Pooja Ramesh Singh vs State Bank Of India And Anr on 28 April, 2023

Author: Ashok Bhushan

Bench: Ashok Bhushan

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No.329 of 2023

[Arising out of order dated 01.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court V in C.P. 543/IB/MB/2021]

IN THE MATTER OF:

Pooja Ramesh Singh
R/o A D Tiwari Chawl, Room No.23,
Mogra Pada Near Reliance Company,
Andheri East, Mumbai - 400069.

...Appellant

Vs.

1. State Bank of India
State Bank Bhavan, Madam Cama Road,
Nariman Point, Mumbai - 400021.

2. Essel Infraprojects Ltd.
Through the Resolution Professional
Mr. Kairav Anil Trivedi,
513/A, 5th Floor, Kohinoor City, Kirol Road,
LBS Marg, Kurla Road, Mumbai - 400070.

...Respondents

Present:
For Appellant: Mr. Gaurav Mitra, Ms. Smriti Churiwal, Mr. Jaiveer Kant and Ms. Lavanya Pathak, Advocates.

For Respondents: Mr. Krishnendu Datta, Sr. Advocate with Mr. Manish Kr. Jha, Ms. Avni Sharma, Mr. Dhruv Nayyar, Ms. Varsha Himatsingka, Advocates for Respondent No.1.

JUDGMENT

ASHOK BHUSHAN, J.

This Appeal by the Suspended Director of the Corporate Debtor (Corporate Guarantor) has been filed challenging the order dated 01.03.2023 Cont'd.../ passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court V admitting Section 7 application filed by State Bank of India. Brief facts of the case necessary to be noted for deciding this Appeal are:

i. M/s Spanco Nagpur Discom Ltd (SND Ltd.), the borrower entered into a Memorandum of Agreement for a term loan for sums not exceeding Rs.80 Crores on 25.02.2013. The Corporate Guarantor (Respondent No.2) and one Essel Utilities Distribution Company Ltd. executed a combined Corporate Guarantee dated 25.02.2013 to secure the Term Loan. Another Memorandum of Agreement was executed between SND Ltd. and the State Bank of India for a working capital credit facility for amounts not exceeding Rs.78,75,00,000/-.

ii. Combined Corporate Guarantee was executed on 01.03.2013 by Respondent No.2 and Essel Utilities Distribution Company Ltd.

A Supplemental working capital consortium agreement was executed.

iii. Another combined corporate guarantee was executed by Respondent No.2 and Essel Utilities Distribution Company Ltd.

for loans sanctioned to SND Ltd. on 17.07.2018 for an amount not exceeding Rs.185,27,00,000/-.

iv. On 17.05.2019, fresh Corporate Guarantee was executed by the Respondent No.2 and Essel Utilities Distribution Company Ltd with respect to facilities extended to the SND Ltd.

Company Appeal (AT) Insolvency No. 329 of 2023 v. On 05.12.2019, SND Ltd. was declared as Non-performing Asset.

vi. The consortium of banks lead by Respondent No.1 issued a notice of recall of the loans and invocation of corporate guarantees towards loans aggregating to a total of Rs.410,00,00,000/-

granted to SND Ltd. The Respondent No.1 granted the Corporate Guarantor a period of 7 days to make payment i.e. by 08.10.2020.

vii. State Bank of India filed an application under Section 7 of the I&B Code being CP(IB) No. 543 of 2021 against the Corporate Debtor (Corporate Guarantor) on 10.05.2021 for default of an amount of Rs.1,77,37,02,868.74/-. Corporate Debtor filed its reply.

viii. A Company Petition under Section 7 was also filed against the Principal Borrower - SND Ltd. which has been admitted by the Adjudicating Authority on 29.09.2022 and the Principal Borrower is presently undergoing Corporate Insolvency Resolution Process.

ix. The Company Petition 543/IB/MB/2021 was heard by the Adjudicating Authority. The Corporate Debtor raised the defence that Application under Section 7 against the Corporate Debtor was not maintainable because the guarantee against the Corporate Debtor invoked on 01.10.2020, which period squarely fall under Section 10A of the Code.

x. On 01.03.2023, the Adjudicating Authority admitted the Section 7 application. The Adjudicating Authority overruled the defence Company Appeal (AT) Insolvency No. 329 of 2023 raised by the Corporate Debtor that application is barred by Section 10A. The Adjudicating Authority took view that the Account of Principal Borrower became NPA on 05.12.2019, hence, notice dated 01.10.2020 shall not change date of default which was 05.09.2019. Challenging the impugned order this Appeal has been filed.

2. We have heard Shri Gaurav Mitra, learned senior counsel for the Appellant and Shri Krishnendu Datta, learned senior counsel appearing for the Respondent Bank.

3. Learned counsel for the Appellant submits that the corporate guarantee issued by the Corporate Guarantor was on demand guarantee and the default on behalf of the Corporate Guarantor can take place only when amount is demanded from the Corporate Guarantor. It is admitted fact that notice was issued on 01.10.2020 to the Corporate Guarantor demanding the payment within 7 days, hence, default on the part of Corporate Guarantor shall take place only w.e.f. 08.10.2020. The date of default being covered by Section 10A, the application was clearly barred and the application was not maintainable for a default which took place between the period 25.03.2020 to 25.03.2021. The Adjudicating Authority committed error in holding that for Corporate Guarantor date of default shall be 05.09.2019. It is submitted that the Adjudicating Authority not looked into the relevant clauses of the corporate guarantee which clearly contemplated notice of demand by the Bank. On demand guarantee is a different nature of guarantee under which Company Appeal (AT) Insolvency No. 329 of 2023 limitation of Guarantor shall come to play only when a demand notice is issued.

4. Learned counsel for the Respondent Bank, Shri Krishnendu Datta refuting the submissions of learned counsel for the Appellant contends that the default committed by the Principal Borrower and the Corporate Guarantor has to be same. The account was declared NPA on 05.12.2019, hence, the default has to be treated as to have taken place three months prior i.e. on 05.09.2019 as per the RBI Circular. When the Principal Borrower committed default on 05.09.2019, the liability of the Corporate Guarantor being coextensive with that of the Principal Borrower, there shall be default on the part of the Corporate Guarantor also. The default having been taken place on 05.09.2019 i.e. before 10A period, there is no applicability of Section 10A, in the facts of the present case. The corporate guarantee in question is not on demand guarantee. Default having arose before insertion of Section 10A, Section 10A is not applicable.

5. We have heard learned counsel for the parties and perused the record. From the submission of learned counsel for the parties and materials on record following issues arise for consideration:

> I. Whether default in payment of guaranteed amount by the Corporate Debtor is the same default as is committed by the Principal Borrower and the period of limitation for both the Principal Borrower and the Corporate Guarantor shall be same for the purposes of filing Section 7 application for the Bank?
>
> Company Appeal (AT) Insolvency No. 329 of 2023 II. Whether the Deed of Guarantee dated 17.05.2019 is guarantee on demand and the limitation of Guarantor shall ensue only when demand is made to the Guarantor?
>
> III. Whether notice dated 01.10.2020 issued by the Bank to Guarantor can be treated to be notice on demand as contemplated in the guarantee and the default on the part of the Guarantor shall be only after notice dated 01.10.2020 i.e. during period of Section 10A?
>
> IV. Whether the application filed by the Bank under Section 7 was barred by Section 10A?
>
> Issue No. I

6. We, in the present case, are concerned with filing of Section 7 application of the I&B Code. We need to first notice the statutory scheme under I&B Code regarding limitation when application under Section 7 is filed against a Corporate Person. Article 137 of the Limitation Act, 1963 is applicable in an application under Section 7, which provides as follows:

> "PART II Other applications
>
> 137. Any other Three When the application for years right to which no period of apply limitation is accrues.
>
> provided elsewhere in this Division.
>
> Company Appeal (AT) Insolvency No. 329 of 2023

7. As per Article 137, time from which period begins to run is "when the right to apply accrues". Section 7 of the Code Sub-Section (1) provides that the Financial Creditor may file an application for initiating CIRP against the Corporate Debtor "when the default has occurred". In the present case, the Corporate Debtor being a Corporate Guarantor the question is to be considered is as to when the default is occurred on the part of the Corporate Guarantor. The 'Corporate Guarantor' is defined under Section (5A) in following manner:

> "(5A) "corporate guarantor" means a corporate person who is the surety in a contract of guarantee to a corporate debtor;"

8. Section 3 of the Code is a definition clause. Section 3(11) defines 'debt' in following words:

> "3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"

9. Section 3(12) defines 'default':

> "3(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;"

10. When we look into the definition of 'debt' and 'default' under Section 3(11) and 3(12), it is clear that debt is a liability or obligation in respect of a claim which is due from any person and default is committed when debt Company Appeal (AT) Insolvency No. 329 of 2023 which has become due and payable and is not paid by the debtor. Section 3(12) uses two additional words i.e (i) "payable"; and (ii) "is not paid by the debtor". The expression 'debtor' as used in Section 3(12), in the present case, is to be read as 'Corporate Guarantor'. The Indian Contract Act, 1972 contains provisions in Chapter VII- 'of Indemnity and Guarantee'. Section 126 defines "Contract of guarantee, surety, principal debtor and creditor" and Section 128 deals with "Surety's liability", Section 129 deals with "Continuing guarantee". Sections 126, 128 and 129 of the Indian Contract Act are as follows:

> "Section: 126. "Contract of guarantee", "surety", "principal debtor" and "creditor".

A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

Section: 128. Surety's liability.

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

Section: 129. "Continuing guarantee".

A guarantee which extends to a series of transactions, is called a "continuing guarantee"."

Company Appeal (AT) Insolvency No. 329 of 2023

11. As per Section 128, the liability of the Surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. Law, thus, contemplates liability of the Surety i.e.

Guarantor co-extensive with that of the Principal Debtor.

12. The question of start of period of limitation against the Guarantor when the default committed by the Guarantor in non-fulfilment of its obligation as contained in the guarantee deed has come for consideration before the Hon'ble Supreme Court in several cases. Learned counsel for the both the parties have relied on judgments of Hon'ble Supreme Court in the above context, which we need to notice before proceeding any further. The judgment which has been relied by learned counsel for the Respondent Bank is "Margaret Lalita Samuel vs. Indo Commercial Bank Ltd, (1979) 2 SCC 396". In the above case, a continuing guarantee was executed by the Appellant 'Margaret Lalita Samuel' in which she guaranteed to the Bank for repayment of all money which shall at any time shall be due to the Bank by the Company. Bank has filed his suit for recovery of amount by the Guarantor in which one of the defence was raised of the limitation. The Hon'ble Supreme Court in the above judgment while considering the question of limitation made following observations in Para 10:

> "10. The guarantee is seen to be a continuing guarantee and the undertaking by the defendant is to pay any amount that may be due by the company at the foot of the general balance of its account or any other account whatever. In the case of such a continuing guarantee, so long as the account is a live Company Appeal (AT) Insolvency No. 329 of 2023 account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, we do not see how the period of limitation could be said to have commenced running. Limitation would only run from the date of breach, under Article 115 of the schedule to the Limitation Act, 1908. When the Bombay High Court considered the matter in the first instance and held that the suit was not barred by limitation, J. C. Shah, J., speaking for the Court said:
>
> "On the plain words of the letters of guarantee it is clear that the defendant undertook to pay any amount which may be due by the Company at the foot of the general balance of its account or any other account whatever ..... We are not concerned in this case with the period of limitation for the amount repayable by the Company to the bank. We are concerned with the period of limitation for enforcing the liability of the defendant under the surety bond ..... We hold that the suit to enforce the liability is governed by Article 115 and the cause of action arises when the contract of continuing guarantee is broken, and in the present case we are of the view that so long as the account remained a live account, and there was no refusal on the part of defendant to carry out her obligation, the period of limitation did not commence to run."

13. The Hon'ble Supreme Court in Para 11 has further observed:

> "11. We agree with the view expressed by Shah, J. The intention and effect of a continuing guarantee such as the one with which we are concerned in this case was considered by the Judicial Committee of the Privy Council in Wright and Anr. v. New Zealand Farmers Cooperative Association Company Appeal (AT) Insolvency No. 329

> of 2023 of Canterbury Ltd. The second clause of the guarantee bond in that case was in the following terms:
>
> "This guarantee shall be a continuing guarantee and shall apply to the balance that is now or may at any time hereafter be owing to you by the William Nosworthy and Robert Nosworthy on their current account with you for goods supplied and advances made by you as aforesaid and interest and other charges as aforesaid."

A contention was raised in that case that the liability of the guarantor was barred in respect of each advance made to the Nosworthys on the expiration of six years from the date of advance. The Judicial Committee of the Privy Council expressed the opinion that the matter had to be determined by the true construction of the guarantee. Proceeding to do so, the Judicial Committee observed (at p. 449):

> "It is no doubt a guarantee that the Association will be repaid by the Nosworthys advanced made and to be made to them by the Association together with interest and charges; but it specifies in col. 2 how that guarantee will operate-namely, that it will apply to (i.e. the guarantor guarantees repayment of) the balance which at any time thereafter is owing by the Nosworthys to the Association. It is difficult to see how effect can be given to this provision except by holding that the repayment of every debit balance is guaranteed as it is constituted from time to time, during the continuance of the guarantee, by the excess of the total debits over the total credits. If that be true construction of this document, as their Lordships think it is, the number of years which have expired since any individual debit was incurred is immaterial. The question of limitation could only arise in regard to the time Company Appeal (AT) Insolvency No. 329 of 2023 which had elapsed since the balance guaranteed and used for had been constituted".

Later it was again observed (at p. 450):

> "That document, in their opinion, clearly guarantees the repayment of each debit balance as constituted from time to time, during the continuance of the guarantee, by the surplus of the total debits over the total credits, and accordingly at the date of the counterclaim the Association's claim against the plaintiff for payment of the unpaid balance due from the Nosworthys, with interest, was not statute-barred."

14. The Hon'ble Supreme Court in the above case has observed that cause of action arises when the contract of continuing guarantee is broken i.e. breach is committed by the Guarantor to the guarantee given.

15. The next judgment on which reliance has been placed is judgment of Hon'ble Supreme Court in "Syndicate Bank vs. Channaveerappa Beleri & Ors., (2006) 11 SCC 506". Hon'ble Supreme Court in the above case had occasion to consider the provisions of Section 128 and 129 of the Contract Act. Hon'ble Supreme Court in the above case has laid down that the limitation of the guarantor will

depend purely on the terms of the contract. In the above case, the Bank had filed suit against the guarantors for recovery of credit facilities extended to the company. The Hon'ble Supreme Court held that the guarantor's liability depends on terms of his contract. In Para 9, 10 and 11 following was held:

> "9. A guarantor's liability depends upon the terms of his contract. A 'continuing guarantee' is different from an ordinary guarantee. There is also a difference Company Appeal (AT) Insolvency No. 329 of 2023 between a guarantee which stipulates that the guarantor is liable to pay only on a demand by the creditor, and a guarantee which does not contain such a condition. Further, depending on the terms of guarantee, the liability of a guarantor may be limited to a particular sum, instead of the liability being to the same extent as that of the principal debtor. The liability to pay may arise, on the principal debtor and guarantor, at the same time or at different points of time. A claim may be even time-barred against the principal debtor, but still enforceable against the guarantor. The parties may agree that the liability of a guarantor shall arise at a later point of time than that of the principal debtor. We have referred to these aspects only to underline the fact that the extent of liability under a guarantee as also the question as to when the liability of a guarantor will arise, would depend purely on the terms of the contract.
>
> 10. Samuel (supra), no doubt, dealt with a continuing guarantee. But the continuing guarantee considered by it, did not provide that the guarantor shall make payment on demand by the Bank. The continuing guarantee considered by it merely recited that the surety guaranteed to the Bank, the repayment of all money which shall at any time be due to the Bank from the borrower on the general balance of their accounts with the Bank, and that the guarantee shall be a continuing guarantee to an extent of Rs.10 lakhs. Interpreting the said continuing guarantee, this Court held that so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, Company Appeal (AT) Insolvency No. 329 of 2023 the period of limitation could not be said to have commenced running.
>
> 11. But in the case on hand, the guarantee deeds specifically state that the guarantors agree to pay and satisfy the bank on demand and interest will be payable by the guarantors only from the date of demand. In a case where the guarantee is payable on demand, as held in the case of Bradford (supra) and Hartland (supra), the limitation begins to run when the demand is made and the guarantor commits breach by not complying with the demand."

16. It is to be noted that in Para 10 of the above judgment, the Hon'ble Supreme Court had referred to earlier case of 'Margaret Lalita Samuel' and the issue of 'Margaret Lalita Samuel' was noticed in following words:

> "...this Court held that so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, the period of limitation could not be said to have commenced running."

17. In Para 15, the Hon'ble Supreme Court further laid down following:

> "15. The respondents have tried to contend that when the operations ceased and the accounts became dormant, the very cessation of operation of accounts should be treated as a refusal to pay by the principal debtor, as also by the guarantors and, therefore the limitation would begin to run, not when there is a refusal to meet the demand, but when the accounts became dormant. By no logical process, we can hold Company Appeal (AT) Insolvency No. 329 of 2023 that ceasing of operation of accounts by the borrower for some reason, would amount to a demand by the Bank on the guarantor to pay the amount due in the account or refusal by the principal debtor and guarantor to pay the amount due in the accounts."

18. The judgment which has been referred by learned counsel for both the parties is the judgment of Hon'ble Supreme Court in "Laxmi Pat Surana vs. Union of India & Anr., (2021) 8 SCC 481". In the above case the Hon'ble Supreme Court had occasion to consider the provisions of I&B Code and the question of limitation for filing application under Section 7 of the Code. The two questions which arose of consideration has been noticed in Para 1 of the judgment, which is to the following effect:

> "1. Two central issues arise for our determination in this appeal, as follows:
>
> 1.1 (i) Whether an action under Section 7 of the Insolvency and Bankruptcy Code 2016 (for short "the Code") can be initiated by the financial creditor (Bank) against a corporate person (being a corporate debtor) concerning guarantee offered by it in respect of a loan account of the principal borrower, who had committed default and is not a "corporate person" within the meaning of the Code?
>
> 1.2 (ii) Whether an application under Section 7 of the Code filed after three years from the date of declaration of the loan account as Non-performing Asset (for short "NPA"), being the date of default, is not barred by limitation?"

Company Appeal (AT) Insolvency No. 329 of 2023

19. In the above case, the Bank has extended credit facility to the Principal Borrower - M/s Surana Metals Ltd., for which the Appellant has offered Guarantee. Loan accounts were declared NPA on 30.01.2010. The Financial Creditor issued recall notice dated 19.02.2010. The Financial Creditor thereafter filed a Section 19 application under the RDDBFI Act, 1993 against the Principal Borrower. The Principal Borrower has repeatedly assured to pay the outstanding amount. Thereafter the Bank filed an application on 13.02.2019 against the Corporate Debtor - M/s Surana Metals Ltd., which was resisted on several grounds including that the Principal Borrower is not a corporate person; and further it is barred by limitation, as the date of default was 30.01.2010 and application has been

filed on 13.02.2019 i.e. beyond the period of three years, which submissions were negatived by the Adjudicating Authority. The order of the Adjudicating Authority was also affirmed in appeal. Thereafter, the Corporate Debtor i.e. Guarantor filed an appeal in the Hon'ble Supreme Court. In the above context, the Hon'ble Supreme Court has occasion to consider the scheme of IBC. The Hon'ble Supreme Court in the above context has held that the liability of the Guarantor is co-extensive with that of the Principal Borrower and the Guarantor is also a Corporate Person and the Guarantor metamorphoses into a Corporate Debtor the moment the Principal Borrower makes default in payment of debt. In Para 30, 31 and 32 following was laid down while answering question no. (i), as noted above:

> Company Appeal (AT) Insolvency No. 329 of 2023 "30. The expression "corporate debtor" is defined in Section 3(8) which applies to the Code as a whole. Whereas, expression "corporate guarantor" in Section 5(5A), applies only to Part II of the Code. Upon harmonious and purposive construction of the governing provisions, it is not possible to extricate the corporate person from the liability (of being a corporate debtor) arising on account of the guarantee given by it in respect of loan given to a person other than corporate person. The liability of the guarantor is coextensive with that of the principal borrower. The remedy under Section 7 is not for recovery of the amount, but is for reorganisation and insolvency resolution of the corporate debtor who is not in a position to pay its debt and commits default in that regard. It is open to the corporate debtor to pay off the debt, which had become due and payable and is not paid by the principal borrower, to avoid the rigours of Chapter II of the Code in general and Section 7 in particular.
>
> 31. In law, the status of the guarantor, who is a corporate person, metamorphoses into corporate debtor, the moment principal borrower (regardless of not being a corporate person) commits default in payment of debt which had become due and payable. Thus, action under Section 7 of the Code could be legitimately invoked even against a (corporate) guarantor being a corporate debtor. The definition of "corporate guarantor" in Section 5(5A) of the Code needs to be so understood.

Company Appeal (AT) Insolvency No. 329 of 2023

32. A priori, we find no substance in the argument advanced before us that since the loan was offered to a proprietary firm (not a corporate person), action under Section 7 of the Code cannot be initiated against the corporate person even though it had offered guarantee in respect of that transaction. Whereas, upon default committed by the principal borrower, the liability of the company (corporate person), being the guarantor, instantly triggers the right of the financial creditor to proceed against the corporate person (being a corporate debtor). Hence, the first question stands answered against the appellant."

20. The observations made by the Hon'ble Supreme Court in the above paragraphs were in reference to question no. (i) and the proceedings were initiated by the Bank treating the date of declaration of NPA as date of default for the Corporate Guarantor.

21. Learned counsel for both the parties have again referred to Para 43 of the judgment on which heavy reliance has been placed. In Para 43, Hon'ble Supreme Court has occasion to examine the expression 'default' as used in Section 7. Para 43 of the judgment is as follows:

> "43. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 of the Code. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" -- not the date of notifying Company Appeal (AT) Insolvency No. 329 of 2023 the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean non□payment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to non-payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for Company Appeal (AT) Insolvency No. 329 of 2023 institution of the proceedings under Section 7 of the Code. Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under Section 7 of the Code"

22. It is submitted that the Hon'ble Supreme Court in the above para has held that in cases where the corporate person had given a guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to non-payment of debt. We may notice that the above observations are founded by next stipulation i.e. thus, when the principal borrower and/or the corporate guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. The Hon'ble Supreme Court in the above case had considered the acknowledgement given by the Principal Borrower when it undertook to make the payment. It was observed by the Hon'ble Supreme Court that acknowledgement under Section 18 shall extend the period of limitation and hence it was held that the application was not

barred by limitation.

23. We may further notice Para 44 of the judgment in which it was held that the liability of the guarantor being coextensive with the principal borrower under Section 128 of the Contract Act, it triggers the moment Company Appeal (AT) Insolvency No. 329 of 2023 principal borrower commits default in paying the acknowledged debt. This is a legal fiction. Para 44 of the judgment is as follows:

> "44. In the present case, the NCLT as well as the NCLAT have adverted to the acknowledgments by the principal borrower as well as the corporate guarantor - corporate debtor after declaration of NPA from time to time and lastly on 08.12.2018. The fact that acknowledgment within the limitation period was only by the principal borrower and not the guarantor, would not absolve the guarantor of its liability flowing from the letter of guarantee and memorandum of mortgage. The liability of the guarantor being coextensive with the principal borrower under Section 128 of the Contract Act, it triggers the moment principal borrower commits default in paying the acknowledged debt. This is a legal fiction. Such liability of the guarantor would flow from the guarantee deed and memorandum of mortgage, unless it expressly provides to the contrary."

24. The scheme of I&B Code clearly indicate that both the Principal Borrower and the Guarantor become liable to pay the amount when the default is committed. When default is committed by the Principal Borrower the amount becomes due not only against the Principal Borrower but also against the Corporate Guarantor, which is the scheme of the I&B Code. When we read with as is delineated by Section 3(11) of the Code, debt becomes due both on Principal Borrower and the Guarantor, as noted above. The definition of default under Section 3(12) in addition to expression 'due' occurring in Company Appeal (AT) Insolvency No. 329 of 2023 Section 3(11) uses two additional expressions i.e "payable" and "is not paid by the debtor or corporate debtor". The expression 'is not paid by the debtor' has to be given some meaning. As laid down by the Hon'ble Supreme Court in "Syndicate Bank vs. Channaveerappa Beleri & Ors." (supra), a guarantor's liability depends on terms of his contract. There can be default by the Principal Borrower and the Guarantor on the same date or date of default for both may be different depending on the terms of contract of guarantee. It is well settled that the loan agreement with the Principal Borrower and the Bank as well as Deed of Guarantee between the Bank and the Guarantor are two different transactions and the Guarantor's liability has to be read from the Deed of Guarantee.

Issue No. II

25. Now we come to the Deed of Guarantee dated 17.05.2019 which has been brought on record. The relevant clauses of the Deed of Guarantee which has been relied by learned counsel for the Appellant are clause 1, 13, 14 and 20, which are to the following effect:

> "1. If at any time default shall be made by the Borrower in payment of the principal sum (not exceeding Rs.186,60,00,000/- (Rupees One Hundred Eighty Six Crore

Sixty Lacs Only) together with Interest, costs, charges, expenses and/or other monies for the time being due to the Bank in respect of or under the aforesaid credit facilities or any of them the Guarantors shall forthwith on demand pay to the Bank the whole of such principal sum (not Company Appeal (AT) Insolvency No. 329 of 2023 exceeding Rs.186,60,00,000/- (Rupees One Hundred Eighty Six Crore Sixty Lacs Only) together with interest, costs, charges, expenses and/or any other monies as maybe then due to the Bank in respect of the aforesaid credit facilities and shall indemnify and keep indemnified the Bank against all losses of the said principal sum, interest or other monies due and all costs charges and expenses whatsoever which the Bank may incur by reason of any default on the part of the Borrower.

13. The Guarantors shall forthwith on demand made by the Bank deposit with the Bank such sum or security or further sum or security as the Bank may from time to time specify as security for the due fulfillment of their obligations under this Guarantee and any security of deposited with the Bank may be sold by the Bank after giving to the Guarantors a reasonable notice of sales and the said sum or the proceeds of sale of the securities may be appropriated by the Bank in or towards satisfaction of the said obligations and any liability arising out of non- fulfillment thereof by the Guarantors.

14. The Guarantors hereby agree that notwithstanding any variation made in the terms of the said Agreement of loan and / or any of the said security documents including reallocation/ interchange of the individual limits within the principal sum variation in the rate of interest, extension of the date for payment of the instalments, if any, or any composition made between the Bank and Borrower to give time to or not to sue the Company Appeal (AT) Insolvency No. 329 of 2023 Borrower, or the Bank parting with any of the securities given by the Borrower, the Guarantors shall not be released or discharged of their obligation under this Guarantee provided that in the event of any such variation or composition or agreement the liability of the Guarantors shall not withstanding anything herein contained be deemed to have accrued and the Guarantors shall be deemed to have become liable on the date or dates on which the borrower shall become liable to pay the amount/amounts due under the said Agreement of Loan and/or any of the said security documents as a result of such variation or composition or agreement.

20. The Guarantors agree that amount due under or in respect of the aforesaid credit facilities and hereby guaranteed shall be payable to the Bank on the Bank serving the Guarantors with a notice requiring payment of the amount and such notice shall be deemed to have been served on the Guarantors either by actual delivery thereof to the Guarantors or by despatch thereof by Registered Post or Certificate of Posting to the Guarantors address herein given or any other address in India to which, the Guarantors may by written intimation give to the Bank or request that communication addressed to the Guarantors be despatched. Any notice despatched by the Bank by Registered Post or Certificate of Posting to the address to which it is

> required to be despatched under this clause shall he deemed to have been duly served on the Guarantors four days after the date of posting thereof, and shall be sufficient if signed by any officer of the Bank and in proving such service it Company Appeal (AT) Insolvency No. 329 of 2023 shall be sufficient if it is established that the envelope containing such notice communication or demand was properly addressed and put into the post office."

26. The judgment of the Hon'ble Supreme Court in "Syndicate Bank vs. Channaveerappa Beleri & Ors." has categorically laid down that liability of the Guarantor depends on the terms of his contract. The relevant clauses of the Deed of Guarantee, as noted above, clearly contemplate demand by the Bank upon the Guarantor. Clause 1 provides that "the Guarantors shall forthwith on demand pay to the Bank the whole of such principal sum not exceeding Rs.186,60,00,000/- together with interest". Similarly, Clause 13 uses expression, "the Guarantors shall forthwith on demand made by the Bank deposit with the Bank....". Clause 20 again makes it clear that what was guaranteed by the Guarantor was that amount shall be payable to the Bank on serving the Guarantor with notice requiring payment of the amount.

27. In view of the clear stipulation in the Deed of Guarantee, default on the part of the Guarantor cannot be treated to be on 05.09.2019, when it is alleged that the Principal Borrower committed default, nor the default on the part of the Guarantor can be on date of NPA i.e. 05.12.2019 for the purpose of present case. In the present case, admittedly, the Bank has issued notice dated 01.10.2020 to the Principal Borrower as well as to the Guarantor - Essel Infraprojects Ltd. Notice dated 01.10.2020 which has been brought on the record indicate that notice is addressed to the Principal Borrower and to Guarantors. In Para 8 of the notice following has been stated:

> Company Appeal (AT) Insolvency No. 329 of 2023 "8. Our Clients states that, You Nos.2 to 4, executed Deed of Guarantee on respective dates inter alia agreeing to pay on demand and without demur to our clients alongwith interest, cost, charges, expenses and/or other money due thereon from time to time in terms of the Agreement of Loan for overall limits, Agreement of Hypothecation of Goods and Assets and Supplemental Agreements."

28. In Para 12, it is clearly stated that Bank is invoking guarantee agreement and call upon the guarantors to make the payment within seven days. Para 12 and 13 of the notice are as follows:

> "12. We state that You No. 1 to 4, have mischievously, intentionally, deliberately and malafidely misrepresented before our Clients only in order to avail the said facilities and also have committed various defaults under the terms and conditions of the Loan Agreements and also failed and neglected to perform your duties and obligations diligently under the aforesaid Agreements and other documents, which had been duly agreed by you thereby causing irreparable loss and damages to our Clients and for which we are entitled to take action against you under the various provisions of law, civil as well as criminal. Therefore our clients hereby invoking guarantee agreement, executed by you No.2 to 4, and call upon you to make payment to our clients

forthwith.

13. In the circumstances, we call upon You Nos. 1 to 4 to pay to our Clients within seven (7) days from Company Appeal (AT) Insolvency No. 329 of 2023 the date of receipt of this recall cum invocation of corporate guarantees notice, the outstanding overdue amount alongwith with interest, additional interest, and other charges payable under the aforesaid Agreements and other documents,

(i) a sum of Rs. 166,40,63,441.95 (Rupees One Hundred Sixty Six Crores Forty Lakhs Sixty Three Thousand Four Hundred Forty One and Ninety Five Paise only) to our client State Bank of India as on 31.08.2020,

(ii) a sum of Rs.72,51,00,000.00 (Rupees Seventy Two Crores and Fifty One Lakhs only) to our client Canara Bank as on 31.08.2020,

iii) a sum of Rs.65,68,15,530.77 (Rupees Sixty Five Crore Sixty Eight Lakh Fifteen Thousand Five Hundred and Thirty and Seventy Seven Paise Only) to our client IIFCL as on 31.08.2020,

(iv) a sum of Rs.33,33,64,937.16 (Rupees Thirty Three Crores Thirty Three Lakhs Sixty Four Thousand Nine Hundred Thirty and Sixteen Paise only) to our client Bank of Baroda on 31.08.2020 and

(v) a sum of Rs.34,18,16,286.80 (Rupees Thirty Four Crores Eighteen Lakhs Sixteen Thousand Two Hundred Eighty Six and Eighty Paise only) to our client Punjab National Bank an 31.08.2020 Company Appeal (AT) Insolvency No. 329 of 2023 together with further interest, additional interest and other charges at the contractual rates upon the footing of compound interest until payment/realisation towards the loan availed by you No.1 herein, failing which our clients will be constrained to initiate necessary action against You no.1 to 4 at your costs, risks and consequences including but not limited to-

i) initiating recovery proceedings against you before the Debts Recovery Tribunal or any other forum under Recovery of Debts and Bankruptcy Act, 1993 or any other law,

ii) initiating insolvency proceedings against you under the Insolvency and Bankruptcy Code, 2016 ("IBC") or any other law,

iii) initiating criminal proceedings against directors of the Borrower,

iv) initiating proceedings under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

v) informing default/breach under the Working Capital, Cash Credit, Seasonal Limit, Term Loan and Standby Letter of Credit/Bank Guarantee Facility to TransUnion CIBIL, Reserve Bank of India, information utility under IBC or any other reporting authority/body;

vi) reporting you and/or Borrower's directors as non-cooperative borrowers or wilful defaulters;

Company Appeal (AT) Insolvency No. 329 of 2023

vii) initiating civil and criminal proceedings against the Personal Guarantors; and

viii) any other step under law or contract to recover the Outstanding Amount."

29. The notice dated 01.10.2020, thus, has been issued invoking the grantee which expression is used in Para 12 above. When the Bank has given time to the Guarantor to make payment on 01.10.2020, there can be no default on part of the Guarantor on any earlier date. The default on part of the Guarantor thus has to be subsequent to the notice dated 01.10.2020 i.e. Non-payment within seven days as required.

30. In Part IV of the application, date of declaration of the Principal Borrower's account as NPA i.e. 05.12.2019 was mentioned. Part IV also clearly mentions the invocation of guarantee by notice dated 01.10.2020. Relevant portion of Part IV reads as follows:

"DATE OF DECLARATION OF THE BORRWER'S ACCOUNT AS NPA: December 5, 2019.

(a) It is submitted that the Borrower failed in making payments under the Facilities from the year 2019 onwards. Accordingly, a breach of the contractual arrangement between the Financial Creditor and the Borrower for the Facilities, occurred and consequently a breach of the contractual arrangement between the Financial Creditor and the Corporate Debtor.

Company Appeal (AT) Insolvency No. 329 of 2023

(b) In view of the same, a Notice dated October 1, 2020, was issued by the Advocates of the Financial Creditor. In the said Notice, the Financial Creditor also invoked the corporate guarantees provided by various group companies of the Borrower, including by the Corporate Debtor herein. A copy of the Notice is marked and annexed hereto as Annexure-I (L).

(c) However, despite repeated reminders, the Borrower and the Corporate Debtor has failed to cure its default and the Facilities remain unpaid. Thus, it is submitted that the Corporate Debtor has become insolvent and initiation of corporate insolvency resolution process ("CIRP") under the Insolvency and Bankruptcy Code, 2016 ("Code") against the Corporate Debtor, is essential, crucial

and in the interests of all stakeholders.

(d) Thus, the present Application is filed by the Financial Creditor under Section 7 of the Code, seeking the initiation of CIRP against the Corporate Debtor, in accordance with the provisions of the Code and the Rules and Regulations made thereunder."

31. When the notice dated 01.10.2020 is relied by the Financial Creditor with further stipulation that the Financial Creditor has invoked the corporate guarantee, the default of corporate guarantor has to be subsequent to 01.10.2020.

Company Appeal (AT) Insolvency No. 329 of 2023

32. In view of the foregoing discussion, we arrive at following conclusions:

> (i) The Corporate Guarantee Deed dated 17.05.2019 is on demand guarantee deed and the default shall arise on the part of the Guarantor only when demand notice is issued as contemplated in the Deed of Guarantee. When the State Bank of India invoked the guarantee vide notice dated 01.10.2020, demand on the part of the Corporate Guarantee shall arise only subsequent to the notice dated 01.10.2020 i.e. non-payment of the amount within seven days i.e. default arise on 08.10.2020.
>
> (ii) Default on the part of the Guarantor having arisen on 08.10.2020 i.e. within the period which is covered as prohibited period under Section 10A, application under Section 7 was clearly barred by Section 10A. Issues No. II, III and IV are answered accordingly.
>
> (iii) The Adjudicating Authority in the impugned order has not adverted to the relevant clauses of the Deed of Guarantee as noted above. The date of default on part of the Guarantor being subsequent to 01.10.2020 when guarantee was invoked, the application was barred by Section 10A and the Adjudicating Authority committed error in admitting the Section 7 application.

33. In view of the foregoing discussion and conclusions, we answer Issues No. II, III and IV in following manner:

> Company Appeal (AT) Insolvency No. 329 of 2023 Issue No. II: The Deed of Guarantee dated 17.05.2019 is guarantee on demand and the limitation of Guarantor shall ensue only when demand is made to the Guarantor.
>
> Issue No. III: The Notice dated 01.10.2020 issued by the State Bank of India to Guarantor has to be treated to be notice on demand as contemplated in the guarantee and the default on the part of the Guarantor shall be only after notice dated 01.10.2020 i.e. during period of Section 10A.

Issue No. IV: The application filed by the Bank under Section 7 was barred by Section 10A.

34. We, thus, are of the view that the application under Section 7 filed by the Bank being barred by Section 10A could not have been admitted. In result, the Appeal is allowed. The impugned order dated 01.03.2023 is set aside.

[Justice Ashok Bhushan] Chairperson [Barun Mitra] Member (Technical) NEW DELHI 28th April, 2023 Archana Company Appeal (AT) Insolvency No. 329 of 2023