

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court-II)
KOLKATA**

C.P. (IB)/46(KB)2023

***An application under Section 7 of the Insolvency and Bankruptcy
Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy
(Application to Adjudicating Authority) Rules, 2016***

In the matter of:

UCO BANK;

... .. **Financial Creditor**

-Versus-

**M/s. Poddar Mech Tech Services Pvt. Ltd., a company within the
meaning of the Companies Act, 2013, having its registered office
at 35, Chittaranjan Avenue, Kolkata- 700012;**

... .. **Corporate Guarantor**

Date of pronouncement: 16th July, 2024

CORAM:

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

Appearance (via video conferencing/physically)

Mr. Santosh Kr. Ray, Adv. : For the Financial Creditor

Ms. Rituparna Sanyal, Adv. :

Ms. Zeba Khan, Adv. :

Ms. Muskan Saha, Adv. :

Mr. Shaunak Mitra, Adv. : For the Corporate Guarantor

Mr. Snehasis Sen, Adv. :

Mr. Ashwin Nair, Adv. :

O R D E R

Per: D. Arvind, Member (Technical)

1. The Court is convened through hybrid mode.

- 2.** Ld. Counsel appearing on behalf of the parties were heard at length.
- 3.** This is a petition preferred by **UCO Bank (Financial Creditor/Applicant)** against **Poddar Mech Tech Services Pvt. Ltd., (Corporate Guarantor/Respondent)** seeking initiation of CIRP of the Respondent herein.
- 4. Factual matrix of the case is as under: -**
- 4.1.** The principal borrower, Ankit Metal & Power Limited entered into an agreement with the Applicant wherein working capital facility of Rs. 65,00,00,000/- (Rupees Sixty-five Crore Only) which includes (cash credit of Rs. 35.00 crore with a sub-limit of Rs. 10 crores for EPC/FBP/FBN/FBD and letter of credit of Rs. 30.00 crore) was extended to the principal borrower.
- 4.2.** The account of the principal borrower was classified as a non-performing asset by the Applicant as per the guidelines of the Reserve Bank of India.
- 4.3.** Master Restructuring Agreement (in short "MRA") was executed between the principal borrower and all CDR lenders under the consortium arrangement on 25th September, 2014. However, the Principal Borrower failed to comply with the terms and conditions of the said restructuring and hence the restructuring failed.

4.4. On 11th August, 2017, the principal borrower executed a letter of revival and has acknowledged its debt towards the consortium lenders and on failure to repay the debt, the Applicant had filed petition under Section 7 of the IBC to initiate Corporate Insolvency Resolution Process (in short “CIRP”) of the principal borrower, Ankit Metal & Power Limited on 16th August, 2022.

4.5. After several rounds of litigations and hearings, the principal borrower (Ankit Metal & Power Limited) was admitted into CIRP *vide* our order dated **20.12.2023**. This application has been preferred on 23rd February, 2023 against the Respondent for initiating CIRP process against the Corporate Guarantor.

5. Learned Counsel for the Applicant: -

5.1. Learned Counsel for the Applicant submits that it is not in dispute that the principal borrower, Ankit Metal & Power Limited has committed default in excess of threshold limit prescribed under Section 4 of the IBC and consequently has been admitted into CIRP *vide* an order dated **20.12.2023** passed by this Tribunal under Section 7 of the IBC.

5.2. Learned Counsel further submits that the principal borrower was declared as Non-Performing Asset (in short “NPA”) on 28th August, 2014. However, on 11th August, 2017, the principal borrower

executed a letter of revival and acknowledged its debts towards the consortium lenders and made several payments from time to time after the said revival arrangement.

5.3. Learned Counsel further contends that the last payment was made on 23rd August, 2018 and the principal borrower has acknowledged its debts to the applicant in its audited balance sheet for the year 2019-20, 2020-21 and 2021-22.

5.4. Learned Counsel for the Applicant also submits that the corporate guarantee given by the Respondent was invoked simultaneously with the recalling of loan from the principal borrower. The principal borrower has been admitted into CIRP and the Corporate Guarantor herein also needs to be admitted for the default of repayment of debt.

6. Learned Counsel for the Respondent: -

6.1. Learned Counsel for the Respondent submits that the instant company petition instituted by the Applicant against the Respondent in the capacity of being a Corporate Guarantor for the default in repayment of loans taken by the principal borrower, Ankit Metal & Power Limited is barred by limitation, inasmuch as the corporate guarantee had been invoked three years back and an application for recovery of debt under Recovery of Debts Due

to Banks and Financial Institutions Act, 1993 was filed by the Applicant before the Debt Recovery Tribunal in March, 2019. The corporate guarantee having been invoked over three years back, the instant proceeding under Section 7 of the Code is thus, barred by limitation.

6.2. Without prejudice to the above, Learned Counsel for the Respondent submits that prior to institution of the instant company petition, the Financial Creditor has already filed an application under Section 7 of the Code against the principal borrower. In such view of the matter, the instant company petition is not maintainable inasmuch as multiple debt resolution arising out of the same cause of action with respect to the same debt is not maintainable in law.

6.3. Learned Counsel for the Respondent submits that the present petition has been filed on the strength of the Deed of Corporate Guarantee executed on 9th December, 2014 which stood invoked in March 2019, which is three years prior to the institution of the instant petition. The said guarantee agreement is a separate and an independent contract which was invoked three years before, the same cannot be re-agitated before this Tribunal that too after the limitation period is over.

7. Learned Counsel for the Applicant: -

7.1. As a rejoinder, Ld. Counsel submits that upon acknowledgement of debt in balance sheet of the principal borrower, limitation period would get extended by a further period of three years on the date of each such acknowledgement.

7.2. Learned Counsel for the Applicant submits that the principal borrower having acknowledged the debt as defaulted in the balance sheet of year ended **31st March, 2022**, the question of limitation would not come to the rescue of the Corporate Guarantor as the principal borrower and the Corporate Guarantor are jointly and severally liable until loan amount is paid in full.

7.3. Learned Counsel for the Petitioner relies on Clause 29 of the Deed of Guarantee executed by the Petitioner and the State Bank of India (Trustee Company Limited which acts on behalf of the Petitioner). In the said Deed of Guarantee, it has been stated in Clause 29 as under: -

“29. *The Guarantors authorize and appoint the Borrower or any person duly authorized by Borrower as agent to confirm the balance due and acknowledge liability on their behalf as Guarantors from time to time. The Guarantors further agree that any acknowledgement of liability made by Borrower or any person duly authorized by them to acknowledge liability as agent on behalf of the Guarantors shall be binding on*

them for giving fresh start of limitation and also for admission of liability against them.”

7.4. Therefore, the learned Counsel for the Petitioner submits that the principal borrower has acknowledged the liability on behalf of the Guarantor in terms of this clause and therefore, the question of applying limitation in favour of the Guarantor does not arise.

7.5. Relying on the Hon'ble Supreme Court judgment in the case of ***Laxmi Pat Surana vs. Union of India*** assailed as under: -

“... Indubitably, a right or cause of action would enure to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default committed by the guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of amount of debt. For, the obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as predicated in Section 128 of the Contract Act. As a consequence of such default, the status of the guarantor metamorphoses into a

debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) of the Code...”

7.6. Learned Counsel for the Applicant submits that pendency of the proceeding before the DRT does not bar the Financial Creditor from proceeding against the Corporate Guarantor under IBC and the same has been held in catena of judgments.

7.7. Therefore, Learned Counsel for the Applicant submits that this application merits of admission and the Respondent should be put into Corporate Insolvency Resolution Process (in short “CIRP”).

8. Learned Counsel for the Respondent: -

8.1. Corporate Guarantee has been invoked in March, 2019 whereas this application has been filed in 21st September, 2023 and consequently the petition filed by the Applicant/Financial Creditor is time barred.

8.2. He further submits that the Applicant has also instituted three other applications under Section 7 against three other Corporate Guarantors of the principal borrower, Ankit Metal & Power Limited, such multiple debt resolution process is legally not sustainable.

- 8.3.** Learned Counsel for the Respondent further submits that the Financial Creditor with a view to overcome a limitation is as averred the principal borrower has made several payments and the last one paid on 23rd August, 2018 and consequently contains that this petition is well within the period of limitation.
- 8.4.** Learned Counsel for the Respondent submits that even the last payment made on 31st August, 2018 by the principal borrower cannot extend the period of limitation, for personal guarantor.
- 8.5.** Learned Counsel for the Respondent relies on Clause 23 of the Deed of the Guarantee which reads as under: -

“23. Any demand for payment or notice under this Guarantee shall be sufficiently given if sent by post to or left at the last known address of the Guarantors or its representative(s) as the case may be, and it shall be assumed to have reached the address in the course of post, if given by post, and no period of limitation shall commence to run in favour of the Guarantors until after demand for payment in writing shall have been made or given as aforesaid and in proving such notice when sent by post it shall be sufficiently proved that the envelope containing the notice was posted and a certificate by any of the responsible officers of the Lenders/Security Trustee that in the best of his knowledge and belief, the envelope

containing the said notice was so posted shall be conclusive as against the Guarantors, even though it was returned unserved on account of refusal of the Guarantors or otherwise.”

8.6. He submits that in view of above clause, the deed of guarantee contemplates invocation of guarantee and mere acknowledgement if any, on behalf of the corporate guarantor by the principal borrower would be hardly sufficient to initiate proceedings against the Corporate Guarantor.

9. Analysis and findings: -

9.1. We find nothing on record to prove that the principal borrower has acknowledged debts of Corporate Guarantor pursuant to the guarantee, on behalf of the Corporate Guarantor, as contemplated in Clause 29 of the deed of guarantee mentioned in para no. 8.5 of this Order.

9.2. We have noted that the principal borrower, Ankit Metal & Power Limited stands admitted into Corporate Insolvency Resolution Process in **Company Petition (IB) No. 236/KB/2022** vide order passed by this Tribunal dated **20.12.2023**. The Corporate Guarantor, such as, the Respondent are responsible for the debt borrowed by the principal borrower and the right to proceed against the principal borrower as well as guarantor is in equal

measure, in case, principal borrower commit default in repayment of the amount of debt as laid down by the **Hon'ble Supreme Court of India** in the case of ***Laxmi Pat Surana vs. Union of India*** reported in ***Civil Appeal No. 2734 of 2020***.

- 9.3.** In other words, the obligation of the guarantor is coextensive and coterminous with the principal borrower to defray the debt as predicated under Section 128 of the Contract Act.
- 9.4.** However, we note that the Corporate Guarantee was invoked in March, 2019 and the application for recovery of the debt due from the Corporate Guarantor under Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was filed by the Petitioner before the learned DRT in March, 2019 whereas this proceeding under Section 7 of the IBC has been initiated on 21st September, 2023 which is well beyond the period of limitation.
- 9.5.** The proceeding under Section 13 (2) of the SARFAESI Act against the Respondent herein was in March, 2019 and in the interregnum, no proceedings have been instituted against the Corporate Guarantor under the Code.
- 9.6.** The **Honourable Supreme Court in Civil Appeal: 6894 of 1997** in the case of ***Syndicate Bank Vs Channaverrappa Beleri - 2006 (11) SCC 506***, had held that “where the guarantee is

payable on demand, the limitation begins to run when the demand is made and the guarantor commits breach by not complying with the demand”.

9.7. The **Honourable NCLAT** in the case of **Archana Deepak vs Indian Bank 2023 SCC online NCLAT 192** has held “*it is clear that although the Guarantor immediately become liable on any default committed by the Principal Borrower but for initiating any action against the Guarantor, demand is to be made. Without there being any demand, it cannot be accepted that period of limitation against the guarantor shall commence”.*

9.8. In other words, the limitation period will commence from the date of demand / invocation of guarantee. In the case in hand, in terms of Clause 2 of the deed of Guarantee executed, the guarantors are liable to pay the amount defaulted by the principal borrower, **on demand** and demand has been made in March, 2019 whereas the instant petition has been filed on 21.09.2023 which is beyond three (3) years from the date of invocation.

9.9. Therefore, we find that this petition filed by the Financial Creditor well after three years after the demand was made/guarantee was invoked is barred by limitation.

- 9.10.** Nothing has been placed on record to prove that Corporate Guarantor has acknowledged its debts within the period of limitation. We however give liberty to the applicant to come before us with fresh CP, in case, he is in a position to prove acknowledgment of debt by the Corporate Guarantor within the admissible period of limitation.
- 10.** Accordingly, **C.P. (IB)/46(KB)2023** stands **dismissed**.
- 11.** The Registry is directed to send e-mail copies of the Order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
- 12.** Urgent certified copy of this Order, if applied for, be supplied to the parties, upon compliance of all requisite formalities.
- 13.** File be consigned to records.

**D. Arvind
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

Order signed on: 16th of July, 2024.

Ar. [steno]