

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No.486 of 2023

IN THE MATTER OF:

J.C. Flowers Asset Reconstruction Pvt. ...Appellant

Versus

Deserve Exim Pvt. Ltd ...Respondent

Present:

For Appellant: Mr. Abhijeet Sinha, Mr. Ritunjay Gupta, Mr. Aman Shukla and Mr. Akash Chaterjee, Advocates.

For Respondent:

ORDER

03.05.2023: Heard learned counsel for the Appellant. This Appeal has been filed against order dated 10.02.2023 by which order the Adjudicating Authority has rejected the Section 7 application filed by the Financial Creditor on the ground that application is barred by Section 10A.

2. Learned counsel for the Appellant challenging the order contends that the Adjudicating Authority has not adverted to the terms and conditions of the Guarantee Deed before coming to the conclusion that application is barred by 10A. It is further submitted that date of default mentioned in the application was 01.08.2019 and 01.02.2019 which was prior to 10A period, hence, application under Section 7 ought not to have been rejected. It is further submitted that there were clauses of Guarantee Deed also including indemnity, which has not been adverted to. It is submitted that even after 10A

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period was over, no payments were made and default still continues by the Corporate Debtor.

3. We have considered the submissions of learned counsel for the Appellant and perused the record.

4. The Section 7 application, which was filed by the Financial Creditor has been brought on the record. In Part IV of the application following details have been given:

“Part IV

PARTICULARS OF FINANCIAL DEBT																				
1.	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	<p>Corporate Debtor has executed two ends of Deeds of Guarantee dated 2nd June 2015 thereby granting the due repayment of the loans sanctioned to:</p> <p>(i) Radius & Deserve Builders LLP ('Borrower 1')</p> <p>(ii) Raghuleela Builders Pvt Ltd ('Borrower 2')</p> <p><u>Amount sanctioned in favour of Borrower 1:</u></p> <p>Nature of Facility: Term Loan</p> <p>Amount Sanctioned: Rs.500,00,00,000/- (Rupees Five Hundred Crores only)</p> <p>Details of disbursement of the Facility:</p> <table border="1"><thead><tr><th>Sr No.</th><th>Date of Disbursement</th><th>Amount (in Rs.)</th></tr></thead><tbody><tr><td>1</td><td>4th June 2015</td><td>431,00,00,000</td></tr><tr><td>2</td><td>13th August 2015</td><td>31,29,20,000</td></tr><tr><td>3</td><td>2nd September 2015</td><td>25,47,78,630</td></tr><tr><td>4</td><td>21st April 2016</td><td>12,23,01,370</td></tr><tr><td colspan="2">Total</td><td>500,00,00,000</td></tr></tbody></table>	Sr No.	Date of Disbursement	Amount (in Rs.)	1	4 th June 2015	431,00,00,000	2	13 th August 2015	31,29,20,000	3	2 nd September 2015	25,47,78,630	4	21 st April 2016	12,23,01,370	Total		500,00,00,000
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		<p>Total Amount disbursed: Rs.500,00,00,000/- (Rupees Five Hundred Crores only)</p> <p><u>Amount sanctioned in favour of Borrower 2:</u></p> <p>Nature of Facility: Term Loan I&II</p> <p>Amount Sanctioned: Rs.300,00,00,000/- (Rupees Three Hundred Crores only)</p> <p>Details of disbursement of the Facility:</p> <table border="1" data-bbox="660 698 1385 891"> <thead> <tr> <th>Sr No.</th> <th>Date of Disbursement</th> <th>Amount (in Rs.)</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>4th June 2015</td> <td>292,60,00,000</td> </tr> <tr> <td>2</td> <td>13th August 2015</td> <td>7,40,00,000</td> </tr> <tr> <td colspan="2">Total</td> <td>300,00,00,000</td> </tr> </tbody> </table> <p>Total Amount disbursed: Rs.300,00,00,000/- (Rupees Three Hundred Crores only)</p>	Sr No.	Date of Disbursement	Amount (in Rs.)	1	4 th June 2015	292,60,00,000	2	13 th August 2015	7,40,00,000	Total		300,00,00,000
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2.	<p>AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)</p>	<p><u>Details pertaining to Borrower 1</u></p> <p>Date of default: 1 August 2019</p> <p>Date of declaration as Non-Performing Asset: 31st October 2019</p> <p>Date of invocation of guarantee provided by the Corporate Guarantor: 7th August 2020</p> <p>Details of outstanding amount:</p> <p style="text-align: right;">(in Rs.)</p> <table border="1" data-bbox="660 1447 1385 1977"> <tbody> <tr> <td>Principal outstanding</td> <td>440,00,00,000</td> </tr> <tr> <td>Normal Interest</td> <td>64,99,23,288</td> </tr> <tr> <td>Penal Interest</td> <td>9,89,93,507</td> </tr> <tr> <td>Total outstanding dues as on 26th August 2020</td> <td>514,89,16,795/- (Rupees Five Hundred Fourteen Crores Eighty Nine Lakhs Sixteen Thousand Seven Hundred Ninety Five only)</td> </tr> </tbody> </table>	Principal outstanding	440,00,00,000	Normal Interest	64,99,23,288	Penal Interest	9,89,93,507	Total outstanding dues as on 26th August 2020	514,89,16,795/- (Rupees Five Hundred Fourteen Crores Eighty Nine Lakhs Sixteen Thousand Seven Hundred Ninety Five only)				
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	<p>Total outstanding dues: Rs.514,89,16,795/- (Rupees Five Hundred Fourteen Crores Eighty Nine Lakhs Sixteen Thousand Seven Hundred Ninety Five only) along with further outstanding amount calculated @13.5% per annum and penal interest of 2% per annum, from 26th August 2020 until the date of the payment.</p> <p>Statement of Accounts in respect of Borrower 1 are annexed hereto and marked as Exhibit "C-1".</p> <p>Details pertaining to Borrower 2</p> <p>Date of default: 1 February 2019</p> <p>Date of invocation of Guarantee of the Corporate Guarantor: 26th June 2020</p> <p>Details of outstanding amount:</p> <p style="text-align: right;">(in Rs.)</p> <table border="1"><tr><td>Principal outstanding</td><td>264,00,00,000</td></tr><tr><td>Normal Interest</td><td>49,16,40,655</td></tr><tr><td>Penal Interest</td><td>60,89,37,415</td></tr><tr><td>Total outstanding dues as on 26th August 2020</td><td>374,05,78,070/- (Rupees Three Hundred Seventy Four Crores Five Lakhs Seventy Eight Thousand Seventy only)</td></tr></table> <p>Total outstanding dues: Rs.374,05,78,070/- (Rupees Three Hundred Seventy Four Crores Five Lakhs Seventy Eight Thousand Seventy only) along with further outstanding amount calculated @13.5% per annum and penal interest of 2.25% per annum, from 26th August 2020 until the date of the payment.</p> <p>Statement of Accounts in respect of Borrower 2 are annexed hereto and marked as Exhibit "C-2".</p>	Principal outstanding	264,00,00,000	Normal Interest	49,16,40,655	Penal Interest	60,89,37,415	Total outstanding dues as on 26th August 2020	374,05,78,070/- (Rupees Three Hundred Seventy Four Crores Five Lakhs Seventy Eight Thousand Seventy only)
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5. The Corporate Debtor – Deserve Exim Private Limited was the Corporate Guarantor to a loan sanctioned to two different Principal Borrowers i.e. Radius & Deserve Builders LLP and Raghuleela Builders Pvt. Ltd. For Radius & Deserve Builders, there was one disbursement and for Raghuleela Builders there were two disbursements. The Corporate Debtor stood Guarantor to the disbursement to both the Principal Borrowers. Default was committed by the Principal Borrowers on 01.08.2019 and 01.02.2019, respectively. The Financial Creditor chose to invoke corporate guarantee given by the Corporate Debtor on 07.08.2020 and 26.06.2020, which has been specifically mentioned in the Part IV of the application. The Adjudicating Authority took the view that since the bank guarantee against the Corporate Debtor were invoked on 07.08.2020 and 26.06.2020, which were within the period covered under Section 10A, the application is barred by 10A.

6. There is no dispute between the facts of the present case. Admittedly, the bank guarantee which was given by the Corporate Debtor was invoked on 07.08.2020 and 26.06.2020 which dates have been mentioned in Part IV. Whether the default on the part of the Corporate Debtor i.e. Corporate Guarantor can be on any date prior to when the guarantee was invoked is the question to be considered.

7. Learned counsel for the Appellant submits that the date of default mentioned as 01.08.2019 and 01.02.2019 in the application. When we look into the application under Section 7, which has been brought on record, 01.08.2019 and 01.02.2019 were the date on which default was committed

by the Principal Borrower. As far as, Corporate Guarantor is concerned, two different dates 07.08.2020 and 26.06.2020 has been mentioned in the application itself in bold letters.

8. The question as to when the default on part of the Guarantor is to considered has been decided by this Tribunal in a recent judgment pronounced on 28.04.2023 in **“Company Appeal (AT) (Ins.) No.329 of 2023, Pooja Ramesh Singh vs. State Bank of India”**, where it has been held that default on the part of the Corporate Guarantor shall be held to have been committed only when guarantee was invoked, when Deed of Guarantee itself mentions issue of demand notice by the Bank. The issues which have been raised in the present appeal are fully covered by the judgment in **“Pooja Ramesh Singh vs. State Bank of India”**.

9. We may also notice certain clauses in the Deed of Guarantee. Deed of Guarantee has been brought on the record as Exhibit ‘L’, where Clauses 1 and 3 of the Deed provides as follows:

“1. The Guarantors doth hereby irrevocably and unconditionally guarantee the due repayment to the Bank at its Chanakyapuri branch at New Delhi on demand without demur and/or contestation and notwithstanding any dispute between the Bank and the Borrower of all the amounts including the principal sum of aggregating to INR 3,000,000,000 (Indian Rupees Three Billion Only) consisting of Term Loan I of INR 1,000,000,000 (Indian Rupees One Billion Only) and Term Loan II of INR 2,000,000,000 (Indian

*Rupees Two Billions Only), under the said credit facility and all indebtedness due and payable by the Borrower to the Bank thereunder or any part thereof for the time being outstanding under the said Credit Facility granted/agreed to be granted by the Bank to the Borrower and all interest, commission, costs, charges and expenses and all other monies whatsoever due owing and payable by the Borrower to the Bank thereunder ("**the said dues**"), in the event of failure on the part of Borrower in repaying the same to the Bank or discharging its liability thereunder (the decision of the Bank as to such default/failure of the Borrower being final, conclusive and binding on the Guarantors).*

3. In the event of the Guarantors's failure to pay to the Bank the above monies forthwith on demand made by the Bank then in such event, the aforesaid amount shall bear and carry interest at the rate of ... % per annum or such other rate as the Bank may in its absolute discretion stipulate, from the date of demand till payment by the Guarantor."

10. Both the above clauses contemplate a demand by the Bank. The Guarantee Deed contemplates demand by the bank, hence, unless demand is made by the bank to the Corporate Debtor, no default can be said to have been committed by the Corporate Guarantor and in the present case, demands for payment were invoked in the period covered under Section 10A.

11. Learned counsel for the Appellant further submitted that the Guarantee Deed also contain indemnity clause. Clause 4 r/w Clause 12 provides as follows:

“4. The Guarantors hereby indemnifies the Bank and shall keep the Bank indemnified and save harmless at all times till the credit facility is outstanding, due and payable by the Borrower, against all actions, proceedings, claims and demands, duties, penalties, taxes, losses, damages, cost (as between Advocate and Client) charges and expenses and other liability whatever which may be brought and made against or sustained or incurred by the Bank by reason of having granted/ continued/ agreed to grant the credit facility to the Borrower.

12. The Bank may proceed against and recover from any of the Guarantors's property including any credit balance or security held / to be held in future, by the Bank on the Guarantors's account by sale and or otherwise and allocate and apply the net proceeds of sale and realisation thereof and any other monies in the Bank's hands standing to the Guarantors's credit or belonging to the Guarantors's on any account whatsoever independently the one of the other in such order and in such manner as the Bank may think fit in or towards the payment of any monies payable by the Borrower/ Guarantors to the Bank hereunder.”

12. The date of default by the Guarantor shall arise only when demand is issued by the Bank to the Corporate Guarantor. The fact that the Corporate

Guarantor has given indemnity to the Bank also shall operate only after default is committed by the Guarantor. Indemnity can be enforced against the Corporate Guarantor but it cannot itself change the date of default on part of the Guarantor. When the invocation of the bank guarantee is admittedly within the period of 10A, the Application which is based on invocation of guarantee is clearly barred by 10A.

13. One of the submission pressed by learned counsel for the Appellant is that even after 10A period was over, no payments were made and default still continues, hence, the application could not have been rejected. When application filed under Section 7 was based only on the default which was committed during the 10A period, the Adjudicating Authority did not commit any error in not entertaining the application. The application was not based on any default which is committed subsequent to 10A period, hence, such question does not arise.

14. We are of the view that there is no good ground to entertain this Appeal. As observed above, the issues in this Appeal are fully covered by judgment of this Tribunal in "***Pooja Ramesh Singh vs. State Bank of India***". Following the said judgment, this Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

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