

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

Company Appeal (AT) (Ins) No. 77 of 2020

[Arising out of Order dated 06.12.2019 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in C.P (IB)No. 346/KB/2019]

IN THE MATTER OF:

**Laxmi Pat Surana
Promoter/Director and Shareholder
of Surana Metals Limited.
S/o Late Hem Raj Surana
Aged about 70 years
Residing at 109/3, Hazra Road,
Kolkata-700026**

...Appellant

Versus

**1.Union Bank of India,
Having its registered and Head Office
At 239, Vidhan Bhawan Marg,
Nariman Point,
Mumbai-400021**

**2. Sunil Mohan Acharaya
The Interim Resolution Professional
of Surana Metals Limited,
Having its registered office at
245/1, Bhattacharya Para 6, Jheelpur Road
Ward No. 15, New Barrackpore
North 24 Parganas
Kolkata -700131**

...Respondents

Present:

**For Appellant: Mr. Abhijeet Sinha, Mr. Aditya, Mr. Sandeep Nagar,
Mr. Kamesh Vedula, Advocates**

**For Respondents: Ms. Nishi Chaudhary, Mr. Yashartha, Ms. Priya
Choubey, Advocates
Mr. Sunil Mohan Acharya,RP**

J U D G E M E N T

Venugopal M., J :

1. The Appellant (Promoter/Director and Shareholder of Surana Metals Ltd.) has focused the present Company Appeal being dissatisfied with the impugned order dated 6.12.2019 in C.P (IB)No.346/KB/2019 dated 6.12.2019 passed by the Adjudicating Authority (National Company Law Tribunal) Kolkata Bench.
2. The Adjudicating Authority in the impugned order dated 6.12.2019 at paragraph 8 to 10 had observed following:

8. “ *Ld. Counsel for the Corporate Debtor submitted that claim is time barred. He pointed out date of default as 03.01.2010 and this proceeding is filed on 13.02.2019. According to him, it is time barred in view of the Hon’ble Supreme Court Ruling in case of Gaurav Hargovindbhai Dave V/s. Asset Reconstruction Company (India) Ltd. &Anr. (Civil Appeal No. 4952 of 2019.)*”

9. “*We have gone through the Ruling. We hold that this Ruling is not applicable in this case. In case before Hon’ble Supreme Court, the facts were after the date of default in the year 2011, there was no acknowledgment of debt by the Corporate Debtor in that proceeding. In this case, after the default in the year 2010, not only original borrower but also the Corporate Debtor admitted and acknowledgement the debt even in the year 2018. This proceeding is filed within period of limitation.*”

10. “*Ld. Counsel for the Corporate Debtor submitted that he cannot be the Corporate Debtor in view of the*

definition of corporate guarantor as stated in Section 5A of IBC,2016. According to him, since his client is guarantor to the individual and not corporate person, no proceeding can lie against his client under IBC,2016. We have considered about his above submission. Section 5A of IBC,2016 states Corporate Guarantor means the corporate person who is surety in contract guarantee to a Corporate Debtor. Section 3(8) of IBC defines Corporate Debtor means corporate person who owes a debt of any person. In this case, it is not in dispute that by virtue of deed of guarantee, the Corporate Debtor herein who is the corporate person owes a debt to the Bank. Hence, the Corporate definition in Section 5A of IBC, 2016 of corporate guarantor cannot be considered for exclusion of this proceeding from consideration for a simple reason that the definition is just explanatory definition as to who could be called as corporate guarantor. In this case, the corporate Debtor is the guarantor of the individual. He executed deed of guarantee in the year 2008. He thereby undertook to repay the debt in case of default by the original borrower. The definition of the corporate guarantor relied on by him in Section 5A cannot be used to show applicability or inapplicability of provisions of IBC against him as it is just explanatory definition. Hence, we reject his argument.”

3. and resultantly held that the first Respondent/’Financial Creditor’ had proved that ‘Financial Debt’ was due and payable by the Corporate

Debtor (M/s Surana Metals Ltd.) and that a default was committed in paying the same.

4. Challenging the Validity and Legality of the impugned order dated 6.12.2019 passed by the Adjudicating Authority, the Learned Counsel for the Appellant submits that the first Respondent/Bank /'Financial Creditor' filed an application under Section 7 of the I&B Code and as per Section 3(7) and 3(8) of the I&B Code, the application can be filed only against Company and the same is not maintainable against the Sole Proprietorship Firm(as in instant case) and as such what cannot be performed directly, cannot be performed indirectly.

5. The Learned counsel for the Appellant contents that as per Section 5A of the I&B Code, 2016 to commence the insolvency proceedings against the 'Corporate Guarantor', both the 'Principal Debtor' and 'Guarantor', must be Corporate entities/ Corporate Debtor, as defined under Section 3(7) and 3(8) of the Code. Furthermore , the insolvency proceedings cannot be initiated against the Sole Proprietorship Firm of Debtor and therefore, the first Respondent/Bank cannot initiate the 'Insolvency proceedings' against the Appellant(Guarantor Company) too.

6. The Learned Counsel for the Appellant refers to the ' Report of the Insolvency Law Committee' (March,2018 - Ministry of Corporate Affairs,

Government of India) whereby and whereunder at Paragraph 23.1 it is mentioned as under:

23.1 “ Section 60 of the Code requires that the Adjudicating Authority for the corporate debtor and personal guarantors should be the NCLT which has territorial jurisdiction over the place where the registered office of the corporate debtor is located. This creates a link between the insolvency resolution or bankruptcy processes of the corporate debtor and the personal guarantor such that the matters relating to the same debt are dealt in the same tribunal. However, no such link is present between the insolvency resolution or liquidation processes of the corporate debtor and the corporate guarantor. It was decided that Section 60 may be suitably amended to provide for the same NCLT to deal with the insolvency resolution or liquidation processes of the corporate debtor and its corporate guarantor. For this purpose, the term ‘corporate guarantor’ will also be defined.”

7. The Learned Counsel for the Appellant points out that Section 5A of the Code is clear, unequivocal and unambiguous and if the legislature had enunciated to include the ‘(Corporate Guarantor)’ in respect of a person and Firm within the purview of the Section 7 of the Code the same would have been provided in an explicit manner.

8. The Learned Counsel for the Appellant advances an argument that the application filed by the first Respondent/Bank/ ‘Financial Creditor’

was barred by the plea of 'Limitation' and that the 'Account' was admittedly declared as 'Non-Performing Asset' on 30.10.2010 by the First Respondent/Bank and that the application under Section 7 of the Code was filed on 13.02.2019 i.e. after more than nine years.

9. The Learned Counsel for the Appellant points out that the letters dated 03.03.2012, 27.05.2015, 24.10.2016 issued by the Principal Borrower and produced by the first Respondent/Bank are not an acknowledgment of 'Debt' by any stretch of imagination, Since there is no admission of liability. In effect, the aforesaid letters do not start the fresh period of Limitation under Section 18 of the Limitation Act, 1963 as averred by the Bank.

10. Expatiating his plea, the Learned Counsel for the Appellant comes out with an argument that the acknowledgement must be made before the expiry of the period of Limitation. Moreover, it is the stand of the Appellant that the three letters were addressed by the Principal Borrower i.e. Sole Proprietorship Firm and not by the Appellant and as such the said communications are not binding upon the 'Appellant'/ 'Corporate Guarantor'/ 'Surety'.

11. Yet another contention raised on behalf of the Appellant is that the Letter dated 8.12.2018 is a 'Privileged Document' and the same was

addressed as 'without prejudice' and as such the same is inadmissible under the Indian Evidence Act, 1872.

12. The Learned counsel for the Appellant submits that the first Respondent/Bank had filed reply before this Tribunal together with the letter dated 3.12.2019 and the said Letter was not produced before the Learned Adjudicating Authority (NCLT) Kolkata and hence the same is not to be relied upon.

13. In response, the Learned Counsel for the first Respondent contends that M/s Mahaveer Construction (Borrower) had borrowed money against the payment of interest from the First Respondent/Bank and M/s Surana Metals Ltd. is being registered under the Companies Act, 2013. Hence, the Plea is taken on behalf of the first Respondent/Bank that M/s Surana Metals Ltd. comes within the purview of 'Corporate Debtor' and the first Respondent/Bank comes within the ambit of 'Financial Creditor' of M/s Surana Metals Ltd. '(Corporate Debtor)' and therefore, the application under Section 7 of the Code filed by the first Respondent/Bank is perfectly maintainable in law.

14. The Learned counsel for the first Respondent takes stand that the Corporate Guarantor (M/s Surana Metals Ltd.) had duly executed the Letters of the Guarantors dated 2.2.2007, 17.2.2007 and 3.8.2008 in respect of the loan facilities signed by the Bank to M/s. Mahaveer

Construction, thereby comes within the purview of the definition 'Corporate Guarantor' as per section 5(A) of the I&B Code. Added further, the 'Corporate Guarantor' had acknowledged its debt against execution of the Letters of Guarantee and in its reply dated 8.12.2018 is not against the demand notice dated 3.12.2018 issued by the Bank.

15. The Learned counsel for the first Respondent/Bank for Financial Creditor submits that the limitation for filing of an application against the 'Corporate Guarantor' begins from the acknowledgement i.e. 8.12.2018, furnished by the 'Corporate Guarantor'.

16. Continuing Further, the 'Corporate Guarantor' in its reply admitted to the effect that loan of Rs. 945 Lakhs and Rs. 245 Lakhs was sanctioned to you to M/s Mahaveer Construction of No. 12, Bonfield Lane, Kolkata -700001....

Our Corporate Guarantee was issued in accordance with the provisions of the Companies act, 1956 and as such the 'Corporate Guarantor' on 8.12.2018 had admitted the execution of guarantee agreements on 2.2.2007, 17.2.2007, 3.8.2008, whereby the 'Corporate Guarantor' had agreed to pay Rs. 12.05 Crores and interest on such amount.

17. The Learned Counsel for the Appellant emphatically takes a forceful stand that the 'Corporate Debtor' as a 'Corporate Person' being Company under the Companies Act, 2013 and had given surety but in

relation to a Contract or 'Guarantor' or Corporate Debtor. Suffice it to make a pertinent mention that the 'Corporate Debtor' had guaranteed surety in regard to this Contract where Debtor firm was Proprietor concern. Besides these, the Corporate Debtor cannot shirk his liability to pay the debt to the 'Financial Creditor'/Bank and also that the Corporate Guarantor had taken 'Guarantee' in respect of Section 5(8) of the Code and M/s Mahaveer Construction had borrowed the money against the payment of interest from the bank.

18. The Learned counsel for the First Respondent /Bank refers to the judgement of this tribunal in Company Appeal (AT)(Insolvency) No. 538 of 2019.K.Paramasivam Vs. The Karur Vysya Bank Ltd. and Ors. Wherein at paragraph 18 it is observed and held as under:

18. "Admittedly, the 'Borrowers' have borrowed the money against payment of interest from the Bank and M/s Maharaja Theme Parks and Resorts Private Limited has taken the 'guarantee' in respect of the item referred to in clause (a) of Section 5(8). In this background, we hold that the Bank comes within the meaning of 'Financial Creditor' of M/s Maharaja Theme Parks and Resorts Private limited ('Corporate Debtor'.) For the said reason, the application under Section 7 is maintainable."

19. The Learned counsel for the first Respondent/Bank pointed out that the Corporate Debtor had acknowledged its debt against the execution of the letters of Guarantee which runs as under:

S.No.	Acknowledgment Letter Dated	Executed by	Page no of the Appeal
1.	16.09.2010	Laxmi Pat Surana	196
2.	03.03.2012	Laxmi Pat Surana	197
3.	27.05.2015	Laxmi Pat Surana	140
4.	24.10.2016	Laxmi Pat Surana	198
5.	08.12.2018	Surana Metals Ltd.	141

Further, the Corporate Debtor had acknowledge that the reply dated 8.12.2018 sent against demand notice dated 3.12.2018 was issued by the Bank for initiation of the proceedings under the Code. In this connection the Learned Counsel for the first Respondent refers to Section 145 of the Indian Contract Act, 1872 to the fact that in every 'contract' of 'Guarantee', there is an implied promise by the 'Principal Debtor' to indemnify the surety.

20. The Learned Counsel for the Appellant contends that the Appellant is also the Proprietor of the firm of M/s Mahaveer Construction and that the proprietorship Firm has no separate legal existence. It is not dispute Company Appeal (AT) (Ins) No. 77 of 2020

that the term Loan No. - 1 was disbursed to an extent of Rs. 9,60,00,000/- on 11.9.2007 and the second term Loan was disbursed to an extent of Rs. 2,45,00,000/- on 11.9.2008 and the total sum disbursed was Rs.12,05,00,000/-.The Letter of Guarantee for Rs. 9,60,00,000/- was given on 2.02.2007, and on 17.02.2007, Letter of Guarantee was issued by the Corporate Debtor. On 30.8.2008 the Letter of Guarantee for Rs. 12,05,00,000/- was given on 30.8.2008 etc. By means of 'Guarantee', to and in favour of the First Respondent/Bank, Corporate Debtor undertook to clear the Loan of the 'Principal Borrower', in the event of the 'Principal Borrower' committed default and it is the primordial duty of the 'Corporate Debtor' to clear the due amount.

21. In the instant case the Corporate Debtor (M/s Surana Metals Ltd.) had duly executed the Letter of Guarantor dated 2.2.2007, 17.2.2007 and 3.8.2008 for the Loan facilities Sanctioned by the Bank to M/s Mahaveer Construction also that the Corporate Debtor had acknowledged its debt on 16.9.2010, 3.3.2012, 27.5.2015, 24.10.2016, and executed by the Appellant (Vide Page. No. 196, 197, 140, 198) and on 8.12.2018 executed by the (M/s Surana Metals Ltd.) page no. 141 respectively against the execution of the Letters of Guarantee. Significantly, the Corporate Debtor in its Reply dated 8.12.2018 had tacitly admitted the execution of Guarantors Agreement dated 2.2.2007, 17.2.2007, 3.8.2008

in and by which the Corporate Debtor had agreed to pay Rs. 12,05,00,000/- crore and interest on such sum.

22. The 'Corporate Debtor' being a 'Corporate Person' and registered under the Companies Act, 2013 had Guaranteed 'Surety' in regard to 'Contract' with 'Debtor firm' or 'Proprietary concern' as the case may be. As per Section 145 of the Indian Contract Act, 1872 in respect of every 'Contract of Guarantee', there is an implied Promise of the 'Principal Debtor' to indemnify the 'Surety'.

23. It may not be out of place for this tribunal to make a relevant mention that the 'Financial Debt' includes a 'Debt' owed to a Creditor by a 'Principal' and 'Guarantor'. A just Omission or failure to pay on the part of a Guarantor to pay the 'Financial Creditor', When the Principal sum is claimed/demanded certainly, will come with the scope of 'Default' under Section (3),(12) of the Code. The proceedings under Section 7 of the Code can be triggered by a 'Financial Creditor' who had taken Guarantee in respect of 'Debt' against 'Guarantor' for failure to repay the money borrowed by the 'Principal Borrower'. To put it explicitly (Ms/ Surana Metals Ltd.) is the 'Corporate Debtor' and that the Appellant is the proprietor of the Firm of M/s Mahaveer Construction.

24. It is to be pointed out that 'Pendency of Debt recovery proceeding' before Tribunal is not to prevent a financial creditor to initiate CIRP

against Corporate Debtor. Be it noted that a legal remedy must be alive for a legislatively fixed period of time as per decision N. Balakrishnan V/s M. Krishnamurthy 1998 7 SCC Page 123.

25.In B.K. Educational services Ltd. V/s Parag Gupta and Associates (Civil Appeal No. 23988/17) it is held that ‘the right to sue therefore accrues when a default takes place. If the default had occurred three years before the date of filing of an application, the same will be barred under Art.137 of the Limitation Act, 1963.

26.In the decision of Hon’ble Supreme Court Jignesh shah and Anr. V/s Union of India &Anr. 2019 10 SCC 750 at paragraph 28 it is among other things observed as under:

“Here again, the trigger point is the date on which default is committed, on account of which the company is unable to pay its debts. This again is a fixed date that can be proved on the facts of each case. Thus, Section 433(e) read with section 434 of the Companies Act, 1956 would show that the trigger point for the purpose of limitation for filing of a winding-up petition under Section 433(e) would be the date of default in payment of the debt in any of the three situations mentioned in Section 434.”

27.In Gaurav Hargovind Bhai Dave V/s Asset Reconstruction Company (India)Ltd. &Anr. 2019 10SCC 572 the Hon'ble Supreme Court has observed that the Respondent was declare 'NPA' on 21.07.11 and Section 7 application was filed in 2017 while the I&B Code was brought into force on 1.12.2016 and held that Art.62 of the Limitation Act applies only to suits and application filed under Section 7 falls within residuary Art. 137 of the Limitation Act and further the three years period had lapsed, the application under Section 7 was held to be time barred.

28. An Acknowledgment does not create any new right and it extends the limitation period as per decision P. Sreedevi V/s P. Appu AIR 1991 Kerala76. When a Debtor makes an acknowledgment of his liability to pay a Debt, it would mean that he was admitting a subsisting liability to pay. The burden lies on the Creditor to prove that an acknowledgment was made within time as per decision Gursaran Shib Singh AIR 1943 All 393CFB. An acknowledgment in writing must indicate Jural Relationship as that of 'Debtor' and 'Creditor' between the parties.

29. As far as the present case present case is concerned the pendency of OA No. 310 of 2010 (filed on 14.7.2010) before the Debt Recovery Tribunal -III Kolkata will not preclude the first Respondent/bank to file the application under Section 7 of the Code before the Adjudicating Authority.If a party claiming the benefit of the Section 14 of the Limitation Act, 1963 had failed to secure relief in favour of earlier proceeding not because of any defect or Jurisdiction or some other cause of like nature, Company Appeal (AT) (Ins) No. 77 of 2020

he cannot derive the benefit of the ingredients of Section 14 of the Act. By virtue of Deed of Guarantee Corporate Debtor being a 'Corporate Person' owes debt to the Bank. In the present case the 'Corporate Debtor' is the Guarantor and in the year 2008, undertook to repay the debt in case of default by the Principal Borrower. As per Section 3(8) of the Code 'Corporate Debtor' means a Corporate Person who owes debt of any person.

30. In the light of detailed qualitative and quantitative discussions aforesaid and also this Tribunal keeping in mind the present facts and circumstances of the instant case in an integral fashion, which float on the surface case comes to an inescapable conclusion that there is an acknowledgment of 'Debt' on various dates like 2.2.07, 17.2.07, 3.8.07 for the loan facilities availed by Mahaveer Construction the Letters of Guarantee Acknowledged by the Corporate Debtor (M/s Surana Metals Ltd.) on 16.9.10, 3.3.12, 27.5.15, 24.10.16 executed by the Appellant and on 8.12.18 by the Surana Metals Ltd. etc. This apart, here is an acknowledgment of Debt by the Principal Borrower but also the Corporate Debtor on 27.5.15 & 8.12.18 respectively. The object of specifying time limit for limitation is undoubtedly based on 'Public Policy'. The application projected before the Adjudicating Authority (NCLT) Kolkata Bench, on 13.2.19 is well within limitation and not barred by Limitation. Looking at from any angle, the present Appeal sans merits and the same is dismissed without costs. The Appellant is directed to furnish the certified copy of the

impugned order of the Adjudicating Authority within one week from today and accordingly IA No. 199/2020 stands disposed of . IA No. 200/2020 stands closed.

[Justice Venugopal.M]
Member(Judicial)

[V.P.Singh]
Member(Technical)

[Alok Srivastava]
Member(Technical)

19/03/2020

NEW DELHI

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