not exceeding Rs.50.48 Crore in accordance with the terms contained in the working capital consortium agreement dated 31.10.2013. In accordance with the terms contained in the working capital agreement and the security trustee agreement, the Corporate Debtor herein

executed a Guarantee Agreement in favour of the Security Trustee, vide Agreement dated 19.07.2018. Thereafter, the said 'debt' was assigned by State Bank of India, to the FC herein vide an Assignment Agreement dated 30.12.2020.

9. After assignment of loan to the Financial Creditor herein, the Financial Creditor issued a notice invoking the Corporate Guarantee to the Corporate Debtor on 12.02.2021. It is the contention of the Learned Counsel for the Corporate Debtor that a Demand of Rs. 150 Crore was made by the Financial Creditor, however the Corporate Debtor is liable only for the debt of the principal borrower to the extent of Rs.50.48 Crore. As already adumbrated supra, the Corporate Debtor has neither replied to the said letter nor paid any amount thereafter. However, in order to countenance the said argument, it is significant to refer to the decision of the Hon'ble Supreme Court in the matter of **Innoventive Industries Ltd. —Vs ICICI Bank and another** (2018) 1 SCC 407 as well as **Mobilox Innovations Pvt. Ltd. —Vs- Kirusa Software Pvt. Ltd.** (2018) 1 SCC 353 after going through the Scheme of IBC, 2016 in depth in relation to an Application under Section 7 filed by a Financial Creditor as compared to the one filed under Section 9 by an Operational Creditor, in relation to a Section 7 Application where there is an existence of a 'financial debt' and its default in excess of Rs. 1,00,000/- (now increased to Rs.1 Crore on and from 24.03.2020) this Tribunal is bound to admit the Application and as a consequence trigger the Corporate Insolvency Resolution Process (CIRP) and in relation to a Section 7

Application defence or set off or counter claim put forth by the Corporate Debtor cannot be considered as a dispute in relation to the Financial debt and default in relation to it. Thus, it is clear that there is a default on the part of the Corporate Debtor for a sum exceeding Rs.1 Crore.

10. Further, in relation to the aspect of Corporate Guarantee it is apt to refer to the decision of the Hon'ble Supreme Court in the matter of **Laxmi Pat Surana —Vs- Union Bank of India & Anr.** in Civil Appeal No. 2734 of 2020 wherein it was held that the liability of the 'Corporate Guarantor' is 'coextensive' with that of the 'Principal Borrower' and that acknowledgment given by the 'Principal Borrower' also binds the 'Corporate Guarantor';

27. 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.

28. 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.

38. 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.

41. The appellant was at pains to persuade us that the intention behind the communication dated 08.12.2018 sent to the financial creditor by the corporate guarantor (corporate debtor) is a triable matter, as it was sent without prejudice. We are not impressed by this submission. The fact that the principal borrower had availed of credit/loan and committed default and that the (corporate) guarantor/corporate debtor had offered guarantee in respect of the loan account is not disputed. What is urged by the appellant is that the acknowledgment of liability to pay the amount in question was by the principal borrower and that acknowledgment cannot be the basis to proceed against the corporate guarantor (corporate debtor). Section 18 of the Limitation Act, however, posits that a fresh period of limitation shall be computed from the time when the party against whom the right is claimed acknowledges its liability. The financial creditor has not only the right to recover the outstanding dues by filing a suit, but also has a right to initiate resolution process against the corporate person (being a corporate debtor) whose liability is

coextensive with that of the principal borrower and more so when it activates from the written acknowledgment of liability and failure of both to discharge that liability.

42. Suffice it to conclude that there is no substance even in the second ground urged by the appellant regarding the maintainability of the application filed by the respondent financial creditor under Section 7 of the Code on the ground of being barred by limitation. Instead, we affirm the view taken by the NCLT and which commended to the NCLAT — that a fresh period of limitation is required to be computed from the date of acknowledgment of debt by the principal borrower from time to time and in particular the (corporate) guarantor/corporate debtor vide last communication dated 08.12.2018. Thus, the application under Section 7 of the Code filed on 13.02.2019 is within limitation.

11. Thus, from the facts which are borne on record, as narrated above, would show that the 'debt' is not barred by limitation and the submissions made by the Learned Counsel for the Corporate Debtor on the aspect of limitation, delivery of the notice at incorrect address, date of default, are all required to be eschewed and are not sustainable. Hence, in all respects the 'debt' as claimed by the Financial Creditor is well within the period of limitation and the Corporate Debtor has committed 'default' in repayment of the said 'financial debt'.

12. Also, the default arising in the present Application is much prior to the advent of the Covid-19 pandemic and hence the Corporate Debtor cannot seek shelter also under Section 10A of IBC, 2016.

13. In view of the facts as stated supra and also in view of the 'financial debt' which is proved by the Financial Creditor

and the 'default' being committed on the part of the Corporate Debtor, this Tribunal is left with no other option than to proceed with the present case and initiate the Corporate Insolvency Resolution Process in relation to the Corporate Debtor”.

and admitted the `Application' by appointing Mr. L. Bhadri as an `Interim Resolution Professional' and declared `Moratorium', etc.

APPELLANT'S SUBMISSIONS:

3. The Learned Counsel for the `Appellant' submits that the `Appellant' is the `Promoter' and `Erstwhile Managing Director' of the Corporate Debtor'/ M/s.Kaveri Gas Power Pvt. Ltd. According to the `Appellant', the `Corporate Debtor'/M/s. Kaveri Gas Power Pvt. Ltd. had executed a `Corporate Guarantee' through `Guarantee Agreement' dated 19.07.2018 for the Due Repayment of Loans and all other sums `due and payable' in connection with the `Working Capital Agreements', for the limits mentioned therein.

4. According to the `Appellant' the Principal Borrower/ M/s. Cauvery Power Generation Chennai Pvt. Ltd. was admitted into `CIRP', as per Order dated 18.10.2019 passed by the `Adjudicating Authority' in IBA/756/2019, based on an `Application' preferred by the `Punjab

National Bank’ under Section 7 of the I & B Code, 2016. Consequent to the Admission of the Principal Borrower/ Cauvery Power Generation Chennai Pvt. Ltd. into ‘CIRP’, the ‘Consortium of Banks’, represented by the State Bank of India, Stressed Assets Management Branch, Chennai, had executed an ‘Assignment Agreement’ dated 30.12.2020 wherein, all their rights and liabilities pursuant to the ‘Working Capital Consortium Agreements’ and the ‘Guarantee Agreements’ were purportedly assigned to the 1st Respondent/ASREC (India) Ltd.

5. It is represented on behalf of the ‘Appellant’ that the ‘1st Respondent’/ ‘Financial Creditor’/‘Applicant’ had issued a ‘Notice’ dated 12.03.2021 (‘Letter of Invocation’/‘Demand Notice’), calling upon the ‘Corporate Debtor’ to settle a sum of Rs.150,39,59,607.73, purportedly arising out of the ‘Guarantee Agreement’ and that a mere perusal of Recital and Clause 20 of the ‘Guarantee Agreement’ would make it evident that the ‘Corporate Debtor’ had extended its ‘Corporate Guarantee’ only to a maximum extent of Rs.50.48 Crores.

6. The Learned Counsel for the ‘Appellant’ adverts to the Clauses No. 3, 20 and 21 of the ‘Guarantee Agreement’ which expressly requires the ‘Lender’/‘Security Trustee’, to issue a ‘Certificate’ or ‘Claim’ in writing

stating that an amount was 'due and payable' under the 'Guarantee Agreement' and only then, would the said amount become 'due and payable', as against the 'Corporate Debtor'/'Corporate Guarantor'.

7. The Learned Counsel for the 'Appellant' points out that the '1st Respondent' / 'Financial Creditor' in the 'Application' in CP(IB)/82/CHE/2021 filed under Section 7 of the Code claimed that the 'Corporate Debtor'/'Corporate Guarantor' had defaulted in its repayment obligations, arising from the 'Corporate Guarantee' extended by it, to and in favor of the 'Principal Borrower' to the extent of Rs.52,25,74,088 with the same being invoked on 12.03.2021.

8. The Learned Counsel for the '1st Respondent'/'Financial Creditor' comes out with a plea that the 'Application' of the '1st Respondent'/'Financial Creditor' is inconsistent one, besides the same being self-contradictory, in that a sum of Rs.52.25 Crores is claimed in Part IV of the Form-1 of the 'Application', and in the 'Notice of Invocation of Guarantee' and Annexure 10 of the Application, where an interest calculation working was annexed, a sum of Rs.150,39,59,607.73 was claimed by the 1st Respondent.

9. The contention of the 'Appellant' is that the '1st Respondent'/'Financial Creditor' does not satisfy the procedural requirements mentioned in Section 7 of the Code. In fact, the '1st Respondent'/'Financial Creditor' had failed to demonstrate that the whole or any part of the debt sum became 'due and payable' as per the terms of the 'Invocation of the Guarantee'.

10. The Learned Counsel for the 'Appellant' takes a stand that the 'Letter of Invocation' purports to invoke the 'Corporate Guarantee' for a sum of Rs.150.39 Crores for which sum, no guarantee was given by the 'Corporate Guarantor' and the said 'Guarantee Agreement' makes it clear that the 'Corporate Guarantor' would only be liable to a maximum extent of Rs.50.48 Crores.

11. The submission of the Appellant's side is that in the instant case, the purported 'Letter of Invocation' / 'Demand' is a nullity and non-est in law. Resultantly, there cannot be a valid 'Debt' and a subsequent 'Default' on the part of the 'Corporate Guarantor' for the purpose of Section 7 of the Code.

12. The Learned Counsel for the 'Appellant' comes out with a plea that as per Clause 21 of the 'Corporate Guarantee Agreement' dated

19.07.2018 the Creditor was obligated to issue a Demand on the Guarantor only, upon which, the liability under the Guarantee arose, thus being a 'Contract' to the contrary, being an exception to Section 128 of the Indian Contract Act, 1872. According to the Appellant, the liability of the 'Corporate Guarantor' in the instant case, starts only upon issue of 'Notice of Demand' and that the 'Notice of Demand' was issued by the 1st Respondent (Assignee of the Original Creditor) on 12.03.2021.

13. The Learned Counsel for the 'Appellant' to lend support to the contention that the Date of 'Demand Notice' is the applicable Date of 'Default' for a 'Corporate Guarantor' refers to the Judgment of this Tribunal dated 23.04.2019 in Edelweiss Asset Reconstruction Company V Orissa Manganese and Minerals Ltd & Ors (vide Comp App (AT) 437 OF 2018, wherein the proposition laid down in paragraph 16 to 27 is stated as under:

“A contract of guarantee matures into a binding obligation only upon its invocation. Contract of Guarantee is an autonomous contract and the admission of the principal debtor to CIRP does not mean that the debt stands proved as against the Guarantor in a Section 7 proceeding against the Corporate Guarantor automatically. The guarantee has to be invoked and the debt and default proved separately in the proceeding against the Guarantor”

14. The Learned Counsel for the `Appellant' adverts to the Judgment of this Tribunal dated 08.01.2019 in the matter of Ferro Alloys Corporation Ltd V Rural Electrification Corporation Ltd (Comp App No. 92 of 2017) wherein at paragraph 27, it is observed as under:

Para 27 "A guarantee becomes a debt as soon as the guarantee is invoked against it whereinafter a guarantor ('corporate guarantor') becomes a 'corporate debtor' in terms of the I & B Code".

15. It is the version of the Learned Counsel for the `Appellant' that the aforesaid Judgment in Ferro Alloys Corporation Ltd of the `Appellate Tribunal' was affirmed by the Hon'ble Supreme Court of India in the Judgment dated 11.02.2019, in the matter of Rai Bahadur Shriram & Co. Ltd V Rural Electrification Corporation Ltd & Ors. (vide Civil Appeal No. 184 of 2019).

16. The Learned Counsel for the Appellant points out that the date of `Default' was wrongly mentioned in the Form 1 filed by the Creditor (vide Page 128 of Master Index Vol-I of Appeal Paper Book) and further that the Adjudicating Authority had wrongly decided the date as 12.02.2021 in the impugned order. In short, the date of determination of date of `Default' by the `Adjudicating Authority' is obviously a `perverse' and `wrong' one.

17. The contention advanced on behalf of the Appellant is that in the present case, the Date of 'Default' being 12.03.2021, the Section 7 Application in CP(IB)/82/CHE/2021 filed by the '1st Respondent'/'Applicant'/'Financial Creditor' is clearly barred under Section 10A of the I & B Code, 2016, and that the 'Adjudicating Authority' without any reasoning in the impugned order had negated this argument of the Appellant.

18. It is the submission of the Learned Counsel for the Appellant that the Application filed u/s. 7 of the Code by the '1st Respondent'/'Financial Creditor' proceeds on the footing that the 'Corporate Guarantee Agreement' was only extended for 'Working Capital Assistance' to an extent of the principal amount of Rs.50.48 Crores.

19. In this connection, the Learned Counsel for the Appellant comes out with a plea that a proper 'Notice of Demand' / 'Invocation' is mandatory as per Clause 21 of the 'Corporate Guarantee Agreement' and in the present case the said 'Agreement' was not invoked in accordance with its terms in the manner known to law. Therefore, it is the clear cut stand of the 'Appellant' that there was 'no Debt' and that there was 'no Default' for the purposes of Section 7 of the I & B Code, 2016. Hence, 'no cause'

had arisen for the acknowledgement of `Debt`. Also, it is contended that no presumption of `indebtedness` or `default` thereof be drawn based on these facts.

20. The Learned counsel for the Appellant submits that the `Corporate Guarantee Agreement` is an `Autonomous Contract` and irrespective of the proof of the `Principal Debt` in the `Corporate Insolvency and Resolution Process` of the `Principal Debtor` as against it, that the `Debt` to the extent carried by the `Corporate Debtor` has to be proved separately by the `Applicant`/`Creditor` in an application filed under Section 7 of the Code and further that the `Statute` prescribed no exception.

21. The Learned Counsel for the Appellant contends that the aggregates sum of `Principal` claimed in the purported `Letter of Intent` is itself called into question much like the `Invoice` itself being disputed.

22. The Learned Counsel for the Appellant points out that the decision in *Sabbas Winifred Joseph V IDBI Bank & Ors* (vide Comp. App. (AT) (INS) 411 of 2021 dated 27.01.2022), was in relation to `Limitation` and its applicability vis-à-vis the `Principal Debtor` and `Corporate Debtor`. In the instant `Appeal`, according to the `Appellant`, no question of `Limitation` is raised. As such, the said decision, is inapplicable to the facts of the present case on hand.

1st RESPONDENT'S CONTENTIONS:

23. According to the `1<sup>st</sup> Respondent` / `Financial Creditor` / `Applicant`, the total outstanding debt of the `Appellant`/`Corporate Debtor` amounts to INR 50.48 Crores in respect of the `Capital Assistance` in execution of the `Working Capital Assistance Agreement` dated 19.07.2018. Further, this amount after the interest stands at INR 52,25,74,088 as on 31.12.2020 and that the total outstanding `Debt` namely, Viz. the defaulted amount of the `Corporate Debtor` stands at INR 1,50,39,59,607.73, which was payable on 27.09.2018, when the account was declared `Non Performing Asset`.

24. It is the stand of the `1<sup>st</sup> Respondent` that the Notice invoking the `Guarantee` against the `Appellant`/`Personal Guarantor` was issued on 12.03.2021. In fact, the Appellant recognises itself as the `Debtor` to the outstanding sum, to be paid to the `1<sup>st</sup> Respondent`, having so acknowledged the 1st Respondent's capacity as `Assignor`.

25. The contention of the 1st Respondent is that the `One Time Settlement Proposal` furnished by the `Appellant` seeks a release of the `Guarantee` revealing that the `Guarantee` is `live` and the obligation of the `Appellant`, thereunder, is yet to be discharged.

26. According to the 1st Respondent, the 'Appellant' is responsible for the liability of the 'Principal Borrower' as per Judgment of this Tribunal dated 27.01.2022 in Sabbas Winifred Joseph V IDBI Bank & Ors (vide Comp. App. (AT) (INS) 411 of 2021). Furthermore, it is projected on the side of the '1st Respondent' that the aspect of 'Quantum of Liability' is irrelevant' has no bearing on the initiation of 'CIRP' since the 'Default' is of a 'Debt' larger than or the equal to 'Rs.1 Crore'. That apart, once the liability is admitted, the 'Dispute' relating to the 'Quantum of Liability' is immaterial at the point of initiation of 'CIRP' as per the Judgment dated 08.12.2020 in Apya Capital Services (P) Ltd V Guardian Homes (P) Ltd (vide Comp. App. (AT) (INS) No.412 of 2020).

EVALUATION:

27. Before the 'Adjudicating Authority' (NCLT, Chennai Bench, in Form-I, filed under Section 7 of the I & B, Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, by the 1st Respondent/Applicant/Financial Creditor under Part IV 'Particulars of Debt', it was mentioned that the total outstanding 'Debt of Corporate Debtor' was Rs.50.48 Crores towards 'Working Capital Assistance' including interest, expenses and costs, as per the

Agreement dated 19.07.2018. In respect of the amount claimed to be in Default and date on which the Default occurred, it was mentioned under Part-IV of Form-I that total outstanding Debt of the Corporate Debtor arose from Rs.50.48 Crores, as per the 'Working Capital Assistance Agreement' dated 19.07.2018 along with interest, at Rs.52,25,74,088 as on 31.12.2020.

28. Furthermore in Form-I Part-IV Column No.3, it was also mentioned that the total outstanding Debt of the Principal Borrower/Debtor M/s. Cauvery Power Generation Power Limited stood at Rs.1,50,39,59,607.73 and that the entire debt was 'Due for Payment' originally when the 'Account' was declared as 'Non Performing Asset' on 27.09.2018. The 'Notice' 'Invoking the Corporate Guarantee' was issued on 16.03.2021.

29. Before the 'Adjudicating Authority' the 'Corporate Guarantor/Kaveri Gas Power Limited' had averred that the alleged 'Default' by the 'Corporate Guarantor' is regard to the Debt of the Principal Borrower', whose liability arises from that of the 'Working Capital Agreement'. In fact, the instant Debt' was 'assigned' to the 1st Respondent/Applicant. The 'Assignment of the Debt' to the 1st Respondent/Applicant would attract the provision of the 'SARFAESI Act 2002' as the said transaction was in regard to the Assignment of the

`financial asset' in favour of the `Asset Reconstruction Company' by a `Bank' or `Financial Institution'.

30. Apart from the above, it is the stand of `Corporate Guarantor' that the `Application' filed by the 1st Respondent/Applicant is to be rejected at the threshold for not having demonstrated any `default' on the part of the `Corporate Guarantor'. It is the stand of the `Corporate Guarantor' that the `Guarantee Agreement' executed by it made it liable for the `Debt' of the `Principal Borrower' only to an extent of Rs.50.48 Crores. The presumption of `Default' of `Financial Debt' as provided for under Section 7 of the I & B Code, 2016 is only available to the `Financial Creditor' if the requirements of Section 7 and the Regulation thereunder are satisfied.

31. Before the `Adjudicating Authority', the `Appellant'/'Corporate Debtor'/'Corporate Guarantor' in its written submissions took a stand that an uninvoked `Corporate Guarantee Agreement' cannot be the basis for an application under Section 7 of the I & B Code, 2016. The said `Corporate Guarantee Agreement' is an `Autonomous Contract' and `irrespective of the proof' of the `Principal Debt' in the `CIRP' of the `Principal Debtor' as against it, the `Debt' to the extent guaranteed by the `Corporate Debtor' has to be proved separately by the `Applicant Creditor' in the `Application' filed under Section 7 of the Code.

32. It is the version of the 'Appellant' that the purported document of 'Default' filed along with Form-I before the 'Adjudicating Authority' discloses a Debt of Rs.150.39 Crores which is incongruous to the claim of Rs.52.25 Crores mentioned in Form-I and a guaranteed sum of Rs.50.48 Crores.

33. A perusal of the 'Guarantee Agreement' dated 19.07.2018, executed by Kaveri Gas Power Limited (Guarantor) to and in favour of SBICAP TRUSTEE Company Limited shows that the Cauvery Power Generation Chennai Private Limited was sanctioned by the State Bank of India (Lender) 'Working Capital Assistance' not exceeding Rs.50.48 Crores on the terms and conditions set out in the 'Working Capital Consortium Agreement' dated 31.10.2013 and First Amendment to 'Working Capital Consortium Agreement' dated 19.07.2018.

34. It must be borne in mind that Clause 6 to 8 of the 'Guarantee Agreement' dated 19.07.2018, executed by the Kaveri Gas Power Limited (Guarantor) run as under :

“6. The Lender/Security Trustee shall have full liberty, without notice to the Guarantor and without in any way affecting this guarantee, to exercise at any time and in any manner any power or powers reserved to the Lender/Security Trustee under the Working Capital Agreement to enforce or forbear to enforce payment of the Loans or any part thereof or interest or other monies due to the Lender/Security Trustee from the Borrower or any of the remedies

or securities available to the Lender/Security Trustee, to enter into any composition or compound with or to grant time or any other indulgence or loans to the Borrower AND the Guarantor shall not be released by the exercise by the Lender/Security Trustee of its liberty in regard to the matters referred to above or by any act or omission on the part of the Lender/Security Trustee or by any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the Guarantor AND the Guarantor hereby waives in favour of the Lender/Security Trustee so far as may be necessary to give effect to any of the provisions of this Guarantee, all the suretyship and other rights which the Guarantor might otherwise be entitled to enforce.

7. *This Guarantee shall be enforceable against the Guarantor, notwithstanding that any security or securities comprised in any instrument(s) executed or to be executed by the Borrower in favour of the Lender/Security Trustee shall, at the time when the proceedings are taken against the Guarantor on this Guarantee, be outstanding or unrealized or lost.*

8. *The Guarantor hereby agrees and gives consent to the sale, release, etc., of any of the assets by the Borrower from time to time as may be approved by the Lender/Security Trustee or to release or leasing out by the Lender/Security Trustee of any or whole of the assets charged to the Lender/Security Trustee on such terms and conditions as the Lender may deem fit and this may be treated as a standing and continuing consent for each and every individual act of transfer, or release of any of such assets of the Borrower. The Guarantor hereby declares and agrees that no separate consent for each such transfer or release of any of such assets would be necessary in future.”.*

35. In fact, ‘the Guarantee Agreement’ dated 19.07.2018, Clause 11 enjoins that ‘the Guarantor’ affirms, confirms and declares that any balance confirmation and / or acknowledgement of debt and/or admission

of liability given or promised or part payment made by the `Borrower' or the `Authorized Agent' of the Borrower to the `Lender/Security Trustee' shall be deemed to have been made and/or given by or on behalf of the `Guarantor' itself and shall be binding upon each of them. That apart, Clause 12 of the `Guarantee Agreement' dated 19.07.2018 proceeds to the effect that `to give effect' to this `Guarantee' the `Lender/Security Trustee' may act as if the `Guarantor' was the `Principal Debtor' to the `Lender/Security Trustee'.

36. As a matter of fact, the aforesaid `Guarantee Agreement' dated 19.07.2018 `Clause 13' points out that the `Guarantor' hereby declares and agrees that they have not perceived and shall not without the prior consent in writing of the `Lender/Security Trustee' receive any Security or Commission from the Borrower for giving this `Guarantee' so long as monies remain `due and payable' by the `Borrower' to the `Lender/Security Trustee' under the `Working Capital Agreement'.

37. In reality, Clause 20 of the `Guarantee Agreement' dated 19.07.2018 categorically provides that the liability of the `Guarantor' shall not exceed the sum of Rs.50.48 Crores plus all interest, additional and penal interest, further interest, premium on pre-payment, costs, charges and other monies payable by the Borrower to the `Lender/Security Trustee' under the

`Working Capital Agreement'. Moreover, the `Clause 20 of the Guarantee Agreement', says that `A Certificate' or `Claim' in writing by the `Lender/Security Trustee' stating the amount at any particular time due and payable under this `Guarantee' shall be `conclusive evidence' as against the `Guarantor', their `representatives and estate'; which shall be paid without demur'.

38. To put it precisely, `Clause 23 of the `Guarantee Agreement' dated 19.07.2018' mentions that the `Guarantor' agrees and declares that the rights and power conferred on the `Lender/Security Trustee' by these presents may be exercised by the `Security Trustee' acting for the benefit and on behalf of the `Lender'.

39. To be noted, that the `Assignment Agreement' dated 30.12.2020 was entered into between State Bank of India (`Assignor') and the 1st Respondent ASREC (INDIA) Limited (`Assignee') relating to the Assignment of the Loans, disbursed under the financing documents together with all its `rights', `title' and `interest' in the financial documents and any underlying `Security Interests', `pledges' and / or `Guarantees' in respect of such loans.

40. It comes to be known that the `1<sup>st</sup> Respondent/ASREC (INDIA) Limited' had issued a `Invocation of Corporate Guarantee' notice dated 12.03.2021 addressed to M/s. Kaveri Gas Power Private Limited whereby and whereunder it was among other things mentioned that the State Bank of India had assigned the Debt of CPGCPL together with its underlying `Security/Guarantees' to ASREC (INDIA) Limited ("ASREC") vide Agreement dated 30.12.2020 and that the 1<sup>st</sup> Respondent stepped into the shoes of State Bank of India and since then the `1st Respondent/ASREC' made efforts to recover the Debts due from CPGCPL and its `Guarantors'. In fact, the communications, the oral conversations and meetings had not fructified in recovering the dues or making the liabilities current.

41. Continuing further, in the notice dated 12.03.2021 (`Invocation of Corporate Guarantee' – M/s. Kaveri Gas Power Limited), M/s. KGPL was called upon to forthwith discharge the liability of Rs.1,50,39,59,607.73 within 14 days, failing which, it was informed that appropriate legal action including approaching the Court, NCLT and Tribunals would be undertaken for enforcing the `Corporate Guarantee' and realizing the dues with costs, etc.

Glimpse of Decisions:

42. At this juncture, this 'Tribunal' aptly cites the decision of the Hon'ble Supreme Court in Syndicate Bank V. Chan Naveerappa Beleri & Ors. reported in All India Reporter 2006 Supreme Court at page 1874 wherein at paragraph 11-14 it is observed as follows:

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 Bradford [(1918) 2 KB 833 : 88 LJKB 85 : 119 LT 727 (CA)] and Hartland [(1863) 1 H & C 667 : 7 LT 792], the limitation begins to run when the demand is made and the guarantor commits breach by not complying with the demand.

12. We will examine the meaning of the words 'on demand'. As notice above, the High Court was of the view that the words 'on demand' in law have a special meaning and when an agreement states that an amount is payable on demand, it implies that it is always payable, that is payable forthwith and a demand is not a condition precedent for the amount to become payable. The meaning attached to the expression 'on demand' as 'always payable' or 'payable forthwith without demand' is not one of universal application. The said meaning applies only in certain circumstances. The said meaning is normally applied to promissory notes or bills of exchange payable on demand. We may refer to Articles 21 and 22 in this behalf. Article 21 provides that for money lent under an agreement that it shall be payable on demand, the period of limitation (3 years) begins to run when the loan is made. On the other hand, the very same words 'payable on demand' have a different meaning in Article 22 which provides that for money deposited under an agreement

that it shall be payable on demand, the period of limitation (3 years) will begin to run when the demand is made. Thus, the words 'payable on demand' have been given different meanings when applied with reference to 'money lent' and 'money deposited'. In the context of Article 21, the meaning and effect of those words is 'always payable' or payable from the moment when the loan is made, whereas in the context of Article 22, the meaning is 'payable when actually a demand for payment is made'.

13. What then is the meaning of the said words used in the guarantee bonds in question? The guarantee bond states that the guarantors agree to pay and satisfy the Bank 'on demand'. It specifically provides that the liability to pay interest would arise upon the guarantor only from the date of demand by the Bank for payment. It also provides that the guarantee shall be a continuing guarantee for payment of the ultimate balance to become due to the Bank by the borrower. The terms of guarantee, thus, make it clear that the liability to pay would arise on the guarantors only when a demand is made. Article 55 provides that the time will begin to run when the contract is 'broken'. Even if Article 113 is to be applied, the time begins to run only when the right to sue accrues. In this case, the contract was broken and the right to sue accrued only when a demand for payment was made by the Bank and it was refused by the guarantors. When a demand is made requiring payment within a stipulated period, say 15 days, the breach occurs or right to sue accrues, if payment is not made or is refused within 15 days. If while making the demand for payment, no period is stipulated within which the payment should be made, the breach occurs or right to sue accrues, when the demand is served on the guarantor.

14. We have to, however, enter a caveat here. When the demand is made by the creditor on the guarantor, under a guarantee which requires a demand, as a condition precedent for the liability of the guarantor, such demand should be for

payment of a sum which is legally due and recoverable from the principal debtor. If the debt had already become time-barred against the principal debtor, the question of creditor demanding payment thereafter, for the first time, against the guarantor would not arise. When the demand is made against the guarantor, if the claim is a live claim (that is, a claim which is not barred) against the principal debtor, limitation in respect of the guarantor will run from the date of such demand and refusal/non-compliance. Where guarantor becomes liable in pursuance of a demand validly made in time, the creditor can sue the guarantor within three years, even if the claim against the principal debtor gets subsequently time-barred. To clarify the above, the following illustration may be useful:

Let us say that a creditor makes some advances to a borrower between 10-4-1991 and 1-6-1991 and the repayment thereof is guaranteed by the guarantor undertaking to pay on demand by the creditor, under a continuing guarantee dated 1-4-1991. Let us further say a demand is made by the creditor against the guarantor for payment on 1-3-1993. Though the limitation against the principal debtor may expire on 1-6-1994, as the demand was made on 1-3-1993 when the claim was 'live' against the principal debtor, the limitation as against the guarantor would be 3 years from 1-3-1993. On the other hand, if the creditor does not make a demand at all against the guarantor till 1-6-1994 when the claims against the principal debtor get time-barred, any demand against the guarantor made thereafter say on 15-9-1994 would not be valid or enforceable."

43. It will be useful for this 'Tribunal' to refer to the decision of Hon'ble High Court of Madras in *Gopilal Q Nichani V Track Industries and Components Ltd and Others* reported in AIR 1978 Mad 134, 137 and 138 wherein at paragraph 12 and 13 it is observed as under:

12. We shall now take the question of interpretation of Section 128 of the Indian Contract Act. No other section of the Contract Act or and general principle has been relied on before us on behalf of the guarantor. We shall extract Section 128 of the Indian Contract Act:-

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“The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.”

13. The section talks of only one thing and that is about the liability of the guarantor as being coextensive as that of the principal debtor. The word coextensive is an objective for the word ‘extent’ and it can relate only to the quantum of the principal debt. This question has been dealt with and discussed at length in a Full Bench decision of this Court in Subramania V Narayanaswami. That was a case arising out of a reference made by Subba Rao J. (as he then was) on the question whether a non-agriculturist surety would be liable for the entire debt even though the principal debt was scaled down under the provisions of the Tamil Nadu Agriculturists Relief Act. In this decision, reference was made to the well know principle that a guarantee is not put to an end to by reason of the debt becoming unenforceable against the principal by reason of matters happening subsequently, and that a surety is liable though the claim against the principal is barred by the Statute of Limitation or by reason of the bankruptcy of the Principal. No doubt, there is the provision in Section 45 (4) of the Presidency Towns Insolvency Act expressly enacting that the fact the principal debtor has become an insolvent did not affect the liability of the surety. But this provision in the Statute does not detract from the principle that we have stated above. The liability of the guarantor arising as it does from an independent contract, even in cases where the guarantor is a privy to the contract between the principal debtor and the creditor, stands on a different footing, and unless we are able to say that by necessary implication that liability is also affected by some conduct of the principal debtor or any other agreement between the principal debtor and the creditor, attracting the provisions of Section 133, 134 or 135 of the Contract Act, the principle laid down in Subramania V Narayanaswami will not extend to a case where a temporarily the

liability of the principal debtor has been suspended and as therefore, become unenforceable. A reference to Section 7 of the Act indicates that it is only a suspension and a liability is not affected at all. Section 7 of the Act specifically provides in computing the period of limitation for the enforcement of any right, privilege, obligation or liability referred to in Clause (b) of Section 4 the period during which it or the remedy for the enforcement thereof was suspended, shall be excluded. It is therefore clear that there is no extinguishment of the principal debt, and the contract between the guarantor and the creditor stands absolutely unaffected by the passing of the notification under Section 3, declaring a particular undertaking as a relief undertaking, with great respect we are unable to agree with the reasoning of Sethuraman J. in Appln No.1849 in C.S. 155 of 1973. The suit has been instituted after the notification, Section 6 of the Act provides for a stay of the pending proceedings against the relief undertaking. But the suit as against the relief undertaking having been instituted after the notification is not maintainable. The dismissal of the suit as against the relief undertaking must therefore stand. But the dismissal of the suit as against the guarantors cannot be sustained. The suit as against them must proceed. In the other Judgment which is under appeal in O.S.A.68 of 1976, Suryamurthy J. has held that the action taken to adjudge the surety as an insolvent is not an action for recovery of debt, and in this appeal a determination of this question, is unnecessary. If a suit against the guarantor would lie, we have not doubt that proceedings for adjudging the guarantor as insolvent would equally lie.”

44. This ‘Tribunal’ seeks in aid of the decision of the Hon’ble Supreme Court in the matter of State Bank of India V Indexport Registered and Ors 1992 3 SCC page 159 at Spl. Page 166 wherein at paragraph 16 to 18, it is observed as follows:

16. “In Halsbury’s Laws of England Forth Edition paragraph 159 at page 87 it has been observed that “it is not necessary for the creditor,

before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for.”

17. In *Hukamchand Insurance Co Ltd Vs. Bank of Baroda*, AIR (1977) Kant 204, a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety vis-à-vis the principal debtor. Venkatachaliah, J. (as His Lordship then was) observed:-

“The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability of a principal debtor and the liability of a surety which is coextensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously. ”

18. It will be noticed that the guarantor alone could have been sued, without even suing the principal debtor, so long as the creditor satisfies the court that the principal debtor is in default.”

45. In the decision of the Hon’ble Supreme Court in *Syndicate Bank V Channaveerappa Beleri & Ors* reported in (2006) 11 SCC 506 at Spl Page 517 wherein at paragraph 9 it is observed as under:-

“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.”

46. In the decision in *Indian Bank, Madras V The State of Tamil Nadu*, read by Secretary, Department of Handloom and Textiles, reported in 2002 (2) MLJ at Page 649, it is observed that the liability of ‘Guarantor’ is coextensive, the word ‘extensive’ was an objective for the word ‘extent’ and it related to the ‘Quantum of Principal Debt’.

47. In the decision of Hon’ble Supreme Court in *Central Bank of India and Others V C.L. Vimala and Others, etc.*, decided on 28.04.2015, reported in AIR (SCW) 3240, wherein it is observed that the ‘liability’ of the ‘Guarantor’ is coextensive with that of ‘Principal Debtor’, unless it is otherwise provided by the ‘Contract’. It is the prerogative of the ‘Creditor’ alone to move against the ‘Principal Debtor’ or the ‘Surety’. ‘Clauses’ in the ‘Letter of Guarantee’ are binding on the ‘Guarantor’. Ignorance is not a valid ground.

48. It is relevantly pointed out that the term 'Guarantee' is a continuous one and therefore, the 'right to sue accrues' when the 'Guarantee Agreement' was invoked and the date when the 'Corporate Debtor' had failed to discharge its obligation, in terms of 'Guarantee'.

49. There is no two opinion of a primordial fact that the liability of the 'Guarantor' being coextensive with the 'Principal Borrower', in terms of the ingredients of Section 128 of the Indian Contract Act, 1872. The liability of a 'Guarantor' will be cemented up on the document like 'Guarantee Deed', 'Mortgage' by 'Deposit of Title Deeds', etc.

50. In the instant case, one cannot remain oblivious of the fact that the outstanding debt Viz., the 'defaulted sum' of the 'Corporate Debtor' stood at Rs.1,50,39,59,607.73 paise, which was payable on 27.09.2018, on the date when the 'Account' as 'Non Performing Asset'.

51. To put it succinctly, the 'Appellant' in its 'One Time Settlement' had recognised itself as the 'Debtor' in respect of the outstanding sum to be paid to the '1st Respondent/Applicant/Financial Creditor', in the latter's position as 'Assignor'.

52. The other vital fact to be kept in mind is that the 'Guarantee' has a 'Live Force' and that the 'Appellant's obligation' is not wiped out in discharging its liability. It is to be remembered that under the I & B Code, 2016, the 'Quantum of Liability' is not a relevant factor to be taken into account and has no nexus in respect of the 'Initiation' of 'Corporate Insolvency Resolution Process', in as much as the 'Default' of a 'Debt' is equivalent to Rs.1 Crore and above.

53. An 'Adjudicating Authority' is not to determine a 'money claim' or 'suit'. The I & B Code, 2016, requires an 'Adjudicating Authority' only, to find out and record satisfaction in a summary adjudication, in regard to the occurrence of 'Default', as per ingredients of Section 4, before admitting a 'Petition'.

54. In the teeth of I & B Code, 2016, the aspect of extent of liability can be dealt with and arrived at a final solution by a 'Resolution Professional' based on the claims projected by the parties, of course after the initiation of 'CIRP'. Furthermore, in any event, the controversy/dispute relating to the 'extent of liability' is not a determining factor at the stage of initiation of "CIRP".

55. Be that as it may, in the light of foregoing detailed 'Qualitative' and 'Quantitative' discussions, this 'Tribunal' taking into account of the fact that in the instant case that the 'Debt' was assigned by the 'Applicant/Financial Creditor/State Bank of India' to the '1st Respondent/ASREC (INDIA) Limited' and bearing in mind another fact that the 'Corporate Debtor' had not replied to the 'Letter' / 'Notice' of the '1st Respondent/Financial Creditor' in pressing into service the 'Corporate Guarantee Agreement' dated 19.07.2018 and considering the cumulative attendant facts and circumstances of the instant case, which float on the surface, comes to an inescapable, inevitable and irresistible conclusion that the impugned order passed by the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench – I, Chennai) in CP(IB)/82/CHE/2021 in arriving at the conclusions that the 'Financial Debt' was proved by the '1st Respondent/Applicant/Financial Creditor' and that the 'Default' was committed by the 'Corporate Debtor' and ultimately admitting the 'Application' (filed under Section 7 of the Code by the 1st Respondent/Applicant/Financial Creditor) are free from any 'legal infirmities'. Consequently, the 'Appeal' fails.

Disposition:

In fine, the instant Company Appeal (AT) (INS) 102 of 2022 is dismissed.

No costs.

IA No.236 of 2022 (Stay Application) is Closed.

[Justice M. Venugopal]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

25/4/2022

SR/NG