IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH-I
KOLKATA
I.A. (IB) No. 986/KB/2019
and
CP (IB) No. 1101/KB/2019

In the matter of:

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

Punjab National Bank
[formerly United Bank of India]

...Financial Creditor

Versus

Cosy (India) Ltd.
[CIN: U29299WB1982PLC035274]

...Corporate Debtor

Order reserved on: 28 April, 2022

Order pronounced on: 29 April, 2022

Coram:

Shri Rajasekhar V.K.	**:**	**Member (Judicial)**
Shri Balraj Joshi	**:**	**Member (Technical)**

Appearances (through video conferencing):

For the Financial Creditor	: Ms Urmila Chakraborty, Advocate Mr. Debashish Chakraborti, Advocate
For the Corporate Debtor	:, Mr. Shovan Ghosh, Advocate

<u>COMMON ORDER</u>

<u>[I.A. (IB) No. 965/KB/2019 and C.P. (IB) No. 1101/KB/2019]</u>

Rajasekhar V.K., Member (Judicial)

1. This Court convened through videoconferencing.

I.A. (IB) No. 986/KB/2019

2. The present I.A. has been filed by Cosy (India) Ltd., the Corporate Debtor praying for dismissal of C.P. (IB) No. 1101/KB/2019 as not maintainable.

Submissions of Mr. Shovan Ghosh, learned Counsel apperaing for the Applicant

3. The Applicant/Corporate Debtor submits that with the promulgation of the Companies Act, 2013, section 185 of the Companies Act, 2013, a Company is prohibited from furnishing any Corporate Guarantee or security towards credit-cum-exposure to any other subsidiary or related company. Hence, the deed of guarantee dated 09 November 2004 and 21 June 2007 are void, in view of section 185 of the Companies Act, 2013.

4. The Corporate Debtor was not a party to the tripartite agreement dated 21 June 2007 and the first repayment date of the principal borrower was due on 31 January 2009 but as per the report submitted before the learned Debt Recovery Tribunal, Kolkata, the date of declaration of Non-Performing Asset (“NPA”) on 30 September 2008.

5. The date of NPA varies from their own records of the Financial Creditor. The Financial Creditor has already taken steps in C.P. (IB) No. 1042/KB/2019 against the principal borrower and the principal borrower was admitted into Corporate Insolvency Resolution Process (“CIRP”) on 01 January 2019.

6. The Company Petition is hit by Article 137 of the Limitation Act, 1963 and therefore it is barred by limitation.

Submissions of Ms. Urmila Chakraborty, learned Counsel appearing for the Respondent

7. The learned Counsel submitted that section 185 of the Companies Act, 2013 is not applicable to the Corporate Debtor as the guarantee was given in the year 2004 and 2007.

8. Section 18 of the Limitation Act, 1963 shall apply to the proceedings initiated under the Insolvency and Bankruptcy Code, 2016 as held by the Hon'ble Supreme Court in ***Jignesh Shah & Anr. v. Union of India & Anr.***

9. The principal borrower defaulted in payment on 31 January 2009 as per the tripartite agreement. The date of default has been mentioned as 31 December 2005 and the Financial Creditor has not changed its stand.

CP (IB) No. 1101/KB/2019

10. This is a Company Petition filed under section 7 of the insolvency and Bankruptcy Code, 2016 by Punjab National Bank [formerly United Bank of India], constituted under the Banking Companies (Acquisition and Transfer Undertaking) Act, 1970, represented by Mr. Nitai Chandra Jana, Chief Manager, authorized by a letter of Authority, seeking to initiate Corporate Insolvency Resolution Process ("CIRP") against Cosy (India) Limited [CIN: U29299WB1982PLC035274] ("Corporate Debtor").

11. The Corporate Debtor is a company limited by shares and was incorporated on 21 September 1982, having CIN: U29299WB1982PLC035274, incorporated under the Companies Act, 1956. It's registered office is P-36, India Exchange Place, 3rd Floor, Room No. 48C, Kolkata- 700001, within the State of West Bengal. Therefore, this Bench has jurisdiction to deal with this petition.

12. The present petition was filed on 11 July 2019 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make a payment of a sum of Rs.39,48,16,565.04 (Rupees Thirty Nine Crore Forty Eight Lakh Sixteen Thousand Five Hundred and Sixty Five and Four paise) as on 30 April 2019 with further interest from 01 May 2019 @ 14%.

Submissions of Ms. Urmila Chakraborty, learned Counsel appearing for the Financial Creditor

13. The Corporate Debtor had furnished corporate guarantee and had mortgaged its immovable properties to secure loan sanctioned to Mansi Oils & Grants Private Limited ('Principal Borrower") which is currently under Liquidation.

14. The Financial Creditor had sanctioned a loan of Rs.8,20,00,000/- (Rupees Eight Crore and Twenty Lakh only) comprising of working capital limit of Rs.2,50,00,000/- (Rupees Two Crore and Fifty Lakh only) and Term Loan of Rs.5,70,00,000/- (Rupees Five Crore and Seventy lakh only) on 04 November 2004.

15. The Corporate Debtor executed the deed of guarantee on 09 November 2004 and deposited twenty-six title deeds relating to the immovable properties in Banganagar on Diamond Harbour Road, P.S. Falta as security for the loan sanctioned to the principal borrower. Charge was registered with the Registrar of Companies by filing Form 8 and Form 13.

16. The credit limit for the principal borrower was increased on 04 April 2006 at the request of the principal borrower. The Corporate Debtor resolved *vide* its Board Resolution dated 08 April 2007 to mortgage its landed properties and give corporate guarantee as an additional security in favour of the Financial Creditor and NABARD. Another Deed of Guarantee was executed on 21 June 2007.

17. The mortgage of assets and properties of Cosy (India) Ltd. were registered with the Registrar of Companies who issued a Certificate of Registration dated 21 August 2007.

18. The principal borrower defaulted in payment and the account of the principal borrower was declared as a Non-Performing Asset on 31 December 2005.

19. The Financial Creditor issued a demand notice on 20 May 2010 to the Corporate Debtor stating that the Financial Creditor would invoke the guarantee furnished by the Corporate Debtor on failure to pay the defaulted amount.

20. The Financial Creditor issued a statutory notice under section 13(2) of the SARFAESI Act, 2002 to the principal borrower on 27 May 2011 and filed a petition before the DRT under section 13(4) of the SARFAESI Act, 2002 against the principal borrower and the Corporate Debtor.

21. An application under section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 was filed by the Financial Creditor against the Principal Borrower and the Corporate Debtor on 17 November 2011.

22. The Financial Creditor has placed the following documents on record:

    a. Copy of the record of default with the Credit Information Facility.

    b. Statement of Bank account;

    c. Copies of audited Balance Sheets for the year 2017-2018.

23. Notice had been served on the Corporate Debtor on 19 July 2019 *via* Post. The Corporate Debtor entered appearance on 23 July 2019.

Submissions of Mr. Shovan Ghosh, learned Counsel for the Corporate Debtor

24. Corporate Debtor filed its reply on 01 August 2019. The learned Counsel appearing on behalf of the Corporate Debtor reiterated the submissions made in I.A. (IB) No. 965/KB/2019 and further submitted that:

   a. The loan sanction letter is dated 04 November 2004 and the Deed of Guarantee are dated 09 November 2004 and 21 June 2007.
   b. The Financial Creditor has already taken steps against the principal borrower and the present application has been made under the garb of a financial debt which time barred in nature.
   c. The Petition has been filed by Mr. Nitai Chandra Jana, Chief Manager, Stressed Asset Management Branch is neither a principal officer nor a person competent to represent the Financial Creditor.

Rejoinder to the submissions made by the learned Counsel for the Corporate Debtor

25. The reason that the date of the account being classified as Non Performing Asset ("NPA") on 31 December 2005 is due to the fact that the account was declared as NPA on 31 December 2005 and then it the account was re-structured on 20 June 2007 but thereafter the principal borrower once again failed to repay the loan after ninety days of restructuring and hence the default was reverted to the original date of NPA i.e. 31 December 2005.

26. With regard to the defence made, with regard to the limitation, the learned Counsel relied on the judgment passed by the Hon'ble Supreme Court in ***Sesh Nath Singh v. Baidyabati Sheoraphuli Co-***

operative Bank Ltd.[1] stating that the provisions of section 14 of the Limitation Act is applicable to the Code and the entire period after the initiation of proceedings under the SARFAESI Act can be excluded. Hence, if the period from the date of institution of the proceedings under the SAEFAESI Act till the date of filing of the application under section 7 of the code before this Adjudicating Authority is excluded then the present petition is within the period of limitation.

Analysis and Findings

27. Heard the learned Counsel appearing for the Financial Creditor and the learned Counsel appearing for the Corporate Debtor and perused the record.

28. A petition under section 7 of the Code can be considered if there is a debt and a default. In the present case, there is a debt and a default. Now the main question that arises is whether the petition has been filed within the period of limitation i.e. a period of three years.

29. Firstly, the Financial Creditor has stated that the date of default is 31 December 2005 but on examination of record, the same has been stated as the date on which the account of the principal borrower was declared as NPA. The Petitioner had entered into a restructuring agreement in the year 2007 but the principal borrower defaulted in payment of the same and the account of the principal borrower was once again declared as NPA. Thereafter, the Financial Creditor sent a notice for invocation of guarantee on 20 May 2010 and filed a petition before the Learned Debt Recovery Tribunal on 17 November 2011, whereas the instant petition was filed on 11 July 2019. Hence, it is squarely barred by limitation.

[1] 2021 SCC OnLine SC 244 decided on 22 March 2021

30. The learned Counsel for the Financial Creditor has relied on **Sesh Nath Singh** (***supra.)*** submitting that the period of limitation in which the proceedings are under the SARFAESI Act has to be excluded. The learned Counsel has failed to appreciate that the proceedings under the SARFAESI Act in ***Sesh Nath Singh (supra.)*** were stayed by the Hon'ble High Court by an interim order with a view that the proceedings were issued in the wrong forum.

31. The Hon'ble Supreme Court it held that the conditions for such exclusion are that the earlier proceedings should have been for the same relief, the proceedings should have been prosecuted diligently and in good faith and the proceedings should have been prosecuted in a forum which, from defect of jurisdiction or other cause of a like nature, was unable to entertain it.[2] Therefore, section 14 of the Limitation Act would be applicable in cases of mistaken remedy or selection of a wrong forum.[3] Hence section 14 or 18 of the Limitation Act, 1963 would apply to the proceedings under section 7 or 9 of the Code.

32. But in the present case, no such stay was granted, neither were the proceedings under the SARFAESI Act nor Recovery of Debts due to Banks and Financial Institutions Act, 1993 were disrupted. Therefore, ***Sesh Nath Singh supra.*** does not apply in the present Company Petition.

33. This petition is barred by limitation and in view of the above circumstances **I.A. (IB) No. 965/KB/2019 succeeds and is allowed** and in view of the above **CP (IB) No. 1101/KB/2019 is dismissed** accordingly. The Financial Creditor is however at liberty to pursue other available remedies under any other law.

2 Para 70 of the judgment
3 Para 74 of the judgment

34. The observations contained in this order shall be confined to the Insolvency and Bankruptcy proceedings alone.

35. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

36. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

37. File be consigned to the records.

BALRAJ JOSHI Digitally signed by BALRAJ JOSHI Date: 2022.04.29 20:26:13 +05'30'

Rajasekhar V K Digitally signed by Rajasekhar V K Date: 2022.04.29 17:46:36 +05'30'

Balraj Joshi
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

Order signed on the 29th day of April 2022.

GGRB[LRA]