

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No. 551/MB-IV/2021

Under Section 7 of the I&B Code, 2016

In the matter of:

Mudhit Madanlal Gupta

...Financial Creditor/Financial Creditor

V/s

**Supreme Construction and Developers
Private Limited**

[CIN: U45200MH2005PTC157311]

...Corporate Debtor/Respondent

Order Dated: 16.05.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. J.P. Sen a/w Ms. Minal Chandnani, Mr. Kunal Vaishnav and Ms. Tanvi Mehta, Advocates.

For the Respondent(s) : Mr. Akshay Patil a/w Ms. Devika Madekar, Mr. Rickin Dang i/b Ganesh & Co., Advocates.

Per - Prabhat Kumar, Member Technical

1. This is an Application being C.P. (IB) No. 551/MB/C-IV/2021 filed on 31.05.2021 by Mudhit Madanlal Gupta, the Financial Creditor/Financial

Creditor, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Supreme Construction and Developers Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

2. The Financial Creditor was one of the Promoters and partners of Emgee Enclave LLP (AAG-9873), a Limited Liability Partnership firm incorporated on 22.07.2016 and registered at Registrar of Companies, Mumbai (hereinafter referred to as "Borrower"). The Financial Creditor had extended financial assistance to the Borrower in the form of unsecured loan carrying interest @18% per annum for the purpose of improving the financial health of the Borrower and boost its economic prospects.

2.1. The said Borrower owed to the Financial Creditor a sum of Rs.6,95,23,602/- including Interest of Rs.97,48,918/- till 31.03.2018.

2.2. The Financial Creditor submits that on 02.04.2018, the Financial Creditor retired from the Corporate Debtor on terms and conditions contained in Supplementary deed of Retirement from and Admission to LLP dated 02.04.2018 recorded that the said Borrower is indebted to pay to the Financial Creditor an amount of Rs. 6,95,23,602/- (Six Crores Ninety-Five Lakhs Twenty-Three Thousand Six Hundred and Two Only) towards repayment of loan advanced by the Financial Creditor to the Borrower till 31.03.2018.

2.3. At the time of retirement of the Financial Creditor from the said Borrower, the said Borrower and the Corporate Debtor, had agreed, confirmed and acknowledged that the Financial Creditor is entitled to receive a sum of INR 6,95,23,602/- Indian Rupees Six Crore Ninety-Five Lakhs Twenty- Three Thousand Six Hundred and Two only) from the said Borrower under the Loan cum Guarantee

Agreement dated 02.04.2018, in which it was agreed that in the event of Borrower defaulting to pay the same, the Corporate Debtor shall repay the loan balance to the lender. The Guarantor i.e. the Corporate Debtor, under the said agreement, agreed to jointly and severally, on demand, make good the same to the lender without any dispute, delay or demur as per the Clause 3(a) of the said Agreement.

- 2.4. As per clause 3 (c) of the said agreement, Corporate Debtor has undertaken to make the payment of sums due and payable under the guarantee when demanded by Financial Creditor, notwithstanding that a dispute is pending between Financial Creditor and the Borrower in respect of any provision of said Agreement or any other related or connected document.
- 2.5. As per Clause 3 (d) of the said agreement, the Guarantor extended a continuing guarantee that shall have effect till such time as the Borrower repays the loan balance in full together with interest, overdue interest, costs, charges and all other monies that may from time to time become due and payable to the Lender i.e. the Financial Creditor.
- 2.6. After execution of the said agreement, in compliance of Clause 2(a) of the said agreement, the Borrower repaid to the Financial Creditor a sum of Rs.50,00,000/- (Rupees Fifty Lakhs only) on 30.05.2018 and the Borrower further repaid a further sum of Rs.25,00,000/- (Rupees Thirty-Five Lakhs only) on 13th July 2018 towards the second instalment. The Borrower committed default in making payment of the balance amount of Rs.6,20,23,602/- (Rupees Six Crore Twenty Lakhs Twenty-Three Thousand Six Hundred and Two only), within time stipulated in the said agreement, i.e., on or before 02.07.2019.

- 2.7. The Financial Creditor vide his notice served through email dated 16.10.2020, demanding the outstanding amount and thereby invoking the guarantee and calling upon the Corporate Debtor to pay to the Financial Creditor the balance sum of Rs.6,20,23,602/- (Rupees Six Crore Twenty Lakhs Twenty-Three Thousand Six Hundred and Two only) for a default committed by the Borrower on 02.07.2019 under the said agreement.
- 2.8. The Financial Creditor sent email dated 19.11.2020, to the Corporate Debtor, informing it that he is in process of initiating corporate insolvency process against the Corporate Debtor.
- 2.9. The Financial Creditor issued final Notice dated 01.04.2021 to the Corporate Debtor demanding it to pay the debt amount with interest thereon within 7 days from date of receipt hereof.
3. The Corporate Debtor has in its reply filed on 17.11.2021, has raised an issue as to the maintainability of the said petition and further states that not only was the claim of the Financial Creditor disputed, but the Financial Creditor has also breached the terms and conditions of the Supplementary Deed of Retirement from and Admission to the Limited Liability Partnership dated 02.04.2018 and the undated Supplementary Deed of Retirement from and Admission to the Limited Liability Partnership, for which dispute was raised by the Corporate Debtor in its letters dated 11.12.2020 and 15.04.2021.
 - 3.1. The Corporate Debtor states that on 18th January 2017, a Memorandum of Understanding was executed between the Corporate Debtor and the Financial Creditor, through its LLP, whereby the Parties agreed and decided to jointly develop a plot of land being all that piece and parcel of land bearing survey no357A (part), Corresponding CTS No128/A3 admeasuring 4 acres 24.66 Gunthas situate, lying and being at village Chembur, Taluka Kuria,

within the limits of Greater Mumbai and in the registration Sub-District and District of Mumbai City and Mumbai Suburban by constructing a multi-storied residential and / or commercial buildings on the terms and conditions more particularly stated therein wherein it was agreed between the parties that they shall execute a Joint Development Agreement within 60 days from the date of the said MOU subject to satisfaction of all queries that may be raised by the Applicant with respect to title, permissions, feasibility etc. Subsequently on 02.04.2017, a Deed of Joint Venture was executed by and between the parties whereby parties agreed to jointly developing the abovementioned plot of land on the terms and conditions more particularly stated therein.

- 3.2. The Corporate Debtor states that in or around December 2017, the Financial Creditor approached the Corporate Debtor and informed them that he was not in a position to continue with the development and was desirous of seeking an exit as he had failed to fulfil his obligations and commitments under the said Deed. He further requested that Mr. Lalit Kumar Shyaam and Ms. Kajol Lalit Tekchandani be inducted as the new Designated Partners who will take over and complete the said Project in accordance with the terms of the said deed and that after they are inducted in the firm, the Financial Creditor will retire from the firm and as a result thereof, on 15.01.2018, vide a Supplementary Deed of Admission of Partner , Mr. Lalit Kumar Shyaam was inducted as the Designated Partner, for a lumpsum consideration of Rs.80,000/- towards 80% shareholding in the said deed. Subsequently, on 02.04.2018, a Supplementary Deed of Retirement and Admission to LLP was also executed whereby Ms. Namrata Malu and the Financial Creditor ("Erstwhile Partners" retired as Designated Partners w.e.f.

02.04.2018 by mutual consent and Kajol Lalit Tekchandani was admitted as a partner and the Financial Creditor and Ms. Namrata Malu were paid a purchase price of Rs.10,000/- each towards their respective shares after valuation of the accounts of the firm.

- 3.3. The Corporate Debtor states that the Firm owed a sum of Rs.6,95,23,602/- (Rupees Six Crores Ninety Five Lakhs Twenty Three Thousand Six Hundred and Two Only) to the Financial Creditor and in view thereof, various documents were executed between the parties viz. a Loan cum Guarantee Agreement, undated Supplementary Deed of Retirement from and Admission to the LLP Agreement, Escrow Agreement dated 02.04.2018. The Financial Creditor requested the Corporate Debtor to be a party to the Loan cum Guarantee Agreement and assured them that it was being executed only for the purposes of documentation and the true and correct understanding between the Applicant and Mr. Lalit Kumar Shyaam and Ms. Kajol Lalit Tekchandani was that in the event they fail to repay the aforementioned amount, then the Financial Creditor would be reinstated as a Partner of the Firm along with Ms. Namarata Malu, and Mr. Lalit Kumar Shyaam and Ms. Kajol Lalit Tekchandani would be forced to retire as Partners and transfer their shareholding to the Financial Creditor and Ms. Namarata Malu.
- 3.4. The Corporate Debtor further states that the Financial Creditor had sought release of the escrow documents from the Escrow Agent by its email dated 05.10.2020, and had exercised its rights under the Supplemental Deed to be reinstated as a partner of the Firm and the same has been conveniently suppressed by the Financial Creditor. The Corporate Debtor states that by doing so, the Financial Creditor foreclosed himself from seeking recovery of the balance loan amount under the terms of the Loan Agreement or otherwise and that the

only right/remedy available to the Financial Creditor is to enforce the said Undated Supplementary Deed of Retirement from and Admission to the LLP, i.e., to be reinstated as a Partner in Emgee Enclave LLP ("Firm") along with Ms. Namarata Malu, while Mr. Lalit Kumar and Ms. Kajol Lalit ("New Partners") would be forced to retire as Partners and transfer their shareholding to the Financial Creditor and further submits that the Financial Creditor has already exercised this remedy/right by addressing the email to the Escrow Agent calling upon him to handover the Escrow Property. In view thereof, the Financial Creditor is now precluded by his actions and conduct from now seeking to enforce any such purported liability of the Corporate Debtor as the same stood satisfied and extinguished already. Therefore, the question of the Corporate Debtor being liable to make payment of any alleged amount of Rs. 7,17,72,520/- (Rupees Seven Crores Seventeen Lakhs Seventy Thousand Five Hundred and Twenty Only) or any other amount does not arise.

- 3.5. The Corporate Debtor states that on 03.06.2021, the Corporate Debtor received an email from the Advocate for Lalit Kumar Shyaam and Kajol Lalit Tekchandani inter alia forwarding therewith copy of the Suit filed by them against the Financial Creditor and Namrata Malu inter alia seeking specific performance of the Supplemental Agreement dated 02.04.2018 and the undated Supplementary Deed of Retirement from and Admission to the LLP with a prayer to direct the Financial Creditor and Ms. Namrata Malu to complete all the formalities including the signing of all the forms, declaration, undertaking etc. for their reinstatement as also for the exit of Lalit Kumar Shyaam and Kajol Lalit Tekchandani as partner of the Firm. The Financial Creditor had also filed a Complaint before Maha RERA against the Corporate Debtor, the details of which are

not mentioned by the Corporate Debtor in the said reply and was eventually withdrawn by the Financial Creditor.

- 3.6. The Corporate Debtor further submits that the said Agreement is an insufficiently stamped document and therefore no proceedings can be initiated without the same being impounded and that the Applicant's alleged claim of an outstanding principal amount of Rs. 6,20,23,602/- is not in the nature of a "financial debt within the meaning of Section 5(8) of the Insolvency and Bankruptcy Code, 2016 and as a consequence, the Applicant is not a "financial creditor" under the Insolvency and Bankruptcy Code, 2016. The Corporate Debtor states that the purported debt allegedly advanced by the Petitioner is not coupled with time value of money and thus the same does not fall into the ambit of financial debt as per Section 7 of the Code.
4. The Financial Creditor herein has filed an Additional Affidavit dated 10.05.2022 wherein he states that he has not been reinstated as partner of Emgee Enclave LLP i.e. the Principal Borrower after his retirement on 02.04.2018 and that the unsecured loan payable to him is reflected in the Annual Returns filed by the Firm for the year ending 31.03.2020 and 31.03.2021 which is signed by the Continuing Partner i.e. Mr. Lalit Kumar Shyam and the Incoming partner i.e. Ms. Kajol Lalit Tekchandani on 31.08.2021 and 28.12.2021; hence the Corporate Debtor is liable to pay the amounts demanded by him.
5. The Corporate Debtor has filed an Affidavit dated 02.09.2022 to place on record the order dated 04.07.2022 passed by the Arbitral Tribunal wherein it was of the view that the said Financial Creditor is not legally entitled to enforce the guarantee against the claimant under the Loan cum Guarantee agreement dated 02.04.2018, having exercised his first option of being

reinstated in the LLP as a partner and without having withdrawn such option at any stage.

6. The Corporate Debtor has filed its Additional Affidavit dated 25.03.2023 wherein it prays that the present petition be dismissed without going into the merits of the case as it is barred by Sec. 10A of the Code.
7. The Financial Creditor has filed an Additional Affidavit on 09.03.2023 to bring on record that the Corporate Debtor had filed a Commercial Arbitration Petition No. 5135 of 2022 before the Hon'ble Bombay High Court seeking to extinguish its liability under the Loan Cum Guarantee agreement in favour of the Financial Creditor which stood rejected vide award dated 02.03.2023 by the Hon'ble Tribunal.
8. The Corporate Debtor has filed Written Submissions dated 06.04.2023 in which it has taken the defence of the petition being non- maintainable on the grounds of – i) Petition being barred by Section 10A of the Insolvency and Bankruptcy Code, 2016; ii) The claim of the petitioner not being a “Financial debt”; iii) Pre-existing dispute between the parties; iv) Application being filed with malicious intent for purposes other than as mentioned u/s 65 of the Code and v) Insufficiently stamped agreement.
9. The Corporate Debtor has also filed Additional Written Submissions dated 10.04.2023 in response to the written submissions filed by the Financial Creditor whereby it vehemently opposes the Financial Creditor's attempt to defeat the protection granted to it by section 10A of the Code by relying upon its notice dated 01.04.2021 and saying that the petition was filed on 31.05.2021 which is not barred under Section 10A of the Code.
10. We have carefully gone through the pleadings available on records and considered the arguments of both the sides.

10.1 On perusal of the documents available on record, we find as per Clause 3(a) of the Loan cum Guarantee Agreement dated 02.04.2018, it was agreed between the parties that-*“The Guarantors/guarantees to the Lender that in the event of the Borrower failing to pay/repay the loan balance or any part thereof to the lender within stipulated time for under this Agreement, the Guarantor/s shall jointly and severally, on demand, promptly pay, and make good the same to the lender without any dispute, delay or demur.”*

In the present case, the Financial Creditor demanded the payment from the Corporate Debtor herein only on 16.10.2020 and there was no notice of obligation sent to the Corporate Debtor prior to the invocation of guarantee vide the said letter. Hence, the date of default can only be considered to be 16.10.2020 and not 02.07.2019. Since the said date of invocation of guarantee falls within the period as mentioned u/s 10A of the Code, it is ought to be dismissed.

10.2 The Hon’ble NCLAT Chennai in *S. Elangovan Promoter and erstwhile Managing Director of Kaveri Gas Power Pvt. Ltd. Vs. ASREC (India) Ltd*, held that-

“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’.”

10.3 The Hon’ble Supreme Court in *Sabarmati Gas Lts. v/s Shah Alloys Ltd. (2023) ibclaw.in02 (SC)* held that-

*“Right to apply under Insolvency and Bankruptcy Code, 2016
would accrue on the date when default occurs and it is extendable
only by application of sec 5 of The Limitation Act.”*

10.4 We further observe that, in the present case, the amount claimed as debt was arising out of Supplementary Deed of Retirement from and Admission to the Limited Liability Partnership dated 02.04.2018 whereby it was agreed that-

“Clause 5 – If the Continuing partner, incoming partner and said LLP default in repaying the Said loan to Mr. Mudhit Madanlal Gupta in compliance of terms of the loan agreement, then the Retiring Partner/s shall be reinstated as partners of the LLP. In such Event The Continuing Partner and the Incoming Partner shall resign from the said LLP and transfer their respective shareholding to the retiring partners at the same price at which the retired partners have transferred their respective shares in the said LLP to the continuing and incoming partner. In such scenario all liabilities, if any, incurred by the continuing and the incoming partner in the name of LLP shall stand debited to their accounts for which they shall be jointly and severally liable to the LLP.”

10.5 Therefore, even on this ground, the petition cannot be admitted as it was agreed between the parties that upon the default committed in repaying the said loan to the Financial Creditor by the Incoming and Continuing partner, the Retiring Partner/s i.e. the Financial Creditor and Ms. Namrata Malu shall be reinstated as partners of the LLP and that the Financial Creditor had already availed that option by approaching to Escrow Agent to release all the

documents related to the LLP and hand it over to the said Financial Creditor by its email dated 05.10.2020.

11. In view of the above facts, this Bench is of the view that this petition is therefore not maintainable under Section 7 of the Code for initiation of CIRP against the Corporate Debtor and deserves to be Dismissed.

ORDER

12. This Application being C.P. (IB) No. 551/NCLT/MB/C-IV/2022 filed under Section 7 of I&B Code, 2016, filed by Mr. Mudhit Madanlal Gupta, Financial Creditor against Supreme Construction and Developers Private Limited, Corporate Debtor for initiating Corporate Insolvency Resolution Process is **Dismissed**.
13. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

Prabhat Kumar
Member (Technical)
/LRA-Akshata/

Sd/-

Kishore Vemulapalli
Member (Judicial)