

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

Company Appeal(AT) (Ins)No. 220 of 2021

IN THE MATTER OF:

**Intec Capital Limited
708, Manjusha Building,
57, Nehru Place,
New Delhi - 110 119**

...Appellant

Vs.

**Arvind Gaudana
Resolution Professional
Vrundavan Ceramic Pvt. Ltd.
307, Ashirwad Paras, Corporate Road,
Near Prahldanagar Garden, Satellite,
Ahmedabad, Gujarat - 380 015**

...Respondent

Present:

For Appellant: Mr. Krishnendu Dutta, Sr. Advocate with Mr. Harsh Sinha, Mr. Dabhas Singh, Advocates.

For Respondent: Mr. Abhijeet Sinha, Mr. Ravi Pahwa, Ms. Aastha Mehta, Advocates.

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The Appeal has been filed by the Appellant- 'Intec Capital Ltd', under Section 61 of the 'Insolvency and Bankruptcy Code, 2016' (in short 'Code') against the impugned order dated 05.02.2021 passed by the 'Adjudicating Authority' (National Company

Law Tribunal), Ahmedabad Bench Court No.1 in I.A No.340 of 2020 in CP(IB) No. 561/7/NCLT/AHM/2018.

2. The Adjudicating Authority has held at para 34 & 35 as follows:

"Para 34: Conclusion

(i). We hold that, in the present case, due to lack of demand notice by the applicant as per clause 6 Deed of Guarantee, the Guarantee stands un-invoked and consequently, the claim filed by the applicant is not ascertained and accrued liability.

(ii) We hold that time barred claims or contingent claims cannot be admitted during the CIRP though such claims will be part of information memorandum being provided to perspective Resolution Applicant.

(iii) We hold that so far as the meaning of various words/terms such as "debt due", "debt incurred", "debt owed", "debt due and payable", "claims" and "claims due" which have been used in various Sections / Regulations pertaining to collation / adjudication of claims for the purpose of ascertainment of liability in respect of such claims under CIRP/ Liquidation would mean a debt which is due and payable, both in law or in fact and the provision of Limitation Act, 1963 will be applicable thereto.

(iv) We hold that claims in respect of a time barred debt, whether such claim is principal debt or arise out of a contract of Guarantee, cannot be entertained in CIRP/ Liquidation Proceedings.

35. In view of the above discussions, the application filed by the Applicant is liable to be dismissed; hence, the same is dismissed."

3. The Appellant case is that it is a 'Non-Banking Finance Company' (NBFC) and it's registered with 'Reserve Bank of India' (RBI). It is a case of corporate Guarantee given by the Corporate Debtor (CD) for the loan facilities availed from the Appellant. The Appellant had sanctioned two loan facilities to 'Umiya Ceramic Pvt. Ltd' in terms of two separate sanction letters both dated 16.03.2013 and one loan facility was sanctioned to Gokul Ceramic Pvt. Ltd in terms of sanction letter dated 27.07.2013. The amount involved in Umiya case is Rs. 3, 36,23,730/- and in case of Gokul Ceramic, it is Rs. 1,88,76,480/- copies of sanction letter signed by the parties are appearing at (*Annexure A3 page 115-130 of the Appeal Paper Book*). Both the companies executed the loan agreements with the Appellant on 30.03.2013 and 12.04.2013 in case of Umiya Ceramic Pvt. Ltd and dated 28.08.2013 in case of Gokul Ceramics Pvt. Ltd. The CD/Vrundavan Ceramics Private Ltd., assented by signing the loan agreement and related documents in the capacity of a corporate guarantor and further executed 'Deeds of Guarantee' thereby furnishing joint, several and co-extensive with that of borrower under respective loan agreements. In terms of the Guarantee, the CD/ Respondent guaranteed that in the event of demand raised by the Appellant in respect of the dues under the respective loan agreement, the CD/ Respondent shall discharge the dues without demur, reservation, contest or protest within seven days from the demand and that such obligations shall be continuing one till such time, the dues owed by the borrowers are completely discharged to the satisfaction of the Appellant. (*Copies of the three-loan agreement and loan documents executed by the borrowers and guarantee furnished by the CD are*

appearing at Annexure A-4 page 131-313 -particular reference to page no.168 -171)

For brevity and clarity, page No. 168 to 171 of the Appeal Paper book are given below:-

GUARANTOR'S FORM
(FOR CORPORATE)

We request you to grant the Loan as requested by the Borrower as per the terms and conditions mentioned in the Loan Agreement. In order to enable you to do so, we make the following representations and furnish the following particulars, which I warrant to be true and correct in every respect. We understand the same are required for evaluation of the Borrower's proposal and will be kept confidential for the above-mentioned purpose.

Name of the Company: Vrundayan Ceramic Pvt. Ltd. Auth. Sign: Mr. Vittal Reddy on Page 1
 Office Address: S.A. Anandaram Highway, Pt-Dhruv, Tq- Wankar, Dist- falkn
 City: _____ Pin Code: 363633 Tel No: 02228-282224/25
 Factory Address: S.A. Anandaram Highway, Pt-Dhruv, Tq- Wankar, Dist- falkn
 City: _____ Pin Code: 362623 Tel No: 02228-282226
 Date of Incorporation: 06-07-1994 Relationship with Borrower of any: Close Company
 Annual Turnover Rs: 57,45,51,929/- Tax Paid Rs: 43,52,677
 Details of Income Tax: PA No: AAACV9302B Circle/Ward/ Dist: _____

Immovable Assets Owned		Amount (Rs. In Lacs)
Factory land		26.92
Buildings		261.31
Movable Assets Owned		Amount (Rs. In Lacs)
Plant & Equipments		2025.84
Furniture & fixtures		33.40
Total Net worth		

Relationship with Borrower of any: Close Company
NETWORTH STATEMENT

We, the proposed Guarantor do declare and confirm that:
 We have fully understood my responsibility as Guarantor and that We have not issued any guarantees to the applicant or any other persons and we have omitted nothing material.
 If Intec Capital Limited accepts the proposal of the applicant for Loan facility We undertake to guarantee the repayment of all the amounts payable by the Borrower and the due performance of the terms and conditions of the Loan Agreement.

PLACE: New Delhi **Vrundayan Ceramic Pvt. Ltd.**
 DATE: 30/3/13 V. V. Reddy
 Signature: Director

Loan Agreement: 012/913
 AMOUNT: 18576480/-
 Certified that the Guarantor has affixed the above signature in my presence.

Signature of the Borrower
 Name of the Borrower: Umiya Ceramic Pvt. Ltd.
Jayashree Reddy
 Director

26
TRUE COPY

169



100

DEED OF GUARANTEE

This Instrument of Guarantee is made at and on the day month and year as set out in Clause 23 of this Guarantee

BY

Guarantor, more particularly described and set out in clause 23 of this Guarantee (hereinafter referred to as "Guarantor")

IN FAVOUR OF

INTEC CAPITAL LIMITED, a company incorporated under the provisions of The Companies Act, 1956 having its registered office at 751, Marjula, ST, Nehru Place, New Delhi - 110 019 (hereinafter referred to as "INTEC CAPITAL LIMITED").
The expressions "Borrower" and "INTEC CAPITAL LIMITED" shall unless repugnant to the context or meaning thereof, be deemed to include their legal heirs, representatives, successors, agents, administrators, executors, nominees, permitted assigns etc.

WHEREAS:

1. INTEC CAPITAL LIMITED has at the request of the Borrower, more particularly described and set out in clause 23 (hereinafter referred to as "Borrower") agreed to provide to the Borrower a Loan for an amount as set out in Clause 23 (hereinafter referred to as "Loan") wide Loan agreement dated as set out in Clause 21 (hereinafter referred to as "Agreement").
2. The Loan is to be utilized by the Borrower for the purpose(s) as set out in Clause 21.
3. In terms of the Agreement the Guarantor is required to guarantee the repayment by the Borrower of the LOAN and all other dues and outstanding and also guarantee the due observance of the terms and conditions of the Agreement by the Borrower.
4. The Guarantor is a Director/Partner/Group Company/Associate of the Borrower as set out in Clause 23.

NOW, THEREFORE, THIS GUARANTEE WITNESSETH AS UNDER:

1. The Guarantor is a Director/Partner/Group Company/Associate of the Borrower as set out in Clause 23.
2. INTEC CAPITAL LIMITED has at the request of the Borrower and the Guarantor, agreed to provide LOAN to the Borrower.
3. The Guarantor, in consideration of INTEC CAPITAL LIMITED providing the LOAN, hereby guarantees the due performance and observance by the Borrower of all the terms and conditions of the Agreement and agrees to pay on first demand any moneys which may be due and etc.
4. The Guarantor confirms to have read and understood the terms and conditions governing the LOAN and agrees to be bound by the same. The Guarantor acknowledges and accepts that this Guarantee shall form an integral part of the Agreement.
5. That the liability to discharge the dues payable under the Agreement shall be joint, several and co-extensive with that of the Borrower and other co-guarantors, if any.
6. In the event of demand being raised by INTEC CAPITAL LIMITED in respect of dues under the Agreement, the Guarantor agrees to discharge the dues with any bonus, reservation, content, protest whatsoever within 7 days of such demand. This Guarantee is independent of and is without prejudice to such other security (ies) that may have been created in favour of INTEC CAPITAL LIMITED in regard to LOAN.
7. This Guarantee will be final and binding notwithstanding any difference or dispute which may be pending between the Borrower, the Guarantor and INTEC CAPITAL LIMITED and notwithstanding any proceeding in this regard pending in any Court, Arbitration, Tribunal etc. The liability under this agreement is absolute and unequivocal.
8. This Guarantee shall be a continuing one till such time INTEC CAPITAL LIMITED may have any claim against the Borrower under the Agreement and all dues are discharged completely to the satisfaction of INTEC CAPITAL LIMITED.

Vrundavan Ceramic Pvt. Ltd. V. M. Patel Director

Umiya Ceramic Pvt. Ltd.
Jayant N. Patil
Director

Vrundavan Ceramic Pvt. Ltd.
V. M. Patel
Director

BORROWER

GUARANTOR

86
TRUE COPY



170

- 9. A statement of account duly certified by the Authorized Officer of INTEC CAPITAL LIMITED shall be conclusive proof with respect to debts payable and outstanding against the Borrower.
- 10. Any novation/variation of the Agreement and/or concession/waiver/acknowledgement made by INTEC CAPITAL LIMITED to the Borrower without informing/notify the Guarantor shall not discharge the Guarantor. The Guarantor further agrees that any concession or indulgence granted to the Borrower in respect of the terms and conditions either in releasing or retaining the security (if any) after taking possession of it or in any other manner, shall not prejudice INTEC CAPITAL LIMITED's right against this or relieve him from his/her guarantee. It shall not be necessary for INTEC CAPITAL LIMITED to give any notice to the Guarantor in the event of any such novation, variation etc.
- 11. The Guarantor further agrees and undertakes to reimburse INTEC CAPITAL LIMITED all payments made by INTEC CAPITAL LIMITED in respect of any fees, penalties, taxes etc. on behalf of the Borrower.
- 12. Any communication/invoice/letter(s)/document(s) sent by INTEC CAPITAL LIMITED to the Borrower and vice versa at the address stated herein or at Registered AD communication/ courier receipt for valid service. The communication/ notice etc. shall be deemed to have been received when sent by mail-3 days after the date of posting or within 48 hours after dispatch by registered post, when personally delivered-on receipt of the same at the address of the party, when sent by fax-when receipt of confirmation. Any change in the address shall be duly notified in writing to the other party within 7 days of such change.
- 13. The Guarantor further agrees and undertakes to do all such acts, deeds(s), things(s) and to execute such documents, deeds, negotiable instruments or other writings, as INTEC CAPITAL LIMITED may in its discretion demand from time to time or consider necessary to safeguard its interest and/or to further secure the repayment of the LOAN and other dues under the Agreement. The Guarantor also agrees to sign and execute all such documents and deeds as may be required by INTEC CAPITAL LIMITED.
- 14. The Guarantor consents and accepts that in any default by the Borrower under the Agreement/any other agreements with INTEC CAPITAL LIMITED or other financial institutions/bank(s)/NBFC(s) shall entitle INTEC CAPITAL LIMITED to terminate the Agreement. On such termination the entire sum of money due and outstanding under the Agreement shall become payable forthwith.
- 15. In event of enhancement of the LOAN provided by INTEC CAPITAL LIMITED with or without informing the Guarantor, this guarantee shall remain valid for such enhanced limit also.
- 16. INTEC CAPITAL LIMITED shall have overriding right of lien and set-off upon all moneys of the Guarantor, which may come into possession of INTEC CAPITAL LIMITED in any manner what so ever. The Guarantor recognizes that such rights of the INTEC CAPITAL LIMITED shall not be affected by any reason whatsoever.
- 17. This Guarantee shall not be affected by any defect or non-enforceability of the Agreement and/or security (if any) and/or other documents.
- 18. Any force majeure on the part of INTEC CAPITAL LIMITED shall not in any way relieve the Guarantor of his obligations under this Guarantee.
- 19. This Guarantee is unconditional and irrevocable and shall remain so till such time INTEC CAPITAL LIMITED discharges this Guarantee by issuing a letter in this behalf.
- 20. This Guarantee is in compliance with the provisions of the Companies Act, 1956 and the Memorandum and the Articles of Association of the Guarantor.
- 21. The Guarantor agrees to keep INTEC CAPITAL LIMITED informed of any dispute or any litigation, which may have an impact on the financial viability of the Borrower and/or the security (if any) offered under the Agreement aforementioned.
- 22. On the aforesaid assurances of the Guarantor, INTEC CAPITAL LIMITED accepts the Guarantee.
- 23. The material facts with regard to this Guarantee are as under:

GUARANTOR
 Vaidyanandan Ceramics Pvt. Ltd.
 V. M. P. Patel

PLACE & DATE OF GUARANTEE:
 PLACE: Vaidyanandan Ceramics Pvt. Ltd. DATE: 30/12/13
 NAME OF THE GUARANTOR: V. M. P. Patel
 ADDRESS OF THE GUARANTOR: B-14 National Highway Dhruva Rajkot
 STATUS OF GUARANTOR: Company
 NAME OF THE AUTHORISED SIGNATORY: V. M. P. Patel
 IN WITNESS WHEREOF THE GUARANTOR HAS/HAVE PUT ITS SIGNATURE AND SEAL ON THIS _____ DAY, MONTH & YEAR ABOVE WRITTEN.
V. M. P. Patel

GUARANTOR
 Vaidyanandan Ceramics Pvt. Ltd.
 V. M. P. Patel

NAME OF THE BORROWER: Umiya Ceramic Pvt. Ltd.
ADDRESS OF THE BORROWER: Survey No. 135 P. T. Industrial Estate Rd. Dhruva
STATUS OF BORROWER: Company
NAME OF THE AUTHORISED SIGNATORY: Hajalraj Patel
LOAN AGREEMENT DETAILS:
 DATE: 30/12/13 AMOUNT: 18876480/-
 AGREEMENT NO: 014913

GUARANTOR
 Vaidyanandan Ceramics Pvt. Ltd.
 V. M. P. Patel
Director



WITNESSES:
M. S. Kamran

INTEC CAPITAL LIMITED
 Through Authorised Signatory

S. B.
TRUE COPY



171

THE UNDERTAKING

In respect of the Loan Agreement / Deed of Guarantee No. 01/915, Executed by me/ us dated 30/11/12 for a principal loan amount of Rs. 1,00,00,000/- (Rupees 100 Crores) each, to secure the repayment of the Loan Facility availed or to be availed by the Borrower from Intec Capital Limited (hereinafter referred to as "Intec")

I/We do hereby further irrevocably and unconditionally guarantee and issue the guarantee cheques as a security for due performance and fulfilment of all dues, obligations, commitments and liabilities to Intec including any sums due by the Borrower to Intec under the above said Loan Agreement.

I/We further agree and confirm that the said guarantee cheque(s) shall be available as a security for meeting or fulfilling all the dues and commitments of the Borrower as directed and decided by Intec, with no reference to the Borrower.

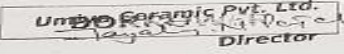
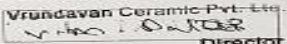
I/We here by authorize Intec to present these Cheques to the bank in case of there is any default made by the borrower in repayment of the Loan Facility under the Loan Agreement No. 01/915


I/We hereby undertake:

- That I/we shall on first demand of Intec and first presentation of the aforementioned Cheque(s) in my/our bank shall honor the Cheque(s) without any demur, protest or contestation and without any reference to the Borrower and notwithstanding any contestation by the Borrower.
- Not to authorize the bankers to stop the payment of the aforementioned cheque(s) issued to Intec.
- Not to close the account without your permission in writing under the terms of the Loan Agreement.
- That we shall never give you any notice requesting you not to present the Cheques given hereunder on due dates.

We are aware that on the faith of these undertaking, you have agreed to provide the said Loan Facility to us. We submit that in the event of any default in honoring the Cheques, you are at liberty to take action against us for the dishonour of the Cheques under section 138 of the Negotiable Instruments Act and 456 as breach of trust of the Indian Penal Code 1860.

1	Place	New Delhi
2	Date	30/12/12
3	Loan Agreement No.	01/915
4	Loan Amount	1,00,00,000/-
5	Tenor	60
6	Rate of Interest (p.a.)	11.75% on the basis Reducing
7	Installment Amount	1,16,54,111/-
8	Number of PDC's	60
9	Detail of Guarantee Cheques	1,00,00,000/- 100,00,000/- with Bank Ltd, Ac No 0206121250 4425
10	Name of the Borrower	Vrundavan Ceramic Pvt Ltd
11	Address of the Borrower	G.A National Highway, At-Dhuvya, Rajkot
12	Name of the Guarantor	Vrinda Ceramic Pvt Ltd
13	Address of the Guarantor	Survey No-139 & 142, Market Road Dhuvya.

 Director
  Director



TRUE COPY

4. A few 'Demands Promissory Note' and 'Letter of Continuity' also given by Borrower and Guarantors are reproduced below (which are appearing at page 206 to 208):

DEMAND PROMISSORY NOTE

PLACE: New Delhi Vrinda Ceramic Pvt. Ltd.
 DATE: 12/01/2013 Jayantitara Director

On demand I/We, the undersigned jointly and severally unconditionally guarantee to pay Intec Capital Limited a sum equal to or less than the amount of the Loan Facility availed or to be availed by the Borrower from Intec Capital Limited (hereinafter referred to as "Intec")

I/We do hereby further irrevocably and unconditionally guarantee and issue the guarantee cheques as a security for due performance and fulfilment of all dues, obligations, commitments and liabilities to Intec including any sums due by the Borrower to Intec under the above said Loan Agreement.

I/We further agree and confirm that the said guarantee cheque(s) shall be available as a security for meeting or fulfilling all the dues and commitments of the Borrower as directed and decided by Intec, with no reference to the Borrower.

I/We here by authorize Intec to present these Cheques to the bank in case of there is any default made by the borrower in repayment of the Loan Facility under the Loan Agreement No. 01/915

I/We hereby undertake:

- That I/we shall on first demand of Intec and first presentation of the aforementioned Cheque(s) in my/our bank shall honor the Cheque(s) without any demur, protest or contestation and without any reference to the Borrower and notwithstanding any contestation by the Borrower.
- Not to authorize the bankers to stop the payment of the aforementioned cheque(s) issued to Intec.
- Not to close the account without your permission in writing under the terms of the Loan Agreement.
- That we shall never give you any notice requesting you not to present the Cheques given hereunder on due dates.

We are aware that on the faith of these undertaking, you have agreed to provide the said Loan Facility to us. We submit that in the event of any default in honoring the Cheques, you are at liberty to take action against us for the dishonour of the Cheques under section 138 of the Negotiable Instruments Act and 456 as breach of trust of the Indian Penal Code 1860.


BORROWER: Vrinda Ceramic Pvt Ltd Jayantitara Director


GUARANTOR (1): Jayantitara Jayantitara Director

GUARANTOR (2): Vrundavan Ceramic Pvt Ltd Jayantitara Director

GUARANTOR (3): Ranselbhatas Abirama Jayantitara Director

AGREEMENT DETAILS: of 3/007 Ranselbhatas Varset.

 Director



TRUE COPY

22

DEMAND PROMISSORY NOTE

PLACE: New Delhi
 DATE: 12-04-2013
 Rs: 14,74,200/-

Umiya Ceramic Pvt. Ltd.
BORROWER
 Director

On demand I/we, the undersigned jointly and severally unconditionally promise to pay INTEC CAPITAL LIMITED at New Delhi or at such other place as INTEC CAPITAL LIMITED may designate, the principal sum of Rs. 14,74,200/- (Rupees 14,74,200/-) at a flat rate of interest of 14.25% Realized annum, for value received. I/we do hereby acknowledge that time is of the essence hereof, and unconditionally promise that for any principal and interest sum due under this Note, if not received by INTEC CAPITAL LIMITED within seven (7) days after the date INTEC CAPITAL LIMITED makes demand for payment of such sum, I/we shall pay, in addition to the amount of such sum, a late payment charge calculated at the rate of thirty six percent per annum (36% p.a.) of such sum until realization.

BORROWER _____

GUARANTOR (1) Adharjitai Bhattacharya

GUARANTOR (2) Jyotsnaben Bhattacharya

GUARANTOR (3) Chitan Patel

AGREEMENT DETAILS 013/002

12

TRUE COPY

23

LETTER OF CONTINUITY

Place: New Delhi
 Dated: 12-04-2013

To
 The Manager
 INTEC CAPITAL LIMITED
 New Delhi.

Dear Sirs,

I/We, Umiya Ceramic Pvt. Ltd. a company incorporated under the provisions of the Companies Act, 1956 / a partnership firm registered under the provisions of the Indian Partnership Act, 1932 / Sole Proprietorship firm and resident of having its registered office / place of business at New Delhi, P.O. 110012 acting through Mr. Jyoti N. Patel who is duly authorized in that behalf vide Board Resolution / Letter of Authority / Power of Attorney dated _____ (BORROWER) and I/we, _____ a company incorporated under the provisions of the Companies Act, 1956 / a partnership firm registered under the provisions of the Indian Partnership Act, 1932 / Sole Proprietorship firm and resident of having its registered office / Place of Business at _____ acting through Mr. _____ who is duly authorized in that behalf vide Board Resolution / Letter of Authority / Power of Attorney dated _____ (GUARANTOR), do hereby acknowledge that the Demand Promissory Note for Rs. 14,74,200/- (Rupees One Crore Fourty Seven Thousand Four Hundred and Twenty) of any sum now due of which may hereafter be or become due from me/us to INTEC CAPITAL LIMITED in respect of LDM (hereinafter referred to as the "Facility"), notwithstanding the fact that the Loan may from time to time be reduced or extinguished, the intention being that the security shall be a continuing security for the other facilities obtained by me/us and payable to INTEC CAPITAL LIMITED.

The Common Seal of the Company has been affixed hereon in the Board Resolution dated 12-04-2013 and signed by Jyoti N. Patel who has offered his/her signature hereon.

(Applicable only where Borrower is a company)

BORROWER
 Umiya Ceramic Pvt. Ltd.
Jyoti N. Patel
 Director

GUARANTOR

13

TRUE COPY

5. The Borrowers have default in repayment of financial assistance sanction and 'Loan Recall Notice cum Arbitration notices' were issued to the 'Principal Borrower' and the Corporate Guarantor/CD on 07.03.2015 for default committed by the 'Principal Borrowers' and simultaneously Arbitration was also initiated. The Appellant issued separate 'Termination -cum – Arbitration Notices' on 07.03.2015 to the Borrowers and Guarantors including the CD for the repayment of outstanding amount alongwith interest etc., and also invoked Arbitration Clause. The Appellant has also submitted that the 'Termination of the Loan' and 'Invocation of Corporate Guarantee' vide notices dated 07.03.2016 took place well within the period of limitation qua all the loans. 'Arbitral Awards' have also been passed on 21.08.2015 and total amount awarded is Rs.3,62,30,729/- against 'Umiya Ceramic Pvt. Ltd' and similarly 'Arbitration Award' given against 'Gokul Ceramic Pvt. Ltd'. dated 08.01.2016 amount to Rs.1,69,30,411/-.
6. It is also submitted by the Appellant that none of the three 'Arbitration Award' was set aside by the 'Competent Court'. All these are 'Arbitration Award' is at *Annexure A-6 of the Appeal Paper Book*. However, on the rejection of the claims by the Resolution Professional (RP), the Appellant filed the said I.A No.340 of 2020 in CP(IB) No. 561/7/NCLT/AHM/2018. The Appellant also submitted that all the records produced before the 'Adjudicating Authority' and the 'Appellate Authority' proves that the 'Corporate Guarantee' furnished by the CD was duly invoked.
7. The Respondent has stated that alongwith the claim in Form-C dated 07.02.2020, they have not provided the information about 'Arbitration Award' and 'Termination cum Arbitration Notices' and invoking of 'Corporate Guarantee'. They have also stated that due to lack of demand notice by Appellant as per 'Clause 6 of Deed of

Guarantee', the Guarantee stands uninvoked and claim filed by the Appellant is not an accrued liability. Time barred claims cannot be admitted during the CIRP. The CIRP has come to its fag end since the RP has filed Section 31 of the Code application on 19.08.2021 before the 'Adjudicating Authority' for approval of 'Resolution Plan'. Hence, it cannot be considered for approval. The Respondent has also submitted time and again that the Appellant didn't invoke the 'Corporate Guarantee' and has filed incomplete information. Moreover, the claims are time barred. Hence, there is no merit in the Appeal and the Appeal deserves to be dismissed.

8. They have cited the decision of Sundaram Finance limited Vs. Abdul Samad (2018) 3 SCC 622 para 14 and have also cited Ebix Singapore Pvt. Ltd. Vs. CoC of Educomp Solutions Ltd & Anr. 2021 SCC Online SC 707 para 178.
9. They have also submitted that the Judgment of Ghanshyam Mishra and Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Company Limited, 2021 SCC Online SC 313 has held that those claims which are not part of the Resolution Plan shall stand extinguish
10. We have carefully gone through the submissions made by the Ld. Sr. Counsel for the Appellant and Ld. Counsel for the Respondent and also have gone through the relevant records and are having following observations:
 - a. Three cheques were issued in respect of these three loans from 09.11.2017 to 16.05.2018 (the details are available on the Appeal paper book from page no. 419-427, page 588 to 598, page 676 to 686).
 - b. It is not in dispute that the loan has not been taken by the concerned party as stated above and the 'Corporate guarantee' has not been given by the CD.
 - c. It is also not in dispute that the 'Principal Debtor' has committed a 'default' leading to issue of 'Termination cum Arbitration notice' way back on 07.03.2015 to the

- 'Corporate Guarantor' and others including the 'Guarantors' were asked to repay the outstanding dues which has been 'defaulted' by the 'Principal Debtor'.
- d. It is also not in dispute a 'Demand cum Legal Notice' dated 04.02.2015 were not issued to the 'Guarantor'. All these notices are demanding repayment of dues. The terms and conditions were also not disputed between the parties.
 - e. It is very much clear that the 'Deed of Guarantee' provides for 'Continuing Guarantee' and shall be deemed to have given separately for payment of loan, interest thereon cost and other expenses in the agreement and shall be enforced till the entire amount guarantees is paid in full.
 - f. The record reveals that the CIRP commenced on 21.01.2020. The 'Interim Resolution Professional' (IRP) invites claim from the Creditors of the CD on 30.01.2020. The Appellant submits its claim with the IRP in 07.02.2020 & 13.02.2020. The claims were rejected by the IRP on 23.03.2020 and on 05.04.2021, the Adjudicating Authority has confirmed the action of the IRP.
 - g. In this context, for brevity and clarity, we are reproducing Section 3(6), 5(7), 5(8) & 7, of the Code:

"3(6) "claim" means— (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

5(7) "financial creditor" means any person to whom a

financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

5(8) "financial debt" *means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—money borrowed against the payment of interest;*

(a) *any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*

(b) *any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*

(c) *the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*

(d) *receivables sold or discounted other than any receivables sold on nonrecourse basis;*

(e) *any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

(f) *any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*

(g) *any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*

(h) *the amount of any liability in respect of any of the Guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;*

Section 7: Initiation of corporate insolvency resolution process by financial creditor.

7. (1) A financial creditor either by itself or jointly with ¹[other financial creditors, or any other person on behalf of the financial creditor, as may be notified² by the Central Government] may file an application for initiating corporate insolvency resolution process

against a corporate debtor before the Adjudicating Authority when a default has occurred.

[Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.]

Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—

(a) *record of the default recorded with the information utility or such other record or evidence of default as may be specified;*

(b) *the name of the resolution professional proposed to act as an interim resolution professional; and*

(c) *any other information as may be specified by the Board.*

(4) *The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).*

⁴*[Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same.]*

(5) *Where the Adjudicating Authority is satisfied that—*

(a) *a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending⁵ against the proposed resolution professional, it may, by order, admit such application; or*

(b) *default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending⁵ against the proposed resolution professional, it may, by order, reject such application:*

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) *The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).*

(7) *The Adjudicating Authority shall communicate—*

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor,

within seven days of admission or rejection of such application, as the case may be.

- h. From the details available on record, it is amply clear that the Appellant has invoked the 'Corporate Guarantee'. The Appellant has invoked the Guarantee well within the expiry of the term of 'Loan Agreement' concerned. The claim was also filed within 30 days from the date of invitation of the claim. Para 132, 142, 144 of the Dena Bank Vs. C.ShivaKumar Reddy and Anr. 2021 SCC online SC 453 states as follows:

Para 132 - . As observed earlier in this judgment, on a conjoint reading of the provisions of the IBC quoted above, it is clear that a final judgment and/or decree of any Court or Tribunal or any Arbitral Award for payment of money, if not satisfied, would fall within the ambit of a financial debt, enabling the creditor to initiate proceedings under Section 7 of the IBC.

142. To sum up, in our considered opinion an application under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of

three years, in which case the period of limitation would get extended by a further period of three years.

144. There is no bar in law to the amendment of pleadings in an application under Section 7 of the IBC, or to the filing of additional documents, apart from those initially filed along with application under Section 7 of the IBC in Form-1... "

- i. Admittedly, there is undischarged live liability and the amount due to the Appellant has not been paid by the 'Principal Borrower'/'Principal Debtor'. For the undischarged live liability for which the Guarantor /corporate Debtor is obliged to pay in terms of Guarantee Agreements and accordingly, Guarantor is fully responsible for the liability of the Principal Debtor.
- j. An agreement executed by a Guarantor is a separate & a collateral Contract distinct from the Contract of Debt between Principal Debtor and Creditor.
- k. A Guarantor is one who guarantees to perform the promise or discharges the liability of a person for whom he stands Guarantee
- l. This Tribunal also points out the decision in 'Maniram vs. Seth Rupchand (1906) 16 Mad. law journal, 300' wherein it is observed that an unconditional acknowledgement has always held to be a promise to pay which is a natural reference.
- m. This Tribunal feels it necessary to cite the judgment of Hon'ble Supreme Court in Syndicate Bank Vs. Chan Naveerappa Beleri & Ors., reported in AIR 2006 SCC 1874 wherein at para 9, it is observed as under:

"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 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.

- n. It is very much clear that the Appellant has submitted its claim within due time frame and with relevant papers and Guarantee is a continuing guarantee.
- o. All this do not suggests that the amount is not due and payable in law and there is no default. The CD/Respondent was made aware of the same well in time.

- p. However, it is essential to mention that the Resolution Professional has filed its reply affidavit wherein it is stated that the Appellant had filed its incomplete information in Form 'C'. The termination of loan and invocation of the arbitration clause does not hold the Corporate Debtor liable for the claims as even if he was Corporate Guarantor as per the deed of Guarantee, he was not a party to the loan agreement nor the arbitration notice issued through the invocation of the arbitration clause in the loan agreement. The Appellant's statement that invocation of corporate Guarantee is incorrect as no invocation of Guarantee took place by the Appellant, and issuing termination-cum-arbitration notices does not amount to the invocation of the corporate Guarantee.
- q. The Resolution Professional had rejected the claim of the Appellant mainly on the ground of non-invocation of the corporate Guarantee. The Resolution Professional further submits that the arbitration award was put on the Adjudicating Authority record during the pendency of the application for the first time. Therefore, Resolution Professional submits that he is not responsible for the non-consideration of the documents since the same was never placed on Form 'C' stage.
- r. Based on the facts of the case, it is undisputed that the arbitration award against the Corporate Debtor was not placed before the Resolution Professional. Accordingly, the rejection of the claim was made without considering the arbitration award. Instead, the said award was placed before the Adjudicating Authority.
- s. However, the Adjudicating Authority has not taken cognizance of the award and rejected the application filed by the Appellant. Since the Appellants claim is also supported by an arbitration award, which has not been considered either by Adjudicating Authority or Resolution Professional. Therefore, we think it appropriate that the claim of the Appellant should be reconsidered even based on the arbitration award.

- t. In the circumstances, we think it appropriate to remand the matter for a decision afresh on the claim filed by the Appellant.
- u. The Adjudicating Authority is directed to restore the I. A No. 340 of 2020 in CP(IB) No. 561/7/NCLT/AHM/2018 to its file. We set aside the impugned order and allowed the Appeal. We direct the Resolution Professional to consider the claims of the Appellant & to proceed further in accordance with the law. No order as to costs.

[Justice M.Venugopal]
Member (Judicial)

[V. P. Singh]
Member (Technical)

[Dr. Ashok Kumar Mishra]
Member (Technical)

07th February, 2022

New Delhi

Raushan .K