

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

C.P. No. 1397 & C.P. 1398/I&BP/2017

Under section 7 of the IBC, 2016

In the matter of

Bank of India (CP 1397)
... Petitioner
V/s.
Gupta Infrastructure (India) Pvt Ltd.
... Respondent

Bank of India (CP 1398)
... Petitioner
V/s.
Gupta Infratec Pvt. Ltd...
... Respondent

Order delivered on: 01.02.2018

Coram: Hon'ble B.S.V. Prakash Kumar, Member (J)
Hon'ble V. Nallasenapathy, Member (T)

For the Petitioners : Mr. Sandeep Bajaj a/w Ms. Nishtha Sikroria i/b
Pamasis Law Chambers.

For the Respondent: Mr. Ashish Pyasi a/w Umang Thakar i/b
Dhir & Dhir Associates

Per B. S. V. Prakash Kumar, Member (Judicial)

COMMON ORDER

Order pronounced on 22.01.2018

These are two separate Company petitions filed by this Financial Creditor, namely Bank of India against Gupta Infrastructure (India) Pvt. Ltd. (CP 1397/2017) and Gupta Infratec Pvt. Ltd. (1398/2017) on the same facts stating that these two Corporate Debtor Companies, Gupta Corporation Pvt Ltd and one Gupta Global Resources Pvt Ltd. executed a Deed of Guarantee on 12.7.2014 standing as Guarantors to the working capital facility availed by their own group company, namely, Gupta Coal India Pvt. Ltd., on having executed so, when this Gupta Coal India Pvt Ltd defaulted in making repayment of the working capital loan facility availed by it, these two companies (Corporate Debtor) along with others having agreed to

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repay the working capital facility loan along with interest accrued upon it in the event Gupta Coal India Pvt. Ltd. failed to repay the same, this Financial Creditor, i.e. Bank of India issued notice to these guarantors to pay off the liability for the principal borrower defaulted in making repayment, as there was no response from these guarantors also, this financial creditor filed these two company petitions against the Corporate Debtors u/s 7 of Insolvency & Bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process.

2. Since the facts and legal proposition in respect to these two company petitions are common, for the sake of brevity and avoiding repetition, instead of dealing with these petitions separately, this Bench hereby passes common order covering both the company petitions with separate reliefs against each of these corporate debtors.

3. As it has been said above, the principal borrower had earlier availed a total financial assistance of ₹906crores, out of which ₹196crores is fund based and remaining ₹710crores is non-fund based. Then a Supplemental Working Capital Consortium Agreement was executed by this principal borrower on 27.6.2014 in favour of Consortium of Banks led by this Financial Creditor revising the existing working capital limit to ₹2547.25crores as shown in the schedule annexed to this Supplemental Working Capital Consortium Agreement. In support of this Supplemental Working Capital Consortium Agreement, these Corporate Debtors along with other group companies and the principal borrower, on 12.7.2014, executed the Deed of Guarantee by paying sufficient stamp duty at New Delhi in favour of the Consortium Banks namely, Bank of India, Indian Overseas Bank, Union Bank of India, IDBI Bank, Allahabad Bank, Vijaya Bank, ICICI Bank, Punjab National Bank, incorporating the following terms and conditions:

- (a) It has been stated that the principal borrower Gupta Coal India Pvt. Ltd. has availed of/agreed to avail of working capital facilities from BOI Consortium on having BOI

Consortium granted working capital facilities to the borrower aggregating to ₹2547.25crores on the terms and conditions as set out in the Working Capital Consortium Agreement (WCCA) dated 14.2.2011 entered in between the borrower and BOI r/w WCCA dated 27.6.2014.

- (b) In this Agreement, it has been said that the terms and conditions in the WCCA reflect that **the borrower shall procure and furnish an unconditional and revocable guarantee** from the guarantors to the working capital lenders guaranteeing due repayment, payment and discharge by the borrower of the said facilities together with interest in respect to the facilities mentioned in the WCCA.
- (c) These Guarantors, **in consideration aforesaid and the request of the borrower**, have agreed to execute this Guarantee in favour of the working capital lenders on the terms appearing in this Deed.
- (d) In consideration of the above premises, **the Guarantors jointly and severally covenanted and guaranteed** to each of the working capital lenders in the terms subsequently mentioned.
- (e) In the event of default in payment of the facilities together with interest by the borrower, **the Guarantors shall forthwith on demand being made in that behalf**, pay, without any demur and notwithstanding any objection on the part of the borrower to the working capital lenders and shall indemnify and keep indemnified the working capital lenders against all losses pertaining to the facilities together with interest and other expenses whatsoever the lenders incur by reason of default on the part of the borrowers.
- (f) The interest shall be paid by the guarantors as may be determined by each of the working capital lenders from time to time. **The lender shall have full liberty without affecting the guarantee to vary the amounts of the individual limits of the facilities** as may be agreed from

time to time between the lenders and principal borrower. **The lenders shall be at liberty** to stipulate, in addition to the subsistence securities, any other securities for the facilities and also **to release or forbear to enforce all or any of the remedies** upon such security and any collateral security or securities presently held by the working capital lenders and **no such release or forbearance as aforesaid shall have the effect of releasing or discharging the liability of the guarantors** and the remedies against the guarantors under this Guarantee Deed, **the Guarantors shall not be relieved from this liability until their debt is fully satisfied.**

- (g) To give effect to the Guarantee, **the lenders are entitled to act as if the Guarantors were the principal debtors to the lenders for all payments guaranteed by them as aforesaid to the lenders.** This Guarantee is a continuing one for all amounts advanced by the lenders to the borrower in respect of or under the facilities together with interest as the case may be and other expenses which may from time to time become due and payable and have remained unpaid to the lenders. Notwithstanding the rights the lenders have under any security, **they shall have full liberty to call upon the guarantors to pay the facilities** together with interest as the case may be. The Guarantee shall not be determined or in any way prejudiced by any absorption by the lenders or by any amalgamation thereof but shall inure and be available for the benefit of the absorbing or amalgamated lenders or concern. Till the repayment of entire amount being due and payable under the facilities together with interest as the case may be, the guarantee shall be revocable and enforceable against the guarantors notwithstanding any dispute between the working capital lenders and the borrower. The declaration of confirmation or acknowledgement given by the borrower to the lenders shall be deemed to have been given by or on behalf of the guarantors. **The guarantors shall not be**

released or discharged their obligations even if any variation made in the terms of working capital consortium agreement or any other security documents given by the borrower.

- (h) **The guarantors further agreed that in the event the borrower enters into liquidation or winding up (whether compulsory or voluntary) or the management of the undertaking of the borrower is taken over under any law or the borrower/its undertaking is nationalized, the lenders may rank the guarantors as debtors and prove against the estate for paying off the amounts payable by the borrower until the entire claim of the lenders against the borrower for the full amount has been paid by the guarantors.**
- (i) **The guarantee given here is independent and distinct from any security that the lender has taken and that notwithstanding the provisions of sections 140 and 141 of the Indian Contract Act, 1872 or any other sections of that Act or any other law, the guarantors will not claim to be discharged to any extent because of the failure of the lenders to take any or other security or in requiring or obtaining any other such security losing for any reason whatsoever including reasons attributable to its default and negligence, benefit of any or other such security or any rights to any or other any security that has been taken.**
- (j) **They further agree that they will not prove or seek to claim in the case of liquidation of the borrower, so long as any amount remains unpaid to the lenders under the given facilities.** The terms and conditions these guarantors entered into with the lenders can be summed up saying that they agree to repay the loan amount along with interest in the event the borrower defaulted notwithstanding any other impediment that comes in realizing the dues of the lenders either from the

borrower or from these guarantors, they have even stated that their guarantee shall not be effected by any change in the constitution or winding up of the borrower or any absorption, merger, amalgamation of the borrower with any other company or any change in the management of the borrower or even takeover of the management of the borrower by the State or the Central Government.

4. On looking at the terms and conditions galore in the deed of guarantee, there could not be any speck of doubt about the binding nature of the guarantee deed upon these corporate debtors. For that matter, any agreement consciously and voluntarily executed between parties is sacrosanct, upon which whole society running from thousands of years, unless such trust and belief is not present, we can't survive even for a single day, some are explicit, some are implicit, but fact of the matter is, every second of us is run on trust upon each other, wherever it is broken, there is a dispute, there is a pain to the doctrine of trust and belief, therefore before going any further, I must say that the discretion given to the courts is to see as to whether the agreement entered in between the parties is prohibited under law or as to for any other reason the agreement is invalid for the reason of incompetency of parties, unlawful object or fraud, but these reasons have to be proved to the hilt by the person assailing it, not by the person asking relief basing on the agreement. The only ground that has to be proved by the party asserting it is execution of the agreement, if execution is admitted, then what all assailing party to do is to prove to the satisfaction of the court that though execution of instrument is admitted, it is hit by one or other ground mentioned above. The basic reason perhaps for not providing trial in IBC proceedings is, credit availed by the debtor and guarantees given by guarantors reflect in various records of the respective company, banks and RoC, therefore the defence that is being witnessed day in and day out is non-filing of certificate, some fraction of deference in computation of claim amount, etc. If we see any case de hors all these frivolous technical flaws, it will be evident that debt is availed and defaulted. So if anybody going beyond this

fact, it is nothing but breach of trust, which is the basic element present in an agreement entered between the parties. We don't say that parties should not raise the defences available to them; we only say how we have to deal with administration of justice when substratum is admitted by the assailing party.

5. Courts normally will not go into the advantages and disadvantages of the parties, we can't get into subjective perceptions of anybody or even of us, law is set out how to deal with it, parties apply their wisdom when they enter into binding covenants they enter into contracts, parliament applies its wisdom when a legislation is brought in, therefore discretion in between left to this Bench is judicial discretion, not to wedge into any other perception into it. Why conventional method of trial has been taken out from IBC proceedings is one - obviously to expedite the process and two - perhaps on the reason that parties cannot deny at least the entries showing in the records of companies.

6. In this case, when this principal borrower defaulted in making payment of loan facility availed by him, the account of the principal borrower was declared and classified as non-performing account on 31.03.2014, by this default, the financial creditor i.e. Bank of India recalled the loan vide letter dated 21.12.2016 and brought the default to the notice of the principal borrower as well as the personal guarantors including the corporate debtors herein by stating that these corporate debtors were to make payment of outstanding amount forthwith, but no amount has been paid either by the principal borrower or by these corporate debtors. When no payment was paid, the petitioner issued a SARFAISI (U/S 13(2)) Act notice to the principal borrower as well as to the guarantors. Perhaps, by looking at the SARFAISI notice issued by the Creditors, this principal borrower approached this Bench by filing a CP 31/IBP/NCLT/MAH/2017 u/s 10 of Insolvency & Bankruptcy Code, wherein this Bench passed moratorium order on 9.3.2017 in the CP filed against this principal borrower. Not only this, another guarantor namely Gupta Corporation Pvt. Ltd. also filed CP No. 67/IBP/NCLT/MAH/2017

u/s 10 of Insolvency & Bankruptcy Code, that was also admitted by this Bench on 31.03.2017. At the same time, the financial creditor along with other financial creditors approached DRT for recovery of their debts from the principal borrower and the guarantors, the same is pending for adjudication.

7. For having these creditors failed to realize the debt amount along with interest either from the principal debtor or from the guarantors, this Petitioner moved these Company Petitions u/s 7 of the Code, for this debt constitutes financial debt as envisaged u/s 5(8) of the Code making a claim of ₹1044,78,31,703.93 as on 31.08.2017 against each of these corporate debtors by filing separate company petitions as mentioned above.

8. Now against these company petitions, the star argument of the corporate debtors is, 1) that the deed of guarantee is not duly stamped therefore they could not act upon or looked into for it has been hit by section 34 of Maharashtra Stamp Act 1958, 2) that the principal borrower M/s. Gupta Coal Ltd. is already undergoing resolution process under IBC, hence this application not maintainable, 3) that the resolution plan, if any passed then it will be binding on this petitioner as well, 4) that guarantors being on the same pedestal as borrowers, the moratorium in respect to the principal borrower will also be applicable to the guarantors of the principal borrower, 5) that since the liability against the guarantors will not be crystallized until the proportionate realization by this financial creditor from the principal borrower company is not decided, this petitioner cannot proceed against these guarantors/corporate debtors, 6) that certain clauses of the deed of guarantee are void by virtue of being in contradiction to the provisions of sections 140, 141 of Indian Contract Act, 7) that the proceedings against these guarantors are liable to be stayed during the resolution/revival process of the Corporate Debtors.

9. Before going into the defences raised by the Corporate Debtors' Counsel, it is pertinent to mention that the Creditor herein filed these

Company Petitions furnishing the documents reflecting the principal borrower entering into Working Capital Consortium Agreement with the Petitioner/Creditor Bank and other Banks thereafter availing loan facility as mentioned in the Company Petition, finally defaulted in making repayment to the Creditor Banks, by which, when these Banks issued SARFAESI notices against the principal borrower and the guarantors, the principal borrower filed company petition u/s 10 of IB Code, 2016 admitting that the principal borrower defaulted in making repayment to the Petitioner and other creditor banks, likewise another guarantor also filed Section 10 Petition to make themselves clear from the debt liability.

10. In this backdrop, the Petitioner filed these Company Petitions by filing Deed of Guarantee executed by these two Corporate Debtors and two other guarantors along with the principal borrower agreeing as aforementioned, to which, there is no objection or contention from these corporate debtors except to the extent saying that the Deed of Guarantee is insufficiently stamped, that the creditor banks shall not proceed against guarantors until and unless asset distribution is decided on liquidation of principal borrower company.

11. The objections raised by these corporate debtors are purely technical not dealing with the substantial issue of their liability to repay the money, especially when the principal borrower defaulted in making repayment to the creditor banks. When there is no categorical denial about an assertive statement making a claim against the corporate debtors herein, absence of denial from the corporate debtors' side will amount to admission of the claim made by the petitioner.

12. Since the Petitioner has already furnished the existence of contract between the Lenders and the Principal Borrower reflecting the Principal Borrower entering into the Agreement for the facility of working capital, in pursuance thereof, the Principal borrower availing that working facility agreed in the agreement and also material reflecting the principal borrower defaulted in making repayment,

besides this, these Corporate Debtors also defaulted in making repayment when notice was issued to the principal borrower as well as these Corporate Debtors demanding repayment of the loan amount along with interest accrued, on having the principal borrower defaulted in making repayment, this Bench, by looking at the evidence reflecting existence of debt and default by the principal borrower and the demand notice to the Corporate Debtors/ Guarantors demanding repayment of the loan facility the principal borrower defaulted, and having these debtors also failed to pay off the defaulted amount, it has to be construed that this Petitioner has furnished all the material reflecting existence of debt and default. Dehors those technical objections mentioned above, for there being no denial to the substratum of the claim petitions, these petitions are fit for admission provided the petitions are not hit by the objections raised by the corporate debtors.

13. For this petitioner has furnished the material sufficient to admit this company petition, let us look into the technical objections raised by the Corporate Debtors to find out as to whether there is any merit in the objections raised by the Corporate Debtors' Counsel or not.

14. On perusal of the defences set out by the Corporate Debtors' Counsel, the points for consideration are as follows:

- i. Whether or not the deed of guarantee executed by the guarantors is duly stamped, and whether or not this company petition be admitted basing on this deed of guarantee.*
- ii. Whether or not moratorium declared in CP 31/2017 against the principal borrower will have any bearing on this proceeding filed u/s 7 of Insolvency & Bankruptcy Code against these corporate debtors/guarantors.*
- iii. Whether or not a resolution plan, if any passed, will be binding on this petitioner in proceeding against this guarantor u/s 7 of IB Code.*

- iv. *Whether or not non-crystallization of realizable claim in distribution of assets will have any bearing on these proceedings against the corporate debtors/guarantors.*
- v. *Whether or not this deed of guarantee is hit by section 141 of Indian Contract Act*
- vi. *Whether these proceedings are liable to be stayed as prayed by the corporate debtors.*

Issues:

Whether or not the deed of guarantee executed by the guarantors is duly stamped and whether or not this company petition be admitted basing on this deed of guarantee.

15. On face of the Guarantee Deed, it appears that this instrument has been executed at Delhi on 12.7.2014 on paying sufficient stamp duty of ₹200. Now the argument of the Corporate Debtor Counsel is that this Deed of Guarantee has not been sufficiently stamped as envisaged under Article 5 (h) (A) (iv) (b), therefore this company petition shall not be admitted for any purpose by this Bench.

16. On making such an argument by the Corporate Debtor's side, when we have visited The Bombay Stamp Act, 1958, we have noticed that this instrument has been captioned as letter of guarantee under Article 37 stating that this instrument shall be levied under Article 5 of Schedule 1 of this Act. By reading Article 5, we have not noticed anywhere that Letter of Guarantee has been specifically dealt with under Article 5 of Schedule 1 of the Act, but whereas, the Debtor Counsel submits that this instrument falls under the category given under Article 5(h)(A)(iv)(b), which speaks of an instrument creating any obligation, right or interest having monetary value, not covered under any other Article, shall be levied with stamp duty of ₹2 for every one thousand rupees or part thereof on the amount agreed in the contract. Our fear is that this document will not fall under this category, because Deed of Guarantee cannot be treated as standalone instrument newly creating some rights and obligations between the parties.

17. If we discern the provisions of the Contract Act, it is evident that it is immaterial whether there is any apparent benefit to the surety or not. It need not be reiterated that validity of any contract is always dependent upon the consideration passed against each other. But in any guarantee deed, whether it is tripartite or bipartite, only the guarantor binds himself agreeing to pay off the liability in the event the principal borrower defaulted in making repayment, for binding himself, guarantor does not receive any consideration either in past, present or future, still such contract is not hit by section 25 of Contract Act. Why so? Because it has been validated under section 127 with a definition that anything done or any promise made, for the benefit of the principal debtor, may be sufficient consideration to the surety for giving the guarantee. The consideration received by the principal borrower is taken to be sufficient consideration for the surety. Therefore, what validates the deed of guarantee from the clutches of section 25 is the consideration received by the principal borrower, therefore the validity of the deed of guarantee is anchored to the consideration received by the borrower in a valid transaction held between the lender and borrower.

18. Since for the reasons stated above, this instrument on its own cannot become an Agreement without support of the instrument executed in between the lenders and principal borrower, therefore, we doubt that it could be seen as an Agreement on its own for the reasons mentioned below:

- i. This Deed of Letter of Guarantee is incidental to the Loan Agreement executed by the Principal Borrower.
- ii. No consideration has been passed to the Guarantor, it is only one side promise or undertaking to the consideration passed to the principal borrower.
- iii. By execution of this instrument, **no monetary value** has been passed to the guarantor.

- iv. Whatever guarantee or promise given by the guarantors being in furtherance of the contract entered between the lender and borrower, this instrument cannot stand on its own without support of the loan agreement and other agreement, if any, executed between the lenders and principal borrowers.

- v. Since it has not been the case of Corporate Debtor that instrument executed in between the principal borrower and the lenders, is insufficiently stamped, this instrument being supporting instrument to the Loan Agreement, once loan instrument is sufficiently stamped to the credit availed, this instrument need not be separately stamped when it is part and parcel of the same transaction. We don't say that this instrument falls under the category mentioned under Section 4 of the Stamp Act, which is applicable only to the transactions of mortgage, sale and settlement, but what we all say is this instrument is to be read along with the loan agreement, therefore it cannot be weighed down by saying that the same duty imposed on loan agreement has to be again imposed on guarantee deed as well, because no transaction can be levied twice with stamp duty. All the more, it has not been envisaged under Article 37 what provision under Article 5 is applicable to guarantee deed. When the provision has not been specified, which is otherwise to be considered as levied with stamp duty because loan agreement has been sufficiently stamped, this instrument has to be construed as sufficiently stamped. We must also mention that literal interpretation has to be given in levying stamp duty, but not a liberal interpretation which normally happens to beneficial legislation.

19. As to Letter of Guarantee is concerned, it cannot be said that a right is crystalized in favor of the lender until before the Corporate Debtor defaulted in making repayment to the lender. As on the date of execution of letter of guarantee, it is also not determinable how much stamp duty is to be paid by the guarantor. The right of

proceeding against the guarantor and determination of the liability will be crystalized only after the borrower defaulted in making repayment of the debt. That being the situation, the rights created in favor of the lender are not immediately exercisable against the guarantors. In view of the same, it is also doubtful whether this instrument will fall under the category as mentioned by the Corporate Debtor Counsel. In most of the State Stamps Act, the stamp duty leviable against the letter of guarantee is mostly fixed as either ₹50 or ₹100 but whereas as here, under the category which is shown by the Corporate Debtor counsel, stamp duty is to be paid on ad-valorem basis. If that is the case, it is nothing but making double payment on the single transaction that has happened between the lender and principal borrower.

20. Now the point for determination is as to whether this instrument is hit by Section 34 of the Stamp Act or not? The facts available before us are that these Corporate Debtors have not denied execution of Deed of Guarantee in favor of the lenders, the Petitioner has not made any direct monetary claim against the Corporate Debtors herein. When totality of situation is taken into consideration, it is undeniable by the Corporate Debtors that the principal borrower availed the loan thereafter defaulted in making repayment likewise when the petitioner made a demand against these guarantors, they also failed to make repayment of the debt liable to be paid by the principal borrower whereby today there is no separate need for this petitioner to prove execution of this Deed of Guarantee by the Petitioner. Requirement of proof of this document will only arise when the opposite side denies execution of such document. When no such denial is there, it has to be treated as an admission in respect to the claim made by the Petitioner.

21. If Evidence Act is looked into, it is evident under Section 58 that facts admitted need not be proved, when proof of document is not required then there could not be any occasion to revisit the validity of the document by-passing the admission already made by the opposite party. For this reason, if any inadmissible document is

filed with the suit, such suit will not be dismissed at threshold stating that since document is inadmissible, the suit is liable to be dismissed. That issue will come for determination only when time has come for marking the document in the evidence to be adduced. Suppose the defendant admits the case of the plaintiff, suit will be decreed without even adducing evidence or marking any document. Such being the case, by taking the totality of the situation, it has been said by Hon'ble High Court of Bombay that in a winding up matter validity of the document is not important, the importance is as to whether the debtor company failed to repay the loan or not. Here it is the Corporate Debtor to pay Stamp duty, therefore wrong doer cannot take the advantage of its own wrong as a cover to get away from the liability taking the help of the wrong he has done. It is an established proposition that the executant has to pay the stamp duty. Here the executants being Corporate Debtors, duty is cast upon them to pay stamp duty but not the holder of the Deed of Guarantee whereby, these Corporate Debtors could not get away from this liability solely on the ground the Deed of Guarantee is insufficiently stamped.

22. The Corporate Debtors' Counsel relied upon *SMS Tea Pvt. Ltd. vs. Chandmari Tea & Co. Pvt. Ltd. (2011) 14 SCC 66* to say that the instrument which is insufficiently stamped cannot be used in evidence or cannot be acted upon for any purpose whatsoever unless the same has been duly stamped. On perusal of the citation supra, it appears the document in question is an unstamped and unregistered lease deed, in which two contracts i.e. the lease agreement and Arbitration Clause have been rolled into one, whereby since the lease agreement which is required to be stamped and registered, not being stamped and registered, the said lease deed being invalid u/s 49 of the Registration Act and 35 of the Stamps Act, the invalidity that attached to the main agreement being attached to the Arbitration Agreement as well, therefore, the Arbitration Clause has also been treated as voidable to the extent of the rights of the parties in respect to lease entered between them.

The situation is slightly converse in the present case, because here it is not the case main instrument is not stamped, the only ground herein is the deed of guarantee is not sufficiently stamped, therefore the aforesaid proposition is not aptly applicable to the present case, because it has already been said that deed of guarantee cannot be construed as standalone instrument attracting levying of stamp duty basing on the consideration received by the principal borrower.

23. To which the Petitioner's Counsel relied upon *L&T Finance Ltd. vs. Damodar Surya Bandekar (2014) (2) BOM CR 575 para 14* saying that the aforesaid SMS Tea Pvt. Ltd. judgment has been distinguished by the Hon'ble High Court of Bombay saying that where the instrument has been adequately stamped in a state where it has been executed there cannot be any impediment to look into the same at least for passing an order and thereafter to send the document for impounding within three months from thereof.

24. In view of the reasons aforesaid, we hereby hold that we have not found any merit of in the argument the Corporate Debtors Counsel submitted saying that the Deed of Guarantee is not admissible on the ground it is insufficiently stamped.

Whether or not moratorium declared in CP 31/2017 against the principal borrower will have any bearing on this proceeding filed u/s 7 of Insolvency & Bankruptcy Code against these corporate debtors/guarantors & Whether or not this deed of guarantee is hit by section 141 of Indian Contract Act

25. The Debtor Counsel submits that CIRP process has already been initiated against the Principal borrower namely M/s. Gupta Coal (India) Pvt. Ltd. on the Company Petition filed under Section 10 of IB Code, 2016 by the Principal Borrower including the debt liability of the creditors herein. The argument of the Counsel is since Section 14 moratorium has been declared against the principal borrower, until and unless the liability of the principal borrower qua the creditor is determined in the IBC proceedings, these guarantors/Corporate Debtors cannot be held liable. To get support to this argument, the

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Counsel relied upon an order passed by Hon'ble NCLT, Chennai in between *V. Ramakrishnan vs. M/s. Veasons Energy Systems Pvt. Ltd. and State Bank of India* holding that the Financial Creditor cannot proceed against guarantors during the moratorium period. It appears the said Ld. Tribunal has relied upon Section 140 of the Indian Contract Act to hold that if the Financial Creditor during CIRP period is permitted to proceed against the personal guarantor of the principal borrower for recovery of the outstanding debt to the extent of the personal guarantee given, then the security interest, if any, of the Financial Creditor, shall get transferred to the Guarantor, which is against the purpose and object of the moratorium declared and is in violation of Section 14(1)(b) of IB Code, 2016, on this ground, the Ld. Tribunal restrained the creditor to proceed against the personal guarantor.

26. The Corporate Debtor Counsel further relied upon a citation in between *Parvateneni Bhushayya vs. Potluri Suryanarayana (AR 1944 Madras)* to say that the guarantor has every right to step into the shoes of creditor once guarantor fulfills its obligations for payment of outstanding debt of the principal borrower, in view of this proposition, the Corporate Debtors Counsel says that since the right of the guarantors under Section 140 will get affected if proceeded against the guarantor, the creditor should not proceed against the guarantor.

27. On looking at aforesaid order of the Ld Tribunal, it appears that the Tribunal is under the impression that if the creditor is permitted against the guarantor, the guarantor may not be in a position to exercise his right under section 140 & 141 because the Insolvency proceedings have already been initiated against the principal borrower.

28. To which, the petitioner Counsel submits that in the Deed of Guarantee itself, these Guarantors unconditionally agreed in Clause 21 that the guarantee given by them is independent and distinct from any security that the lenders have taken and these guarantors will not claim to be discharged notwithstanding the provisions of Section

140 and 141 of Indian Contract Act or any other section of law by attributing failure to working capital lenders in taking security from the principal borrower.

29. On analysis of the provisions relating to guarantee, it is ascertainable that u/s 140 of Contract Act on payment or performance of all that is liable to be payable by the principal borrower, the surety is invested with all rights which the creditor had against the principal debtor. It is a right vested with the guarantor to step into the shoes of the Creditor. It is the discretion of the surety/guarantor whether to waive that right or to reserve that right to exercise after performance of the guarantee. It does not make any sense to harp on this right to give an impression that unless and until this guarantor is in a position to exercise such right under sec 140 of the Act, the creditor cannot proceed against the guarantor. No such law has been envisaged under Contract Act. It has only been said that after making payment to the creditor, the guarantor will get transposed into the creditor's shoes for realizing his claim from the assets of the corporate debtor. By reading this provision, it cannot be construed that creditor shall not proceed against the guarantor for the guarantor will not have anything to realize from the principal borrower for the CIRP process has already been initiated against the principal borrower.

30. Here, the guarantor is bound by the Guarantee Agreement for four reasons, (i) the loan facility is given to the principal borrower on the promise or guarantee given by the Guarantor (ii) the right of stepping into creditors shoes only a residual right exercisable by the guarantor provided any security is left after the debt has been realized from the principal borrower and the guarantors (iii) the right given to guarantor cannot be understood that if the security given by the principal borrower is exhausted, the guarantors are not liable to the guarantee given by them, (iv) since it is a right given to the guarantor to step into the shoes of the creditor, if on his own waives that right, such guarantor cannot even rely upon Section 140 and 141 of the Indian Contract Act to say that Creditor shall not proceed

against the guarantor, moreover, the guarantor will get jurisdiction to exercise this right only after the creditor realized the outstanding dues from the guarantor until such time even if it is assumed that the guarantor is still vested with that right, it remains premature until the liability of the principal borrower is discharged by the guarantor, (v) however, the guarantors themselves agreed that the liability of the guarantee shall not be affected by variance to the terms and conditions of the loan Agreement or winding up of borrower or any merger taken place to the principal borrower, in the backdrop of these terms and conditions, the guarantors cannot today submit that the creditors shall not proceed against these guarantors basing on this Deed of Guarantee.

31. In view of the reasons aforementioned, Section 140 and 141 of the Indian Contract Act will not have any bearing on the creditor proceeding against these guarantors.

Whether or not a resolution plan, if any passed, will be binding on this petitioner in proceeding against this guarantor u/s 7 of IB Code.

32. The Corporate Debtor Counsel relied upon *Sanjeev Shriya vs. State Bank of India* to say that unless liability against the principal borrower has not been crystallised, the creditor shall not proceed against the corporate guarantors moreover, when CIRP process is in progress, it can't be said that how much will come to the creditors in the liquidation out of the total asset of the company.

33. To which, the petitioner Counsel submits that the liability of the surety to pay the guaranteed amount to the creditor does not extinguish even if liquidation proceedings are initiated against the principal borrower, for which the counsel has relied upon *Maharashtra State Electricity Board vs. Official Liquidator (1982) 3 SCC 358 para 7, Punjab National Bank vs. State of UP and Ors. (2001) 5 SCC page no.8 para 5, Jagannath Ganeshram Agarwale vs. Shiv Narayan Bhagirath and Ors. (1940) ILR (BOM) page no.387. He*

further submits that IBC does not impose a bar against initiating proceedings against the corporate guarantors/surety like in Section 22 of SICCA (*Kailashnath Agrawal vs. Pradeshiya Industrial and Investment (2003) 4 SCC 305*).

34. On examination of the submissions of either side, it appears to us that it is true there is no provision of law under IBC restricting the Creditors to proceed against the guarantors, above this, these guarantors themselves are bound by the Deed of Guarantee for they themselves have stated that the winding up proceedings against the principal borrower will not have any bearing on the guarantee given by the Corporate Debtors. Under Section 14 of the Insolvency & Bankruptcy Code, 2016, the moratorium declared is in respect to the properties of the Corporate Debtor and the security interest created by the Corporate Debtor, since the proceeding against the guarantors not being covered under any of the provisions of Section 14, it can't be said that declaration of moratorium in respect to the properties of the corporate debtor and the proceedings against the corporate Debtor will suspend the right of the petitioner proceeding against the guarantors who have separately given guarantee to pay off the debt of the Creditors in the event the principal borrower defaulted in making repayment. By this proceeding, it will not have any bearing either on the moratorium declared in respect to the proceedings of the principal borrower or on any legal proceedings pending against/by the principal borrower. Therefore, it is incomprehensible to understand how the pendency of CIRP in the principal borrower company will have binding effect upon proceeding against the guarantors because if the creditors realise their debt in full or in part from the guarantors, he will not proceed any further against the Corporate Debtor likewise, if the debt is fully realised from the principal borrower, the creditors will not proceed any further against the guarantors. Such being the situation, the guarantors cannot say that since CIRP period is pending against the principal borrower, the right of suing against the corporate debtors is extinguished. Since the guarantors themselves made a promise to the creditor that winding up of the principal borrower company will not have any effect

upon the Deed of Guarantee, the right being co-extensive as against the guarantors, they are equally liable to pay the loan notwithstanding the CIRP in progress in the CP filed against the principal borrower.

35. On careful reading of Insolvency and Bankruptcy Code especially liquidation process chapter, it has nowhere mentioned that the Company will be discharged after distribution of assets of the company unlike in the cases of individual bankruptcy cases. It is nowhere mentioned that the right of claim against the guarantors will get extinguished after distribution of assets of the principal borrower. As long as such provision is nowhere present under Insolvency and bankruptcy code, the claimant is very much entitled to recover his residuary claim from the guarantors. On reading the guarantee deed, it is very much evident that these guarantors are none other than group companies of the principal borrower. How these guarantors/Corporate Debtors, who put all kinds of restraints upon themselves by saying that they will be bound to pay off the loan amount notwithstanding fact of principal borrower entering into liquidation, notwithstanding the fact of nationalization or discharge of loan against the corporate debtor by operation of law, now say that the moratorium passed over the affairs of principal borrower is binding upon the guarantors as well. If a right is extinguished by granting any write-off to a loan by any beneficial legislation, then by such extinguishment, the write off will automatically extend to the guarantors but not in a case where the principal borrower defaulted in making repayment. It is an established preposition that right of recovery is quite extensive against the guarantors as against the principal borrower, therefore the creditor need not remain in waiting until the proceeding against the principal borrower has come to a logical end. It is also contextual to mention that liquidation order has already been ordered against the principal borrower wherein the liquidation value of the company is estimated at around ₹252crores, which is only around 24% of the outstanding amount payable to the Petitioner, which is ₹1044,78,31,704.93, of course, this Petitioner

will not get the entire amount to its account from the proceeds of liquidation.

36. In view of the same, we have not found any merit in the arguments advanced by the Corporate Debtor Counsel, therefore, the aforesaid issue decided against the Corporate Debtors.

Whether or not non-crystallization of realizable claim in distribution of assets will have any bearing in proceeding against the corporate debtors/guarantors.

37. For the Corporate Debtor themselves agreed that the right against the principal borrower and the corporate guarantors is co-extensive, the creditor need not remain in waiting until the realisable claim is crystalized from the principal borrower. Since the right against the principal borrower not being extinguished in making the claim against the principal borrower, the creditor has every right as per law to proceed against the Corporate Debtors therefore, we have not found any merit in the arguments made by the Corporate Debtors Counsel.

Whether these proceedings are liable to be stayed as prayed by the corporate debtors.

38. On perusal of the provisions of the Insolvency & Bankruptcy Code as well as Indian Contract Act, we have not seen any impediment in proceeding against the guarantors under any provision of law, much less under Insolvency & Bankruptcy Code, whereby we have not found any sufficient cause to stay these proceedings against these Corporate Debtors.

39. On having already stated the Creditor has furnished the material showing existence of debt and default by the principal borrower, these Company Petitions are in fact fit to be admitted for declaration of moratorium as envisaged under Section 14 of the Code.

40. As the Creditor has proceeded against Gupta Infrastructure (India) Pvt. Ltd., Corporate Debtor in CP 1397/2017 and against Gupta Infratec Pvt. Ltd., Corporate Debtor in CP 1398/2017, relief under Section 14 are separately given as mentioned below:

CP 1397/2017

- (I)(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act);
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- (II) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (III) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (IV) That the order of moratorium shall have effect from 01.02.2018 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

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- (V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- (VI) That this Bench hereby appoints Mr. Ranjit Dnyanchand Jain, 107, Rachana Sahil Apartment, Ambazari, Nagpur, email ranjitdjain@gmail.com, Registration No. IBBI/IPA-001/IP-P00063/2017-18/10149 as Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

CP 1398/2017

- (I)(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act);
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- (II) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (III) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (IV) That the order of moratorium shall have effect from 01.02.2018 till the completion of the corporate insolvency

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resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

- (V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
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41. Accordingly, these Petitions are admitted.

42. The Registry is hereby directed to communicate this order to the parties within seven days from the date order is made available.

Sd/-

V. NALLASENAPATHY
Member(Technical)

Sd/-

B. S. V. PRAKASH KUMAR
Member (Judicial)