

IN THE NATIONAL COMPANY LAW TRIBUNAL

COURT NO. V, MUMBAI BENCH

Company Petition No. 889/(IB)-MB-V/2021

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

Anchor Leasing Private Limited,

1301, 13th Floor, Peninsula Business Park, Tower B, Senapati Bapat Marg, Lower Parel (West), Mumbai – 400 013, Maharashtra, India.

... Petitioner/Financial Creditor

V/s

Sejal Realty and Infrastructure Limited,

173/174, Sejal Encasa, 3rd Floor, S.V. Road, Kandivali (West), Mumbai – 400 067, Maharashtra, India.

... Respondent/Corporate Debtor

Order Pronounced on: 20.04.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (via Video Conferencing):

For the Petitioner: Adv. Pulkit Sharma a/w Vibha Joshi i/b Abhishek Adke

For the Corporate Debtor: Adv. Shyam Kapadia, Rishir Daulat, Siddharth Nunes, Raj Adhia i/b. TRD Associates

Per: Shri Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. The Petitioners/Petitioner viz. 'Anchor Leasing Private Limited'(hereinafter referred to as **Petitioner**) has furnished Form No. 1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) in the capacity of "**Financial Creditor**" by invoking the provisions of Section 7 of the Insolvency and Bankruptcy Code (hereinafter as **Code**) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against 'Sejal Realty and Infrastructure Limited' (hereinafter as "**Corporate Debtor**"/ "**Respondent**").
2. In the requisite Form-1, under the head "Particulars of Financial Debt" the amount claimed to be in default is Rs. 26,33,02,231/- inclusive of interest.

BRIEF FACTS OF THE CASE:

1. It is stated that this Tribunal, by an order dated 13.02.2019, initiated a Corporate Insolvency Resolution Process ("**CIRP**") against Sejal Glass Limited (hereinafter referred as "**SGL**" / "**Principal Borrower**") in Company Petition No. 1799(IB)/MB/2018.
2. The Petitioner filed Form C under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate

Persons) Regulations, 2016 with the Insolvency Resolution Professional. The Petitioner was duly admitted in the Committee of Creditors of SGL.

3. Pursuant to approval of the Resolution Plan dated 11.11.2019 by this Tribunal vide its order dated 26.03.2021, the Petitioner received an amount of Rs. 33,33,100/- (Rupees Thirty-Three Lakhs Thirty-Three Thousand One Hundred Only) from SGL. Consequently, the remaining amount were still due and payable to the Financial Creditor.
4. The present Petition has been filed against the Respondent, in its capacity as a **'Guarantor'** of the loan availed by Sejal Glass Ltd. (**"SGL"/ "Principal Borrower"**) from the petitioner.
5. As per the agreement dated 11.08.2009, the Petitioner herein disbursed to Sejal Glass Limited, Rs. 10 Crores on the condition that the same shall be repayable by 30.06.2010, along with interest at the rate of 12% per annum payable quarterly. It was also mentioned that on default, interest at the rate of 21% per annum would be applicable till the date of payment.
6. A Deed of Guarantee and Pledge Agreement, both dated 11.08.2009, were executed between the Petitioner, the Principal Borrower and the Corporate Debtor, wherein the Corporate Debtor guaranteed the loan amount of Rs. 10 Crores disbursed pursuant to the Loan Agreement executed by the Principal Borrower. The Corporate Debtor has also provided security under the Pledge Agreement.
7. It has been submitted that the Petitioner disbursed a total amount of Rs. 15 Crore to the Principal Borrower, out of which an amount of Rs. 13.80 Crore has admittedly been repaid. Thus, the Petitioner has claimed that an amount of Rs. 1.20 Crore on account of Principal Borrowing along with the interest which remains unpaid.

8. The Principal Borrower failed to repay the loan amount under the Loan Agreement on 30.06.2010 and committed default with effect from 30.06.2010 onwards.
9. Since the Principal Borrower defaulted in making the payments of the entire outstanding, the Petitioner, on 13.05.2021, invoked the Guarantee under the Deed of Guarantee dated 11.08.2009, executed by the Corporate Debtor.
10. It is submitted by the petitioner that the Principal Borrower has been confirming the outstanding amounts by way of confirmation of accounts on 01.04.2013 and 11.04.2015. The Principal Borrower further admitted the outstanding amount in its ledger statements and balance sheets right up to financial year 2019.
11. The amount of default claimed in the present Petition is 1,20,00,000/- along with the interest of Rs. 25,13,02,231/- (calculated at the rate of 12% at quarterly rate up to 30.06.2010 and the rate of 21% at quarterly rate from 01.07.2010), aggregating to Rs. 26,33,02,231/-. The workings and computation arriving at the aforesaid amount as on 19.05.2021 has been annexed to the Petition.

REPLY OF THE CORPORATE DEBTOR:

12. The Corporate Debtor vide its Affidavit in reply ("**Reply**") dated 27.07.2022 has submitted that the petition is not maintainable, and the Petitioner had concealed and suppressed material facts from this Tribunal while filing the present petition.
13. The Corporate Debtor, in its reply, submitted that the petition is *ex facie* grossly time barred and not maintainable as the petitioner has already settled their claim with the original/principal borrower by accepting the payments under the resolution plan. In such

circumstances, neither does the debt survive nor does the guarantee. Moreover, the alleged date of default is 30.06.2010, i.e. over 10 years prior to the filing of this petition. However, the petition was filed in May 2021 which is barred by limitation.

14. The Corporate Debtor has submitted that the CIRP against SGL came to an end when the NCLT, Mumbai Bench, vide its order dated 26.03.2021 approved the Resolution Plan submitted by the Successful Resolution Applicant. As stated aforesaid, the petitioner accepted a lower amount in settlement of its debt, the remaining part of its claim was extinguished. That being so, no liability can be fastened on the Respondent/ Corporate Guarantor.
15. The Corporate Debtor has submitted that the petitioner has failed to produce even a single document whereby the Corporate Debtor agreed to repay the loan amount of Rs. 15 Crores and interest thereof. On the contrary, the petitioner has admitted in the petition itself that an amount Rs. 19.12 Crore comprising principal, interest and TDS certificates has been repaid to the petitioner against such loan of Rs. 10 Crore which discharges the respondent from any/all obligations arising out of the deed of guarantee.
16. The Corporate Debtor has further submitted that the Deed of Guarantee is not legally valid document, as it is not sufficiently stamped and has been obtained by misrepresentation.
17. The Corporate Debtor has further submitted that the documents relied upon by the petitioner clearly shows that the petitioner has varied the terms of the Loan Agreement and have violated the arrangement of guarantee. At the time of execution of the Loan Agreement and the Deed of Guarantee, it was represented to the Guarantors that the amount of loan intended to be advanced to SGL was Rs. 10 Crores Only.

However, as per the petitioner's own admission, it has advanced more loan without informing the Guarantors.

18. The Corporate Debtor has further raised certain objections which are as follows:
 - a. The Petitioner has referred to the arbitration clause that there are several disputes between the parties arising out of the Deed of Guarantee and the petitioner ought to have invoked arbitration against the Guarantors.
 - b. The Guarantors have collectively made an aggregate payment of Rs. 91 Lakhs to the petitioner towards the Settlement amount. Further, the Guarantors are also ready and willing to make payment of the remaining amount of Rs. 54 Lakhs to the petitioner towards complete satisfaction of the settlement amount. The Petitioner has reportedly received Rs. 10,00,000/- on 23.02.2022 and Rs. 5,00,000/- on 12.04.2022.
 - c. The liability of the guarantors, if any, stands discharged.
 - d. The amount claimed in the letter invoking the guarantee and the petition are extortionate in nature.
19. Therefore, the Corporate Debtor submitted that the Present Petition is not maintainable and deserves to be dismissed.

REJOINDER FILED BY THE PETITIONER

20. The Petitioner, in its rejoinder, denied all the allegations and contentions contained in the Corporate Debtor's Reply.
21. The Petitioner stated that ledger account and Balance Sheet of SGL, the Principal Borrower shows that amount is due and payable to Financial Creditor.

22. It is submitted while referring to the Deed of Guarantee and Pledge Agreement read with Loan Agreement dated 11.08.2009, executed between the Financial Creditor, the Guarantor and the Principal Borrower, the IRP admitted the entire claim of the Petitioner and the Petitioner was the part of the Committee of creditors of SGL. It has further been submitted that no proceedings were initiated by the erstwhile promoter/directors of SGL against admission of the Financial Creditor's claim by the IRP. The Petitioner further submitted that Resolution Plan prepared by the Resolution Applicant is based on the claims admitted by the IRP and thus, it is binding on the Guarantor.
23. The Petitioner further submitted that during the pendency of this Petition, the Guarantors have paid an aggregate amount of Rs. 91,00,000/- towards the part repayment of Financial Creditor's claim amount. It was further submitted that out of the given amount, the petitioner has received Rs. 15,00,000/-. The Petitioner stated that as per the updated statement of working and computation of claim as on 03.10.2022, the aggregate claim amount is Rs. 34,00,58,685/-.
24. The Petitioner stated that assuming the Guarantor's liability to repay the loan is limited to principal amount of Rs. 10 Crore along with interest, the aggregate amount of Rs. 29,91,41,485/- is still outstanding as on 03.10.2022, and the Guarantor is liable to repay the same to the Petitioner.
25. The Petitioner further submitted that Settlement talks were entered into by the Petitioner, on a 'without prejudice' basis. The settlement terms were not concluded between the Petitioner and the Guarantor and thus, no consent terms have been executed.

FINDINGS

26. We have heard the Counsel for the Parties and have gone through the records.
27. During the course of arguments, it has been contended by the Counsel for the Petitioner that by virtue of Deed of Guarantee and Pledge of Agreement, dated 11.08.2009, the Corporate Debtor stood guarantor for the loan of Rs. 10 Crores, disbursed to its Principal Borrower, i.e. Sejal Glass Limited. Since the principal borrower failed to pay the loan amount under said the loan Agreement, the date of default was 30.06.2010, as indicated in Part IV of the Company Petition. The Counsel for the Petitioner has further pointed out that subsequent to the Loan Agreement and the Deed of Guarantee, the Petitioner has further disbursed of Rs. 5 Crores to the Principal Borrower but the said amount was not connected in any manner with the amount disbursed under the loan Agreement, dated 11.08.2009. Therefore, there was no variation in the terms of the original Loan Agreement, dated 11.08.2009 and the Guarantee Deed. Thus, Section 133 of the Indian Contract Act is not applicable
28. The Counsel for the Petitioner has further pointed out that the Principal Borrower has been acknowledging/confirming the outstanding amounts from time to time and even in the ledger statements and the balance sheets, the loan amounts have been acknowledged up to the Financial Year-2019. Even the Corporate Debtor has admitted the outstanding amount under the Deed of Guarantee and has waived its subrogation rights in favour of the Financial Creditor after the CIRP process was initiated against the Principal Borrower and the Resolution Plan was approved. Therefore, in view of the unequivocal and unconditional acknowledgement of debt by the Principal Borrower as well as the Corporate Debtor, the

present Petition is within the period of limitation as acknowledgment of debt by the Principal Borrower is an acknowledgment of debt by the Guarantor as well.

29. The Counsel for the Petitioner has further argued that even during the pendency of the Petition, the Respondent has attempted to clear dues of the Principal Borrower by making a payment of Rs. 15 lacs on 23.02.2022 and 12.04.2022. Even otherwise, the debt owed by the Corporate Debtor does not get extinguished in the backdrop of conclusion of CIRP proceedings against the Principal Borrower as held in “Lalit Kumar Jain Vs. Union of India 2021 9 SCC 321” whereby it has been held by the Hon’ble Supreme Court that sanction of Resolution Plan does not perse operate as discharge of Guarantors’ liability in terms of Section 31. Moreover, the loan of Rs. 10 Crores incurred by the Principal Borrower has not been paid in full which means the liability of the Corporate Debtor as Guarantor has not come to an end. The Counsel for the Petitioner has further urged that the Petition deserves to be admitted.
30. On the other hand, the Counsel for the Corporate Debtor has argued that the Petitioner materially altered the terms of the Contract by disbursing the additional sum of Rs. 5 Crores to the Principal Borrower without the consent and knowledge of the Corporate Debtor and it amounts to varying the term of contract and the liability of the Corporate Debtor as surety/Guarantor gets discharged in terms of Section 133 of the Indian Contract Act. The Counsel for the Respondent has further argued that even otherwise, as per the terms and conditions of the Guarantee Deed dated 11.08.2009, the liability of the Corporate Debtor was limited to the extent of Rs. 10 Crores only and the said amounts has admittedly been repaid.
31. The Counsel for the Corporate Debtor has further argued that the Petitioner has taken a self-contradictory stand, as it has been

submitted in the Rejoinder that the entire additional loan of Rs. 5 Crores was repaid whereas in the Petition, the loan of Rs. 10 Crores and Rs. 5 Crores advanced to the Principal Borrower is shown to be a part of the same transaction. According to the Counsel for the Corporate Debtor, the Financial Creditor has taken a summersault in the Rejoinder to show that the loan of Rs. 5 Crores was a separate transaction and by disbursing the said amount, the terms of the original agreement were not varied.

32. As regards the settlement talks or any payments made during the course of the said settlement talks, it has been contended by the Counsel for the Respondent that the said talks were without prejudice to the rights of the Corporate Debtor and the Corporate Debtor has been negotiating for settlement with the Petitioner to resolve the dispute as the Petitioner has filed various petitions against the other Guarantors as well including certain women Guarantors from the family of the promoters of the Corporate Debtor.
33. The Counsel for the Respondent has further argued that even otherwise, the Petition is hit by limitation considering the fact that the Guarantee was invoked in the year 2021 though the date of default qua the Corporate Debtor was admittedly 30.06.2010. According to the Counsel for the Corporate Debtor as the liability of the Corporate Debtor was co-terminus with that of the Principal Borrower, the invocation of the Guarantee on 13.05.2021 is clearly barred by time. It has Also been argued on behalf of the corporate debtor that during the CRP proceedings initiated against the principal borrower, the financial creditor agreed to receive a total sum of Rs.33.33 lakhs against a claim of 16.60 Crores. That being so, the entire claim of the Financial creator stood satisfied and, therefore, the liability of the corporate guarantor also stood extinguished and on this ground alone, the petition is liable to be dismissed.

34. Having considered the contentions raised by the Counsel for the parties, we are of the considered view that so far as the point raised with regard to limitation is concerned, it is worth noting that the principle borrower has been acknowledging the outstanding amounts right from 1 April 2012 to March 2019, as is evident from Annexure I and Annexure K attached with the petition. Considering the fact that the liability of the corporate debtor/corporate guarantor was co-terminus with that of the principal borrower, all acknowledgement made by the principal borrower are also binding upon the corporate guarantor. Therefore, it cannot be successfully argued on behalf of the corporate debtor that the claim raised in the petition is hit by the law of limitation or the petition is barred by time.
35. Secondly, it has been argued on behalf of the corporate debtor that admittedly a CIRP process was initiated against the principal borrower and during the pendency of the said process, the principal lender agreed to receive a definite amount from the principal borrower towards full and final settlement of all its claims against the principal borrower. It has further been argued on behalf of the corporate debtor that by way of the resolution plan, all liabilities of the principal borrowers came to an end and that being so, the liability of the corporate guarantor also stands extinguished.
36. We have thoughtfully considered the above contention raised on behalf the corporate debtor but have found the same to be devoid of any force or substance. In this regard, a reference can be made to the law laid down by the Hon'ble Supreme Court in **Lalit Kumar Jain v. Union of India** (Transferred Case (Civil) No. 245/ 2020) whereby it has been unequivocally held that merely with the approval of the resolution plan against the principal borrower, the liability of the guarantor does not ipso facto come to an end. In this regard it is further worth mentioning that during the CIRP against the Principal Borrower, the corporate guarantor voluntarily agreed to forego his

right of subrogation against the successful resolution applicant which clearly means that the liability of the corporate guarantor did not come to an end with the approval of the resolution plan in the proceedings under section 7 against the principal borrower. Apart from this, in the resolution plan there is no specific mention of the fact that the liability of the guarantors of the principal borrower will come to an end with the approval of the said plan. Therefore, it cannot be successfully argued on behalf of the corporate debtor that its liability as guarantor came to an end with the approval of the resolution plan against the principal Borrowers.

37. It has further been contended by the Counsel for the Corporate Debtor that since the terms of the loan Agreement dated 11.08.2009 were varied by the Financial Creditor in as much as an additional sum of Rs. 5 Crores was advanced and disbursed as loan to the Principal Borrower, i.e. Sejal Glass Limited, the liability of the Corporate Debtor stands extinguished in terms of Section 133 of the Indian Contract Act. According to the Corporate Debtor, the Financial Creditor did not make the Corporate Debtor a party at the time of varying the terms of the loan agreement whereby an additional loan of Rs. 5 crores was disbursed to the Principal Borrower.
38. We have thoughtfully considered the aforesaid contentions raised on behalf of the Corporate Debtor. The Financial Creditor has relied upon loan agreement dated 11.08.2019 which is annexed as Annexure-C with the Petition. This loan agreement was executed between the Financial Creditor and the Principal Borrower, i.e., Sejal Architectural Glass Limited along with several other individuals as well as the Corporate Debtor. As per the terms and conditions of the Loan Agreement, a total sum of Rs. 10 Crores was proposed to be advanced as Loan, as stated in Clause 2.1 and 2.2 of the Loan Agreement which was repayable on or before 30.06.2010. To secure the repayment of the Loan, four cheques of Rs. 10 Crores were

obtained by the Financial Creditor. In addition to this, four more cheques of interest amounts were also obtained as security at the time of the execution of Loan Agreement itself as is evident from Clause 3.2 of the Loan Agreement. There is no condition in the Loan Agreement that any amount exceeding Rs. 10 Crores can be advanced to the Principal Borrower.

39. A perusal of the Deed of Guarantee (Annexure-D) which was executed by the Corporate Debtor along with certain other individual Guarantors also shows that the Guarantee Deed was executed to secure the repayment of principal amount Rs. 10 Crores only with interest. There is further no condition in the deed of Guarantee that any amount exceeding Rs. 10 Crores could be advanced to the Principal Borrower or that the Corporate Debtor as Guarantor would be liable to pay any amount disbursed to the Borrower in addition to the amount of Rs. 10 Crores. Therefore, a perusal of the Guarantee Deed shows that liability of the Guarantors was limited to the extent of Rs. 10 Crores plus interest accruing on the said principal amount.

40. That being so, the Financial Creditor does not appear to be justified in imposing a liability of more than Rs. 10 Crores upon the Guarantors. The Financial Creditor has not relied upon any other loan agreement, separate and distinct from the loan agreement dated 11.08.2009 which might have been executed between the Financial Creditor and the Borrower, i.e. Sejal Architectural Glass Limited with regard to the additional loan of Rs. 5 Crores. In part IV of the Petition, the loan of Rs. 15 crores is shown to have been advanced out of which the last tranche of Rs. 5 Crores is stated to have been disbursed on 25.09.2009 whereas the remaining Rs. 10 Crores was disbursed up to 02.07.2009. No separate Loan Agreement in respect of the amount of Rs. 5 Crores shown to have been executed between the Financial Creditor and Borrower nor any such document has been relied upon and attached with the Petition by the Financial Creditor.

41. Therefore, in our considered view, the amount of Rs. 5 Crores disbursed on 25.09.2009 to the Borrower constitutes variance of the terms and conditions of the Loan Agreement dated 11.08.2009. Since the Guarantee executed by the Corporate Debtor was confined to the extent of Rs. 10 Crores only, the liability of the Guarantor could not be extended to Rs. 15 Crores. This clearly amounts to varying the terms of the Loan to which the Guarantor was not made a party and, therefore, as per the provisions of the Section 133 of the Indian Contract Act, the liability of the Guarantor gets extinguished.
42. In this regard, the Financial Creditor has tried to explain in the Rejoinder that even assuming the Guarantor's liability is limited to Rs. 10 Crores with interest, the Petitioner is claiming an aggregate amount of Rs. 29,91,41,458/- due as on 03.10.2022 as the amount of Rs. 10 Crores was never repaid by the Borrower nor the Guarantor ever called upon the Financial Creditor to release the shares pledged under the Pledge Agreement dated 11.08.2009. It has also been claimed that the Corporate Debtor while acknowledging its liability to repay has repaid a sum of Rs. 15 lacs to the Financial Creditor in April 2022 and, therefore, it cannot be successfully argued on behalf of the Corporate Debtor that its liability has been extinguished.
43. In our considered view, the stand taken by the Financial Creditor in the Rejoinder does not appear to be correct. As stated above, in Part IV, the Financial Creditor clearly shows disbursement of Rs. 15 Crores as a part of one transaction. It has further been claimed in the Petition that the amount in default is Rs. 1.2 Crores on which an interest of Rs. 25,13,02,231/- has been claimed in all aggregating to Rs. 26,33,02,231 as on May 2019. If the Principal amount was Rs. 1.20 Crores as on the claim date of default, i.e. 30.06.2019, it means that the amount of Rs. 13.80 Crores had been repaid prior to 30.06.2010. This further proves that an amount of Rs. 10 Crores had

been repaid. This is further proved from the statement Annexure B attached with the Petition wherein also out of the total loan of Rs. 15 Crores advanced, an amount of Rs. 13.80 Crores is shown to have been returned. Therefore, looking at the case from any angle, the liability of the Corporate Debtor as Guarantor came to an end as it was limited to Rs. 10 Crores which stands repaid.

44. As a result of the forgoing discussions, we are of the considered view that the Petitioner has failed to make out a case of admission of the petition under Section 7 of the Code. Therefore, the Petition deserves to be dismissed.
45. Accordingly, C.P. No. 889/(IB)-MB-V/2021 is **dismissed** and **disposed of**.

Sd/-
ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
MEMBER (JUDICIAL)