

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

*(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)*

C.P. (IB) No.60/BB/2022

U/s 7 of I&B Code, 2016

R/w Rule 4 of I&B (AAA) Rules, 2016

**M/s. Indian Renewable Energy
Development Agency Limited**

R/O at India Habitat Centre, 1st Floor,
East Court, Core 4A, Lodhi Road,
New Delhi – 110 003.

... Petitioner/Financial Creditor

Versus

M/s. Sai Spurthi Power Pvt. Ltd.

Registered Office at:
Prestige Khoday Tower,
Municipal No.5 (Old and 5), Ground Floor,
Cubban Road (Rajbhavan Road),
Bangalore – 560 001.

... Respondent/Corporate Debtor

Order delivered on: 20th July, 2023

Coram: 1. Hon'ble Justice (Retd.) T. Krishnavalli, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Present:

For the Petitioner : Shri S.S. Naganand, Sr. Adv. with
Ms. Shilpa Shah, Adv.
For the Respondent : Shri Dhyan Chinnappa, Sr. Adv. with
Ms. Krishma N., Adv.

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. The instant Petition has been filed on 04.03.2022 u/s 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter as 'IBC / Code') r/w Rule 4 of the

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by M/s. Indian Renewable Energy Development Agency Limited (hereinafter as 'Petitioner / Financial Creditor / IREDA') with a prayer to initiate the Corporate Insolvency Resolution Process in respect of M/s. Sai Spurthi Power Private Limited (hereinafter as 'Respondent / Corporate Debtor') for defaulting an amount of Rs.71,88,32,068/- (Rupees Seventy One Crores Eighty Eight Lakhs Thirty Two Thousand and Sixty Eight Only) as on 31.12.2021, with the Date of NPA of Borrower being 31.03.2012.

2. The Corporate Debtor (CD) – M/s. Sai Spurthi Power Private Limited is incorporated on 16.05.2002 under the provisions of Companies Act, 1956 with CIN: U40105KA2002PTC030502 having its registered office situated in Bangalore. Hence, the jurisdiction lies with this Adjudicating Authority. Its Authorised Share Capital is Rs.18,00,00,000/- and Paid-up Share Capital is Rs.17,81,75,720/-.

3. Brief facts of the case as stated by the Petitioner are as under:

(a) The Financial Creditor (FC) i.e., IREDA, *vide* its letter dated 05.12.2007 sanctioned a term loan of Rs.13,87,50,000/- to the Principal Borrower i.e., Bhadrageri Power Pvt. Ltd. for setting up of 3 MW (2 Nos. x 1.5 MW) Gondi Small Hydro Project in Karnataka (Project No.1823).

(b) It is stated that in terms of Clause 7(iii) of Annexure-I r/w Clause 4 of Annexure-III of the sanction letter, the said loan was to be secured by way of the Corporate Guarantee to be provided by the Corporate Debtor. The Board of Directors of Corporate Debtor (CD) *vide* a Board Resolution dated 10.12.2007 guaranteed the payment of loan advanced by the Financial Creditor to the Borrower. The CD was holding 4,00,000 Equity Shares of the Borrower Company in FY 2007-08. Subsequently, a Loan Agreement dated 12.03.2008 was executed between the Financial Creditor and the Borrower.

- (c) Further, a Deed of Guarantee dated 26.03.2008 was executed by the CD in favour of IREDA, which was unconditional and irrevocable guarantee, whereby the CD *inter alia* guaranteed the due repayment of the loan amount of Rs.1387.50 Lakhs together with the applicable interest and other charges and further guaranteed that in the event of default on the part of Borrower in payment/repayment of loan amount, the CD would upon demand by the FC forthwith pay all the amounts which would become due and payable by the Borrower under the Loan Agreement. The CD also submitted two undertakings. The guarantee as well as these two undertakings, are continuing ones and thus the CD continues to be liable for the debts due and payable in terms of Loan Agreement dated 12.03.2008.
- (d) A total amount of Rs.13,59,30,259/- under the Loan Agreement was disbursed to the Borrower on various dates between March, 2008 to December, 2009. Subsequently, the FC, *vide* its letter dt.30.12.2010, rescheduled the period for loan repayment, and extended the time period for such repayment upto 30.09.2021. Besides, IREDA also agreed to fund the interest due and payable by the Borrower on the loan amount for the period from June, 2010 upto September, 2011 i.e., the aggregate amount of Rs.2,97,23,000/-.
- (e) The account of the Borrower was declared Non-Performing Assets (NPA) by the FC on 31.03.2012. The loan facility, was thereafter, recalled by the FC *vide* a recall notice dated 09 / 13.08.2012, with a copy marked to all the guarantors including the Corporate Debtor, demanding an amount of Rs.18,24,69,308/- fallen due as on 30.06.2012. However, no response was received from the Corporate Debtor.
- (f) It is stated that the Principal Borrower, *vide* its letters dated 31.08.2012 and 18.01.2013, acknowledged its liability to pay the loan amount and

requested for time up to September, 2013 for repayment of the financial debt which was rejected by the FC *vide* letter dated 12.02.2013.

- (g) The FC *vide* letter dated 13.06.2014 requested the CD to impress upon the Borrower to clear their outstanding dues and further notified the CD that in case of non-payment, the FC would be constrained to invoke the Corporate Guarantee provided by the CD.
- (h) Further, the FC, *vide* its letter dated 22.10.2014, with a copy marked to Greenko Group (Holding Company of the Corporate Debtor herein), warned the Principal Borrower that on failure to repay the loan amount, it would be notified as a non-cooperative borrower in accordance with the RBI Circular.
- (i) The CD *vide* letter dated 14.11.2014, with malafide intentions, disputed the validity of the corporate guarantee on frivolous ground that there was no record of the Minutes of Meeting of the Board of Directors or the Shareholders of Company approving the issue of Corporate Guarantee given by them and further stated that the Borrower was nowhere related to them. A perusal of the statutory records of the Borrower as well as the CD would reveal that as on 31.03.2018, the CD was holding 17,37,000 Equity Shares (27.42%) of the Borrower Company. Even during FY 2014-15, CD was holding 7,50,000 Equity Shares of Borrower Company. Further, in the Balance Sheet for FY 2014-15, 2018-19 and 2020-2021, the CD has admitted the Corporate Guarantee as a contingent liability.
- (j) As the Borrower failed to pay the outstanding loan, the FC issued a Demand Notice dated 24.02.2015 to the Guarantors including the CD calling upon them to pay to the FC an amount of Rs.25,99,05,876/- due as on 31.12.2014. However, no response was received from the CD. The Greenko Group in its response dated 10.04.2015 to FC's email dated

09.04.2015 assured the FC to extend their cooperation in recovering their dues from the Borrower.

- (k) The CD filed Suit No. OS/147/2018 titled *Sai Spurthi Power Pvt. Ltd. vs. Bhadragiri Power Pvt. Ltd. & Anr.* before the Hyderabad City Civil Court seeking injunction against invocation of Corporate Guarantee. However, the Hon'ble Court refused to grant any ad-interim injunction.
- (l) The Financial Creditor, issued a notice dated 31.07.2018 u/s 13(2) of SARFAESI Act to the Borrower and the Guarantors including the CD demanding an amount of Rs.43,20,49,144/- due and payable as on 30.06.2018. In response, the Borrower *vide* its letter dated 01.10.2018 admitted its liability to repay the outstanding debt and undertook to commence repayment of dues from April / May, 2019. On failure of the Borrower to pay the outstanding debt, the FC proceeded to issue a notice dated 19.02.2019 u/s 13(4) of SARFAESI Act to the Borrower and the Guarantors.
- (m) It is stated that the Borrower, *vide* its letter dated 21.10.2019, while admitting its liability, proposed a One Time Settlement (OTS) to the FC, thereby offering to pay only the Principal amount which was rejected by the FC *vide* its letter dated 18.03.2020.
- (n) Thereafter, the FC issued another Demand Notice dated 11.05.2020 to the Borrower, with a copy marked to all the Guarantors and later issued a separate notice dt.27.05.2020 to the Guarantors to repay the financial debt. In response, the CD *vide* its letter dated 11.06.2020 denied the validity and subsistence of the Corporate Guarantee on false and frivolous grounds.
- (o) The FC *vide* its letter dated 08.10.2020 duly responded to the letter dated 11.06.2020 dismissing the frivolous objections of the CD. The CD

vide letter dated 23.10.2020, once again making baseless submission which were denied by FC *vide* letter dated 24.12.2020.

- (p) It is stated that *vide* the Deed of Guarantee dated 26.03.2008, the CD has guaranteed to repay the loan amount in case of default on the part of the Financial Creditor in repayment of its debt. Therefore, the CD is in default and is liable to repay the financial debt due to the FC.
- (q) However, no payment has been made either by the Borrower or the CD even after issuance of Demand Notices dated 11.05.2020 or 27.05.2020 till date. Accordingly, as on 31.12.2021, the total financial debt due and payable under the loan granted to Borrower is Rs.71,88,32,068/-, which is payable by the Corporate Debtor. Hence, the Petition.
- (r) In support of its case, the Petitioner *inter alia* filed the following:
- i. *Copy of the sanction letter dated 05.12.2007;*
 - ii. *Copy of Loan Agreement dated 12.03.2008 executed between the Financial Creditor and Borrower;*
 - iii. *Copy of Deed of Guarantee dated 26.03.2008 executed by the Corporate Debtor;*
 - iv. *Copy of Undertaking dated 26.03.2008 for meeting the shortfall in the project by M/s. Sai Spurthi Power Pvt. Ltd.;*
 - v. *Copy of Undertaking dated 26.03.2008 for non-disposal / pledge of shares by M/s. Sai Spurthi Power Pvt. Ltd.;*
 - vi. *Letter of Amendment dated 27.10.2008;*
 - vii. *Letter dated 30.12.2010 of reschedulement of loan and sanction of funding the interest due for the period from June, 2010 to September, 2011.*
 - viii. *Copy of recall notice dated 09 / 13.08.2012;*
 - ix. *Copy of relevant pages of Balance Sheet of the CD for FY 2014-15, 2018-19 and 2020-2021;*
 - x. *Copy of notices dated 31.07.2018 and 19.02.2019 issued under SARFAESI Act, 2002;*
 - xi. *Copy of the demand notice dated 11.05.2020.*

4. Pursuant to the issue of notice, Respondent filed its statement of objections *vide* Diary No.3224 dated 26.07.2022 by *inter alia* contending as under:

- (a) It is submitted that the Notice to Guarantors dated 24.02.2015 was issued by the Petitioner to the Respondent by invoking Clause 21 of the 'claimed' Deed of Guarantee dated 26.03.2008 (hereinafter 'Alleged Corporate Guarantee') and demand for payment of an alleged financial debt of Rs.25,99,05,876/- along with interest was made by Petitioner, thus the limitation starts from 24.02.2015. Therefore, the present Petition ought to have been filed by the Petitioner within 3 years from the date of expiry of stipulated period of 21 days in the said guarantee invocation notice i.e., any time prior to 17.03.2018.
- (b) It is stated that the Petitioner had issued Notice dated 09 / 13.08.2012 to Bhadragiri Power Pvt. Ltd. i.e., the Borrower recalling the entire financial debt of Rs.18,24,69,308/- which was outstanding as on 30.06.2012. Further, in para 8 of the guarantee invocation notice dated 24.02.2015 sent by Petitioner to Respondent, the Petitioner has stated that it had issued a loan recall notice to the Borrower on 09 / 13.08.2012. It was in this context that the Petitioner proceeded to invoke the Alleged Corporate Guarantee *vide* its notice dt.24.02.2015.
- (c) The Respondent received a notice dated 22.10.2014 bearing Ref. No. 221/2445/SHP/2007-IREDA/3787 ('October 2014 Notice'), which averred that Borrower had approached the Petitioner seeking financial assistance to start a 3 MW Power Project, being the Gondli Small Hydro Project on Bhadravathi River in Shimoga Dist, Karnataka and that the Petitioner had sanctioned the loan amount of Rs.1387.50 Lakhs to the Borrower. It further alleged that the Respondent herein had stood as security as a corporate guarantor for the repayment of the aforesaid loan amount.

- (d) There are no documents that are a part of the Respondent's records to approve the execution of the Alleged Corporate Guarantee in favour of the Petitioner, including the audited financial statements. It was only after receipt of October 2014 Notice, did the Respondents disclose in its financial statements as per the accounting practices, and even thereunder, Respondent disputed the existence of the said Guarantee.
- (e) Consequently, Respondent *vide* reply dated 14.11.2014 to the October 2014 Notice denied any liability under the Alleged Corporate Guarantee and categorically explained to the Petitioner that there were no records of Minutes of authorisation of Respondent's Board of Directors nor any approval from its lenders that authorised the same, and thus the said Guarantee is ultra-vires to Articles of Association of the Respondent.
- (f) Despite receiving clear reply, the Petitioner issued Notice to Guarantor dated 24.02.2015, wherein, the Petitioner invoked Alleged Corporate Guarantee against all the Guarantors including the Respondent herein, demanding all to pay an amount of Rs.25,99,05,876/- due from the Borrower as on 31.12.2014 along with interest and other monies.
- (g) Consequent thereto, the Respondent filed a Civil Suit bearing OS No. 147/2018 before the City Civil Court, Hyderabad against the Borrower and Petitioner *inter alia* seeking a permanent injunction restraining the Plaintiff from invoking the Alleged Corporate Guarantee, wherein, the Petitioner in its reply has clearly admitted that it has issued a Notice to the Respondent dt.24.02.2015 for invoking the Corporate Guarantee. The proceedings before it are still pending.
- (h) The Petitioner kept making the same allegations *vide* its Notices dated 08.10.2020 and 24.10.2020, and in response, the Respondent *vide* its letters dated 23.10.2020 and 15.01.2021 reiterated that the Alleged Corporate Guarantee is not legal and valid against the Respondent and that the claim is time-barred.

- (i) Without prejudice to other contentions, as per Clause 3 of the Alleged Corporate Guarantee, the Respondent would be liable to pay the amounts due and payable by the Borrower on demand by the Petitioner. The Hon'ble Apex Court in *Syndicate Bank vs. Channaveerappa Beleri & Ors. (2006) 11 SCC 506* had categorically held that computation of the period of limitation in respect of a guarantor commences from the date the creditor makes a claim against the guarantor which, in the instant case, was 24.02.2015.
- (j) Therefore, a joint reading of Clauses 3 and 21 of the Alleged Corporate Guarantee, observation of the Hon'ble Apex Court, Notice to Guarantor dt.24.02.2015 and consistent stand taken by the Respondent, clearly reveal that the Petition is barred by limitation as it is filed after nearly 7 years from the date of expiry of stipulated period.
- (k) As regards the Board Resolution dated 10.12.2007 of the Respondent placed at Annexure A-4 of the CP, the Respondent reiterated that the same is false and is a forged document. Additionally, the Respondent had availed term loans of Rs.15 Crore each from SBI & SBH, wherein, its terms stipulate that the Respondent shall not without such Bank's permission in writing undertake guarantee obligations on behalf of any other Company. Further, the absence of the Common Seal on the said Deed predicates that the same was not executed by the Respondent. Therefore, it is in violation of Article 85 of the Articles of Association and cannot bind the Respondent. In this regard, it relied upon *Rajendra Nath Dutta & Ors. vs. Shibendra Nath Mukherjee & Ors. (1981) SCC Online Cal 229* of the Hon'ble Calcutta High Court.
- (l) Being the major stakeholder with over 70% of the funds invested, no action was taken by Petitioner inspite of huge delays in implementing the Project. As stated supra, the Petitioner issued Notice dated 09 / 13.08.2012 calling the Borrower to repay the entire financial debt of

Rs.18,24,69,308/- which had fallen due and was outstanding as on 30.06.2012. It is stated that at no stage since the issue of Borrower Facility Recall Notice in 2012, has the Petitioner sought to formally withdraw the said Notice.

(m) Relying on the decision of Hon'ble Apex Court in *IBA Health (I) Pvt. Ltd. vs. Info-Drive Systems Sdn. Bhd. (2010) 10 SCC 533*, it is stated that pending adjudication of the Civil Suit which challenges the validity and subsistence of the said Deed, the adjudication of Petition would be premature because the occurrence of default as envisaged u/s 7(1) of the Code does not arise at this stage.

5. Subsequently, the Petitioner filed Rejoinder *vide* Diary No.4482 dated 19.10.2022, by *inter alia* further stating as under:

(a) The Principal Borrower defaulted in repayment of loan and was declared as an NPA. Since the debt was duly acknowledged by the Principal Debtor as well as CD in their respective Balance Sheets for the FY 2020-21, it cannot be contended that the debt is barred by limitation.

(b) The Petitioner by relying on the decision of the Hon'ble Apex Court in *Suo Moto W.P. (C) No.3/2020* and the said acknowledgements, stated that the Petition is within the limitation period. Once the debt has been acknowledged by the Principal Debtor it not only extends the period of limitation to file a petition against the Principal Debtor but also against the Guarantor.

(c) The Board of Directors of the CD in its meeting held on 10.12.2007 duly passed a resolution guaranteeing the repayment of the loan advanced by the FC to Principal Borrower and two Directors, namely, Shri M. Somasekhara Reddy and Shri D. Surendranath Reddy duly executed a registered Deed of Guarantee dated 26.03.2008 in favour of the Financial Creditor. In its letter dated 14.11.2014 the Respondent made

a false statement that they were not related to the Borrower whereas they were holding equity shares of the Principal Borrower as stated in the Petition. Thus, the Deed of Guarantee is valid, legal and binding on the CD.

- (d) In terms of Section 128 of the Contract Act, the liability of a surety / guarantor is co-extensive with that of the Principal Borrower and hence, the guarantor's liability does not end till the time the same is discharged either by the Principal Borrower or by Guarantor.
 - (e) In the financial statements of the CD for the FY 2014-15, the Corporate Guarantee in question has been mentioned under the head 'Contingent Liabilities' and states that the claim under this Guarantee was being negotiated by the Company with 'the Promoters / erstwhile seller-shareholders'.
 - (f) Merely because the Financial Creditor did not initiate any action against the CD in 2015 doesn't make the Petition time barred as the Principal Borrower in this case has acknowledged the debt even till the year 2021 in its Balance Sheets. Further, the judgment of *Syndicate Bank vs. Channaveerappa Beleri & Ors.*, relied by the CD is inapplicable to the facts of present case.
- 6.** The Petitioner filed brief note on limitation *vide* Diary No.375 dated 19.01.2023 in which it was stated that the date of default in respect of CD shall be 31.03.2012 i.e., when the loan account was declared as NPA by the Financial Creditor; and the debt is not time barred as there are acknowledgements by the CD as well as Borrower in their respective Balance Sheets.
- 7.** It was reiterated by the Petitioner that in accordance with Section 128 of the Indian Contract Act, the liability of the Guarantor was co-extensive with that of the Principal Borrower. When the loan was recalled from the

Principal Borrower after declaration as NPA on 31.03.2012, the recall notice was also sent to the Guarantor being the Corporate Debtor here, and the Corporate Debtor *vide* its letter dated 14.11.2014 raised some frivolous objections regarding the existence of the guarantee. It is further stated that notice was sent by the Financial Creditor on 24.02.2015 to the Corporate Debtor, thereby invoking the Corporate Guarantee and demanding the payment of the outstanding amount. Moreover, it is contended that the Date of Default cannot be different for the Corporate Debtor being the Corporate Guarantor than that of the Principal Borrower.

- 8.** The Financial Creditor has placed reliance on the Notes in the Balance Sheet of the Corporate Debtor, specifically citing the Balance Sheets of the FYs 2014-15, 2018-19 & 2020-21, which have been filed with the Application. Further, it is stated that the Corporate Debtor has also acknowledged it in the Balance Sheet for the FY 2016-17 enclosed with the Suit filed in the year 2018 before the Civil Court, Hyderabad in which the existence of the Corporate Guarantee was admitted. Moreover, it is stated this Adjudicating Authority has already admitted the CIRP against the Principal Borrower *vide* order dated 02.12.2022; and the Principal Borrower has duly acknowledged the debt in all the Balance Sheets from FY 2011-12 to FY 2020-21 and also by different letters for acknowledgement. Accordingly, it is contended that the limitation cannot be different for the Corporate Guarantor than from the Principal Borrower for which reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of Laxmi Pat Surana (*supra*).
- 9.** It was further stated that the decision of Syndicate Bank (*supra*) relied by the Respondent is not applicable as the said judgment was passed in a matter where a Suit for recovery was filed by the Appellant therein.
- 10.** Pursuant to order dated 14.12.2022, the Respondent filed brief notes on limitation *vide* Diary No.402 dated 20.01.2023 by *inter alia* further contending as under:

- (a) Clause 21 of the alleged Deed of Guarantee dated 26.03.2008 provides the manner in which a demand notice for payment is to be issued. It specifically provides that 'no period of limitation shall commence to run in favour of the Guarantor until after demand for payment in writing shall have been made or given'. Therefore, the period of limitation in respect of any claim made by the Petitioner, shall commence upon the issuance of a demand notice under Clause 21 of the said Deed.
- (b) Accordingly, *vide* notice dt.24.02.2015, the Petitioner made a demand for payment of an amount of Rs.25,99,05,876/- within the period stipulated in Sec. 271(2) of the Companies Act, 2013 (namely, within 21 days). Therefore, in terms of Clauses 3 and 21 of the alleged Deed of Guarantee, the limitation period in respect of the Petitioner's claim began to run upon expiry of this 21-day period. Therefore, the repayment obligation, if any, arose on 15.03.2015. Therefore, for the purposes of limitation, the right to apply accrued on 15.03.2015, and thus CP is ought to have been filed on or before 15.03.2018, however, it is filed only on 24.02.2022, which is 4 years from the date on which the limitation period expired.
- (c) An argument of co-extensive nature of a guarantee is valid only till its invocation. Once a guarantee is invoked, the obligation to pay arises. Once the obligation arises, the Creditor must sue for recovery of the money under the guarantee within the time prescribed. Further, once the guarantee is invoked, the admissions if at all any by the Borrower is of no consequence in so far as the guarantor is concerned.
- (d) The Petitioner has sought to incorrectly contend that the petition is within time, since the guarantee is apparently a 'continuing guarantee'. It is well established that there is 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.

(e) A perusal of the explanatory report in the CD's Balance Sheets for the FYs 2018-19 and 2020-21, will reveal that no such acknowledgement is made of any purported liability to the Petitioner. To the contrary, the Respondent has categorically denied the existence of any such liability.

(f) Respondent has relied upon the following decisions:

- i. *B.K. Gupta Educational Services Pvt. Ltd. v. Parag Gupta and Associates*, (2019) 11 SCC 633;
- ii. *Syndicate Bank v. Chnnaveerappa Beleri & Ors.*, (2006) 11 SCC 506;
- iii. *Asset Reconstruction Company (India) Ltd. v. Bishal Jaiswal & Anr.*, (2021) 6 SCC 366;
- iv. *Vidarbha Industries Power Ltd. v. Axis Bank Ltd.*, (2022) 8 SCC 352;
- v. *Mango Meadows Agricultural Pleasure Land (P) Ltd. v. Union of India*, (2022) SCC Online Ker 4451.

11. The Petitioner *vide* Diary No.1086 dated 24.02.2023, has relied upon the following decisions:

- i. *Asset Reconstruction Company (India) Ltd. v. Bishal Jaiswal & Anr.*, (2021) 6 SCC 366;
- ii. *Babumanoharan Jai Kumar Christhuran v. Indian Bank & Ors.* (MANU/NL/0216/2022);
- iii. *Laxmi Pat Surana v. Union Bank of India & Anr.*, (2021) 8 SCC 481;
- iv. *Suo Moto Writ Petition (C) No.3 of 2020*;
- v. *Sabbas Winifred Joseph v. IDBI Bank Ltd. & Ors.* (MANU/NL/0078/2022);
- vi. *State Bank of India v. Athena Energy*, (2020) SCC Online NCLAT 774
- vii. *Vishnu Kumar Agarwal v. Piramal Enterprises Ltd.* (MANU/NL/0003/2019);
- viii. *Govindanaik G. Kalaghatigi v. West Patent Press Co. Ltd. & Anr.* (ILR 1979 KAR 1401);
- ix. *Charan Singh & Ors. v. State of U.P.*, (2004) 4 SCC 205;

x. *Indian Renewable Energy Development Agency Ltd. v. Bhadragiri Power Pvt. Ltd. in CP (IB) No.47/BB/2022 dt.02.12.2022.*

12. Pursuant to order dated 22.05.2023, the Petitioner filed clarification Memo *vide* Diary No.2872 dated 02.06.2023, by *inter alia* stating as under:

(a) As per the Laxmi Pat Surana (*supra*), the date of NPA can be reckoned as the date of default. In the present case, the date of NPA of Borrower is 31.03.2012 and therefore, in Part-IV of Form-1 the same date of default is mentioned. Since the liability of guarantor is co-extensive to that of the borrower, as contained u/s 128 of Indian Contract Act, 1872, even the date when the borrower defaulted on its repayment obligation i.e., 31.12.2011, can be said to be the date of default in terms of IBC, and therefore, the said date can also be considered as date of default by the Corporate Debtor.

(b) It is well settled that acknowledgement of debt by the borrower is as good as acknowledgement of debt by the guarantor. It is further stated that this Tribunal has already initiated CIRP against the Borrower i.e., M/s. Bhadragiri Power Pvt. Ltd. *vide* order dated 02.12.2022 finding the 'debt' within the period of limitation.

13. Pursuant to order dated 23.05.2023, the Respondent filed written synopsis *vide* Diary No.2859 dated 01.06.2023, by *inter alia* contending as under:

(a) The loan taken by the Borrower is alleged to have been guaranteed by the Respondent by way of an alleged Deed of Guarantee. Importantly, the Balance Sheet of the Respondent for FY 2008-09 does not mention this alleged Guarantee. Between March-April, 2010, Greenko Energies Pvt. Ltd. acquired the shareholding of Respondent from the Bhadragiri Group.

(b) The Petitioner recalled the loan from the Borrower by way of a loan recall notice dated 09.08.2012, and also claims to have invoked the

alleged guarantee against the Respondent simultaneously. Thus, the alleged corporate guarantee that is subject matter of these proceedings was invoked in August 2012. When the Borrower requested Petitioner between 2012-13 to withdraw its recall notice, the same was refused by Petitioner *vide* letter dated 02.02.2013.

- (c) Subsequently, in June 2014, cheques issued by Borrower to Petitioner bounced. At this stage, the Petitioner notified the Borrower that if it failed to pay the dues to the Petitioner, it would also invoke the alleged Deed. The Petitioner once again notified the Borrower of its default in October 2014, marking a copy of this letter to Greenko Group and not the Respondent herein.
- (d) The Respondent was shocked to receive this letter, and upon receiving the letter, issued a letter dated 14.11.2014 to the Petitioner denying the alleged Deed and any liability thereunder. At this stage, Petitioner issued a notice dt.24.02.2015. This notice disregards the 1st guarantee invocation notice in 2012, which is the actual starting point of limitation. Once a guarantee is invoked the right to sue arises immediately.
- (e) The Respondent filed O.S. No.147/2018 before the Hon'ble City Civil Court at Hyderabad seeking a declaration that the alleged deed of guarantee 26.03.2008 is null and void and other reliefs, wherein, the Petitioner and Borrower are Parties to the Suit, which was filed in 2018, well before the present proceedings were initiated. Therefore, it is clear that the dispute raised by the Respondent on the validity of the alleged Deed is genuine. The said Suit is still pending.
- (f) The Petitioner and Respondent had correspondence between 2019 and 2021, in which the Respondent at all times denied the liability. Despite the same, Petitioner *vide* notice dt.27.05.2020 once again purported to invoke the alleged Deed of Guarantee. In the said Suit, the Petitioner categorically admitted that it had invoked the alleged Deed against the

Respondent herein, by a notice dt.24.02.2015. Petitioner in its written statement admitted that it recalled the loan granted to the Borrower, *vide* notice dated 13.08.2012. Therefore, it is clear that the second purported invocation (in 2020) of the alleged Deed is nothing but an attempt by Petitioner to overcome the fact that its claim is barred by limitation. Law does not permit of repeated invocations of guarantees.

- (g) The demand having been made on 24.02.2015 with payment to be made within 21 days, the period of limitation starts from 17.03.2015 and ends on 17.03.2018. As stated above, the alleged Deed is an 'on-demand' guarantee. In the present case, since the alleged Deed being an 'on-demand guarantee' had been previously invoked on 2 occasions by the Petitioner in 2012 & 2015, the present CP is barred by limitation.
- (h) In *Laxmi Pat Surana (supra)*, the guarantor had admitted liability on 08.12.2018 and Petition had been filed on 13.02.2019, thus bringing the case within limitation. In the present case, the demand was made on 24.02.2015, there is no admission of liability by the Respondent at any time and therefore the claim is barred by limitation.
- (i) In the Balance Sheet for FY 2018-19 the Respondent clearly stated that *'there is an ongoing dispute between the company and the bank on the amount of guarantee the company is obligation, hence we are unable to comment on the present obligation of the company until respective guarantees till the matter reaches a finality'*. The same reveal that the Respondent denies its obligation to the Petitioner and therefore, the same does not amount to acknowledgement of debt and the provisions of Sec.18 of Limitation Act are not applicable to present case. It is also stated that the judgments relied upon by the Petitioner are not relevant to the facts of the instant case. Further, on application of the principle laid down by the Hon'ble NCLAT in *Vishnu Kumar Agarwal v. Piramal*

Enterprises Ltd., the present CP which is for the same set of claim and default is liable to be dismissed.

- 14.** Heard Shri S.S. Naganand, learned Sr. Counsel appearing on behalf of the Petitioner and Shri Dhyan Chinnappa, learned Sr. Counsel appearing on behalf of the Respondent and perused the pleadings on record.
- 15.** It is seen that the instant Petition has been filed by the Financial Creditor M/s. Indian Renewable Energy Development Agency Limited u/s 7 of the Code against the Corporate Debtor herein being the Corporate Guarantor of the term loan provided to M/s. Bhadrhiri Power Pvt. Ltd. by the Financial Creditor. As per the Loan Agreement dt.12.03.2008 entered into between M/s. Bhadrhiri Power Pvt. Ltd. and the Financial Creditor herein, the total loan amount as per Clause 2.1 of the Agreement was Rs.1387.50 Lakhs.
- 16.** It is stated that the Corporate Debtor executed the, Deed of Guarantee dated 26.03.2008 for the aforesaid Loan, along with Undertaking dated 26.03.2008 for meeting the shortfall in the Project by Corporate Debtor. The Deed of Guarantee dated 26.03.2008, which is placed at page 220 of the Petition, was entered into between the Corporate Debtor and Financial Creditor.
- 17.** It is stated by the Petitioner that the Borrower failed to pay the instalment due on 31.03.2010. On reschedulement of the loan, the Borrower again defaulted in repayment of its instalment due and payable on 31.12.2011. Therefore, the Financial Creditor declared the account of the Borrower as a Non-Performing Asset (NPA) on 31.03.2012. Hence, a recall notice was issued by the Financial Creditor on 09 / 13.08.2012, which was also addressed to the Corporate Debtor herein. The Financial Creditor *vide* its letter dated 13.06.2014 addressed to the CD, and to the Borrower *vide* letter dated 22.10.2014 demanded the payment of outstanding amount.

The CD *vide* its letter dated 14.11.2014 informed the FC by denying the existence of the purported Corporate Guarantee.

- 18.** Shri S.S. Naganand, Ld. Sr. Counsel appearing for the Petitioner has drawn our attention to certain Clauses of the Deed of Guarantee dt.26.03.2008 in support of its case and brought to the notice of this Bench that in a separate Petition filed by the Petitioner herein against the Principal Borrower i.e. M/s. Bhadragiri Power Pvt. Ltd., this Adjudicating Authority *vide* order dated 02.12.2022 in CP (IB) No.47/BB/2022, has initiated the Corporate Insolvency Resolution Process u/s 7 of the Code against the Principal Borrower. He further stated that so long as the debt against the Principal Borrower is due, the debt against the Guarantor is also due and in this regard he relied upon the decision rendered by the Hon'ble Apex Court in *Laxmi Pat Surana v. Union Bank of India & Anr.* He also submitted that the Corporate Debtor in respective Balance Sheets for the Financial Years 2014-15, 2018-19 and 2020-21 has acknowledged the debt. It is stated that the Respondent's reliance on *Syndicate Bank vs. Channaveerappa Beleri & Ors.*, is a judgment rendered by two Judges and therein no reference to Section 18 of the Limitation Act, 1963 was made. On the other hand, decision in *Laxmi Pat Surana* (supra) is given by Three Judges wherein reference to Section 18 of the Limitation Act was also discussed.
- 19.** On the contrary, Shri Dhyan Chinnappa, Ld. Sr. Counsel appearing for the Respondent contended that the instant case is liable to be dismissed as the debt in question is time barred and the Petition is filed way beyond the period of limitation besides disputing the validity of the alleged Deed of Guarantee dated 26.03.2008. He submitted that the Corporate Debtor has filed a Civil Suit in O.S. No.147 of 2018 before the Hon'ble City Civil Court at Hyderabad seeking a declaration that the alleged Deed of Guarantee dt.26.03.2008 is null and void. It is stated that the Petitioner herein issued the notice dated 24.02.2015 demanding for payment of an amount of

Rs.25,99,05,876/- within the period stipulated in Section 271(2) of the Companies Act, 2013 i.e., within 21 days from the date of service of the notice on Respondent. He further stated that the Petitioner sent this notice to the Respondent by invoking Clause 21 of the alleged Deed. Hence, once a guarantee is invoked the right to sue arises immediately thereafter. Further, in the instant case the guarantee is a '**guarantee on-demand**' as per Clause 3 of the alleged Deed of Guarantee. Therefore, the date of limitation for filing this Petition began on 17.03.2015 (21 days from the date of service of the notice on the Respondent) and it ended on 16.03.2018.

20. In this connection, it will be relevant to discuss the recent judgments on the issue of starting date for the limitation in case of a Corporate Guarantor. Following recent judgments of the Hon'ble NCLAT, Principal Bench, New Delhi, are relevant to be relied upon here:

(a) *Pooja Ramesh Singh v. State Bank of India & Ors., dated 28.04.2023, (2023) SCC OnLine NCLAT 193;*

(b) *J.C. Flowers Asset Reconstruction Pvt. Ltd. v. Deserve Exim Pvt. Ltd., dated 03.05.2023, (2023) ibclaw.in 378 NCLAT;*

21. In these Judgments, emphasis was placed on the terms of the Deed of Guarantee and whether there was a specific condition that the Guarantee will be invoked '**on demand**' made by the Financial Creditor. Therefore, the relevant question to be looked into is whether the Deed of Guarantee is a guarantee on demand and the limitation for the Guarantor shall ensue only when the demand was made on the Guarantor invoking such Guarantee. The other relevant issue which was examined by the Hon'ble NCLAT is that whether in such a case the period of limitation for both the Principal Borrower and the Corporate Guarantor shall be the same for the purpose of filing of an Application before the Adjudicating Authority.

- 22.** After looking into the relevant Clauses in the Deed of Guarantee, the NCLAT examined the definitions of 'debt' and 'default' and stated that default is committed when the debt has become 'due and payable' and is 'not paid' by the debtor. Relying on the judgment of the Hon'ble Supreme Court in Syndicate Bank (supra) and also extensively discussing the ratio of the judgment in the Laxmi Pat Surana (supra) along with the relevant Clauses of the Deed of Guarantee, it was held that the Guarantors' liability depends on the terms of its contract. There can be default by the Principal Borrower and the Guarantor on the same date; or the date of default for both may be different depending on the terms of the contract of the Guarantee. Since the default occurs only when the **debt is payable and is not paid** by the Corporate Debtor, the Hon'ble NCLAT decided that in case of '**guarantee on demand**' clause in the Deed of Guarantee, default shall arise on the part of the Guarantor only when the invocation of the Guarantee is made, and therefore the limitation of the Guarantor shall ensue only when such a demand is made and the Guarantee was invoked.
- 23.** From the pleadings on record, it is seen that the Deed of Guarantee dated 26.03.2008 has been executed by the Corporate Debtor in favour of the Financial Creditor-IREDA. It is apt to refer Clause 3 of the said Deed of Guarantee, which is reproduced hereunder:

*"(3) In the event of any default on the part of the Borrower in payment / repayment of any of the monies referred to above, or in the event of any default on the part of the Borrower to comply with or perform any of the terms, conditions and covenants contained in the Agreement which constitute an event of default in terms thereof, **the Guarantor shall upon demand by IREDA** forthwith pay to IREDA without demur all the amounts which shall become due and payable by the Borrower under the Agreement."*

- 24.** Further, Clause 21 of the said Deed of Guarantee is also reproduced below:

*"(21) Any demand for payment or notice under this Guarantee shall be sufficiently given if sent by post to or left at the last known address of the Guarantor or its representatives, as the case may be, such demand or notice is to be made or given, and shall be deemed to have reached the addressee in the course of post, if given by post, and **no period of limitation shall commence to run in favour of the Guarantor until after demand for payment in writing shall have been made** or given as aforesaid, and in proving such notice when sent by post it shall be sufficiently proved if the envelope containing the notice was posted and a certificate by any of the responsible officers of IREDA that to the best of his knowledge and belief, the envelope containing the said notice was so posted shall be conclusive as against the Guarantor, even though it was returned unserved on account of refusal of the Guarantor or otherwise."*

- 25.** From the above, it is clear that the liability to pay against the Corporate Guarantor gets triggered **only upon demand made by the Financial Creditor**. As stated supra, the Financial Creditor has issued notice dated 24.02.2015 on the Corporate Debtor demanding to pay an amount of Rs.25,99,05,876/- demanding to pay the amount within 21 days. Hence, the three years period of limitation ended on 16.03.2018. However, this Petition is filed on 04.03.2022 which is much beyond the limitation period. Accordingly, the application is not maintainable on the ground of limitation.
- 26.** With regard to the other argument advanced by the Petitioner that the Corporate Debtor has acknowledged the said debt in its respective Balance Sheets of Financial Years 2014-15, 2018-19 and 2020-21; and thus the limitation is extended due to consistent acknowledgements, it is apt to reproduce hereunder the relevant part of the Auditor's Report of the Corporate Debtor for the Financial Year ending 31.03.2015:

Disclosure of additional balance sheet notes explanatory [Text Block]

Contingent Liabilities:

(Amount in Rupees)

	As at March 31,2015	As at March 31,2014
Corporate Guarantees for credit facilities availed by Sagar Power (Neerukatte) Private Limited *	70,200,000	70,200,000
Corporate Guarantee for credit facilities availed by Bhadragiri Power Private Limited #	120,000,000	120,000,000

During 2013-14, the company received a communication from IREDA informing that the company had given a corporate guarantee of Rs. 120,000,000 for the credit facilities availed by M/s. Bhadragiri Power Private Limited. On verification of records and discussions with the erstwhile Managing Director by the present Management, the company came to an opinion that the said Corporate Guarantee was not executed on behalf of the company and is not duly authorized and hence the company is not responsible for any liability under those documents and

consequent claims, if any. This is a matter disputed by the Management which needs to be finally settled. The promoters/erstwhile seller-shareholders are responsible and obligated to the present shareholders in the event of eventual claim. The matter is under active negotiation for settlement.

Also, in the Auditor's Report of the Corporate Debtor for the Financial Year ending 31.03.2019, it is mentioned as under:

b. Note---- 27 to the Ind AS financial statements which describes the contingent obligations pertaining to corporate guarantees amounting to Rs. 12,00,00,000 executed for credit facilities availed by Bhadragiri Power Private Limited, there is an ongoing dispute between the company and IREDA. In the opinion of the company, it is not obligated to IREDA for the corporate guarantee executed by the erstwhile management of the company. The matter is under active negotiation for settlement. Our opinion is not qualified in respect of this matter.

Further, in the Auditor's Report of the Corporate Debtor for the Financial Year ending 31.03.2021, it is mentioned as under:

Note 27 to the Ind AS financial statements which describes the contingent obligations pertaining to corporate guarantees amounting to Rs. 12,00,00,000 executed for credit facilities availed by Bhadragiri Power Private Limited, there is an ongoing dispute between the company and IREDA. In the opinion of the company, it is not obligated to IREDA for the corporate guarantee executed by the erstwhile management of the company. The matter is under active negotiation for settlement. Our opinion is not qualified in respect of this matter.

Further, the relevant portion of the disclosure in the audited Financial Statements of the CD for the F.Y. 2016-17 is extracted hereunder:

Sai Spurthi Power Private Limited

Notes annexed to and forming part of the financial statements

Note 25. Contingent Liabilities

(Amount in Rupees)

	As at March 31,2017	As at March 31,2016
Corporate Guarantees for credit facilities availed by Sagar Power (Neerukatte) Private Limited *	70,200,000	70,200,000
Corporate Guarantee for credit facilities availed by Bhadragiri Power Private Limited #	120,000,000	120,000,000

During 2013-14, the company received a communication from IREDA informing that the company had given a corporate guarantee of Rs. 120,000,000 for the credit facilities availed by M/s. Bhadragiri Power Private Limited. On verification of records and discussions with the erstwhile Managing Director by the present Management, the company came to an opinion that the said Corporate Guarantee was not executed on behalf of the company and is not duly authorized and hence the company is not responsible for any liability under those documents and consequent claims, if any. This is a matter disputed by the Management which needs to be finally settled. The promoters/erstwhile seller-shareholders are responsible and obligated to the present shareholders in the event of eventual claim. ~~The matter~~ is under active negotiation for settlement.

- 27.** From the above it is observed that the Corporate Debtor has stated that there is an ongoing dispute between the Company and the IREDA, and the Corporate Guarantee is mentioned under the head 'Contingent Liabilities' in its Balance Sheet. The Petitioner argued that since the debt has been mentioned in Balance Sheets of the Corporate Debtor, the same amounts to acknowledgement of debt pursuant to Laxmi Pat Surana (supra) and thus attracted the provisions of Section 18 of the Limitation Act, 1963.
- 28.** In this regard, we are of the view that the Corporate Debtor has rightly relied upon the decision of the Hon'ble Supreme Court in the case of *Asset Reconstruction Company (India) Ltd. v. Bishal Jaiswal and Anr.*, wherein it was held that *it would depend on the facts of each case as to whether an entry made in a balance sheet qua any particular creditor is unequivocal or has been entered into with caveats, which then has to be examined on a case by case basis to establish whether an acknowledgement of liability has, in fact, been made, thereby extending limitation under Section 18 of the Limitation Act.*
- 29.** Therefore, considering the aforesaid decision of the Hon'ble Supreme Court and Hon'ble NCLAT order in *Asset Reconstruction Company (India) Ltd. v. Uniworth Textiles Ltd., dated 10.07.2023, (2023) ibclaw.in 443 NCLAT*, it is to be seen that whether the entry made in Balance Sheet is unequivocal or having caveats. In the present case, it does have caveats when the Balance Sheets of the Corporate Debtor for the Financial Years 2014-15, 2016-17, 2018-19 and 2020-21 is read along with the Disclosure in

Auditor's Report for the aforesaid Financial Years. Moreover, a Suit has also been filed in the Civil Court, Hyderabad in the year 2018 challenging the existence of a valid Corporate Guarantee, which is still pending. Since the above referred caveats have been incorporated by the Corporate Debtor in the Notes included in the Balance Sheets, we are of the view that the same do not amount to acknowledgement of liability, and does not enable extension of the Limitation period.

- 30.** In view of the foregoing discussions, we are of the considered opinion that the instant Company Petition bearing **CP (IB) No.60/BB/2022 is liable to be dismissed on the issue of limitation. Accordingly, the instant Company Petition is dismissed.** However, this Order will not come in the way of the Petitioner to pursue other legal remedies under any other Law, if so advised.

Sd/-
MANOJ KUMAR DUBEY
MEMBER (TECHNICAL)

Sd/-
T. KRISHNAVALLI
MEMBER (JUDICIAL)

jsr