

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 51 of 2018**

**(Arising out of Order dated 11<sup>th</sup> January, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in C.P. No. IB-392(PB)/2017]**

**IN THE MATTER OF:**

**Export Import Bank of India**

**...Appellant**

**Vs.**

**CHL Limited**

**...Respondent**

**Present: For Appellant: - Mr. Tushar Mehta, Solicitor General, Mr. Pallav Shishodia and Mr. Rajeeve Mehra, Senior Advocates with Mr. Krishna Raj Thacker, Mr. Jayant Rawat, Mr. Ashish Rana, Mr. Surekh Baxy, Mr. Shaveer Ahmed, Advocates.**

**For Respondent: - Mr. Arun Kathpalia, Senior Advocate with Mr. Jayant Mehta, Mr. Atul Sharma, Mr. Jayant Nath, Mr. Sugam Seth, Mr. Rudreshwar Singh, Ms. Bani Brar, Mr. Gautam Singh, Mr. Sajal Jain, Mr. Kamal Gupta and Ms. Yamini Khurana, Advocates.**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

The Appellant, as ‘Financial Creditor’, filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “I&B Code”) for initiation of the ‘Corporate Insolvency Resolution Process’ against the Respondent- ‘CHL Limited’ (‘Corporate Debtor’) on the ground of default in discharging its obligations upon invocation of its guarantee. However, the Adjudicating Authority

(National Company Law Tribunal), Principal Bench, New Delhi, dismissed the application on the finding that the Respondent's liability as a surety was not co-extensive with that of the 'principal borrower' by reason of Clause 4 of the 'Deed of Guarantee'. The Adjudicating Authority held that Clause 4 of the 'Deed of Guarantee' is an agreement contrary to the general law of surety's liability being co-extensive with that of the 'principal borrower' as provided in Section 128 of the 'Indian Contract Act, 1872'.

**Stand of the Appellant- 'Export Import Bank of India'**

2. Learned Senior Counsel for the Appellant submitted that the ground given by the Adjudicating Authority is untenable and the order is liable to be set aside for the following reasons:

3. According to the learned Senior Counsel for the Appellant, Clause 4 of the 'Deed of Guarantee' only stipulates the mode of discharge of the guarantee and not the nature of liability of the guarantor. Section 128 of the 'Indian Contract Act, 1872' relates to the liability of the surety which is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. Clause 4 of the 'Deed of Guarantee' reads as follows: -

*"4. In the event of any default on the part of the Borrower in the due repayment of the Loan or any part thereof (whether at stated maturity or upon*

*acceleration or otherwise) including any converted Rupee amount(s) consequent upon default (in the case of Loan in foreign currency) or in payment of an interest, compound interest, additional interest, by way of liquidated damages or other monies in accordance with the Loan Agreement, or in the due compliance with any of the formalities for drawal of the Loan or otherwise in the observance or performance of any other terms and conditions of the Loan Agreement, then and in such an event, the Guarantor shall, within a period not exceeding seven days from the date of despatch or delivery by Exim Bank to the Guarantor of a notice in writing of such default by the Borrower, pay to Exim Bank at Mumbai, on first demand without delay, demur or protest and without any set-off or counter claim, the amounts specified in the notice in the manner required therein and until such payment, the Guarantor shall also be liable to pay further interest thereon including compound interest and additional interest by way of liquidated damages that may be payable by the Borrower to Exim Bank under the Loan Agreement.”*

4. It was submitted by the learned counsel for the Appellant that by virtue of Clause 8 of the 'Deed of Guarantee', the 'General Conditions' which are annexed to the 'Deed of Guarantee' form an integral part of the guarantee and the Respondent is bound by the terms stated therein. The following terms of the 'General Conditions' are relevant for determining the nature and extent of the Respondent's guarantee –

*“2. Exim Bank shall have full discretionary power without further assent or knowledge of the Guarantor and without any way affecting the guarantee or discharging the guarantor from any liability hereunder, to postpone at any time or from time to time the exercise of any power conferred on Exim Bank under the Laon Agreement or any security document and to exercise the same at any time and in any manner, and either to enforce or forebear to enforce payment of the loan or any part thereof or interest or other monies due to Exim Bank by the Borrower or any of the remedies or securities available to Exim Bank, or to enter into any composition or compound with or to promise to grant time or indulgence to or not to sue the Borrower, or make any other arrangement with the Borrower as Exim Bank may deem fit. The Guarantor shall not be discharged by exercise of any liberty by Exim bank*

*with reference to the matters aforesaid or by Exim Bank releasing the Borrower or by any act or omission on the part of the Exim Bank, the legal consequence whereof may be to discharge the Guarantor or the Borrower or by any act of Exim Bank which would but for this provision be inconsistent with the Guarantor's right as surety, or by any omission on the part of the Exim Bank to do any act which but for this provision, Exim Bank's duty to the Guarantor would have required it to do.*

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*“4. The Guarantee shall be enforceable against the Guarantor notwithstanding that any securities comprised in any instruments executed or to be executed by the Borrower in favour of Exim Bank shall, at the time when the proceedings are taken against the Guarantor on this Guarantee, be outstanding or unrealised.”*

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**“6. To give effect to this Guarantee, Exim Bank may act as though the Guarantor were the principal debtor, jointly and severally liable with the Borrower.”**

5. Reliance has been placed on the decision of the Hon'ble Supreme Court in "**Industrial Investment Bank of India vs. Bishwanath Jhunjhunwala [2009 (9) SCC 478]**", wherein the Hon'ble Supreme Court considered clauses similar to Clauses 4 and 6 of the 'General Conditions' extracted above and held that the guarantee was co-extensive. According to the learned counsel, the Adjudicating Authority failed to consider the 'General Conditions'. Clause 4 of the 'Deed of Guarantee' only stipulates that the guarantor shall discharge its liability within 7 days of being given a notice in writing by the Creditor. Clause 4 does not define the nature of the guarantor's liability. However, the Adjudicating Authority dismissed the application solely on its finding that Clause 4 of the 'Deed of Guarantee' recorded an agreement that the liability of the Respondent was not co-extensive with that of the 'principal borrower'.

6. It was submitted that the Adjudicating Authority has relied on the decision of the Hon'ble Supreme Court in "**Industrial Finance Corporation of India Ltd. vs. Cannanore Spinning and Weaving Mills Limited and Ors. [2002 (5) SCC 54]**" (Para 24), but failed to note that on considering clauses similar to Clause 4 of the 'Deed of Guarantee' and Clauses 2 and 4 of the 'General Conditions', the Hon'ble Supreme Court recorded its conclusion in para 25 that the 'Contract of Guarantee' in that case did not provide any contra note pertaining to the liability of the surety so as to create an exception within the meaning of Section 128

of the 'Indian Contract Act'. Respectfully, the impugned order is clearly contrary to two decisions of the Hon'ble Supreme Court.

7. It was further submitted that suspension of the Loan Agreement do not discharge the Respondent from its obligations under the independent 'Contract of Guarantee'. According to him, although the 'Contract of Guarantee' is not a contract regarding a primary transaction, it is an independent transaction containing independent and reciprocal obligations on principal to principal basis between the Appellant and the Respondent. Reliance has been placed on the following terms of the 'General Conditions':

*"1. .... The Guarantor agrees that the liability under this Guarantee shall in no manner be affected or impaired by any such variations, alterations, modifications, waiver or release of security, and that no further consent of the Guarantor shall be required for giving effect to any such variation, alteration, modification, waiver or release of security."*

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*"7. A certificate in writing signed by any duly authorised official of Exim Bank shall be conclusive evidence against the Guarantor of the amount for the time being due to Exim Bank from*

*the Borrower in any action or proceedings brought upon this Guarantee against the Guarantor.”*

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*“9. ....the obligations of the Guarantor hereunder shall not be discharged except by performance, and shall not be conditional on the receipt of any prior notice or demand by the Borrower, and the dispatch of such notice or demand by Exim Bank as provided herein shall be sufficient notice to or demand on the Guarantor.”*

*“10. This guarantee shall not be affected by-  
..... (ii) discharge of the Borrower by operation of law or otherwise;*

*..... (iv) any defect or invalidity in or irregularity or **unenforceability of the obligations of the Borrower under the Loan Agreement** or under any security created or security document executed by the Borrower or any failure or delay in enforcement of such obligations or the absence of any action to enforce the same..*



*(v) Any dispute or difference of any nature whatsoever that may arise between the Borrower and EXIM Bank under the Loan Agreement or under any document related thereto; .....*”

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*“15. The Guarantee shall be in addition to and not in substitution for another security which Exim Bank may now or hereafter hold for the obligations of the Borrower under the Loan Agreement and may be- enforced without Exim Bank being first required to have recourse to any such security or take any steps or proceedings against the Borrower.....”*

8. Referring to the aforesaid terms, it was submitted that the Appellant is not obliged to institute any proceedings against the ‘principal borrower’ as a condition for invoking the guarantee. A fortiori, suspension of the Loan Agreement cannot have any effect on the Respondent's obligations under the ‘Deed of Guarantee’.

9. It was further submitted that the suit in the Economic Court at Dushanbe is a proceeding in personam filed by the ‘principal borrower’ against the Appellant for revision of the terms and conditions of the Loan Agreement, and till such time, suspension of the operation of the Loan Agreement and prohibiting the Appellant from taking any coercive action

against the principal borrower. No order passed in the said suit affecting the liability of the guarantor as the 'Contract of Guarantee' is not the subject matter of the suit and the 'Contract of Guarantee' is subject to the laws of India and the jurisdiction of Indian courts.

10. In ***"Innoventive Industries Ltd. v. ICICI Bank and Anr.— (2018) 1 SCC 407"***, the Hon'ble Supreme Court held:

*"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor- it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under subsection (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the*

*corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a*

*default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.”*

**Stand of the Respondent- ‘CHL Limited’**

11. Learned Senior Counsel for the Respondent submitted that the Appellant's application under section 7 of the ‘I&B Code’ and the present appeal is premised on a ‘corporate guarantee’ furnished by the Respondent in terms of the Loan Agreements entered into and executed between the Appellant and ‘CJSC CHL International’ (“Principal Borrower”).

12. It was submitted that as per the settled principle of law of guarantee, liability of a guarantor arises only when the ‘principal borrower’ defaults in repayment of the demand made by the Lender.

13. Further, according to him, disputes arose between the ‘principal borrower’ and the Appellant on the ground that the entire loan amount

was not disbursed to the 'principal borrower' and that there was a delay in disbursement of loan which led to the parties moving to the Economic Court of Dushanbe at Tajikistan. At the time of recall of loan and illegal invocation of guarantee on 1<sup>st</sup> June, 2017 by the Appellant, the obligations under the loan agreements and the security documents were under suspension by the orders of the Economic Court of Dushanbe at Tajikistan dated 6<sup>th</sup> January, 2017. Therefore, there could not have been any invocation of the guarantee of the Respondent.

14. Learned counsel for the Respondent submitted that the judicial proceedings at Dushanbe culminated into a final order dated 1<sup>st</sup> May, 2018, as per which:-

(a) The Appellant has not executed its obligations in full and has not paid the entire loan amount in full, indeed. Actions of Appellant violated the terms and conditions as mentioned in the contract and considers that the Appellant will be entitled to request repayment of loan only after execution of its commitments in full.

(b) The term of repayment of principal will start after 2 years following the issuance of credit funds in full, considering the amendments and supplements to be made to loan agreements within the term determined for repayment of principal.

(c) 'Principal Borrower' and the Appellant are required to calculate the loan funds issued under the loan agreements and interests so accrued for the issued loan funds, and determine the

liabilities between the parties arising from loan agreements anew and execute them in that scope of obligations.

15. It was submitted by the learned counsel for the Respondent that pursuant to the directions passed in the final order, no reconciliation of accounts has been done by the 'principal borrower' and the Appellant in terms of the final judgment of the Dushanbe Court despite representations made by the 'principal borrower'. Without the reconciliation, as on date, there is no determination of the actual amount of interest which is due and payable by the 'principal borrower' to the Appellant. In the absence of reconciliation, no demand has been made by the Appellant upon the 'principal borrower' to pay the amount of recalculated interest. Without such demand made on the 'principal borrower', there cannot be an assumption of default by the 'principal borrower'.

16. It was further submitted that in absence of default by the 'principal borrower', there can be no invocation of the 'corporate guarantee' of the Respondent in view of Clause 4 of the Guarantee. In terms of Clause 4 of the Guarantee Agreement, only in the event of default by the 'principal borrower', the Appellant can invoke the guarantee and is required to give a notice stating the default made by the 'principal borrower' along with amount payable specified in the notice. Admittedly, there is no demand made on the Respondent after the final judgment passed by the Dushanbe Court. Therefore, the liability of the Respondent is contingent

and as on date there is no debt that is due and/or payable in terms of Section 3 (11) of the 'I&B Code' and there is no default on the part of the Respondent in terms of Section 3 (12) of the 'I&B Code'.

17. We have heard learned counsel for the parties and perused the record.

18. Loan Agreements were executed by the Appellant with the 'CJSC CHL International'- ('Principal Borrower'). The Respondent had executed a corporate guarantee dated 7<sup>th</sup> October, 2010. It followed by additional guarantees by the Respondent executed on 2<sup>nd</sup> September, 2013 and 18<sup>th</sup> March, 2015 in terms of subsequent Loan Agreements executed between the Appellant and 'CJSC CHL International'- ('Principal Borrower'). The 'principal borrower' then filed a suit against the Appellant on 3<sup>rd</sup> January, 2017 before the Economic Court at Dushanbe seeking revision of terms and conditions of the Loan Agreements and suspension of all the operations related to execution of Loan Agreements till the claim is considered by the Court at Dushanbe.

19. On 4<sup>th</sup> January, 2017, the Appellant in terms of the Loan Agreement sent a letter to the 'principal borrower' seeking re-payment of, what it called as outstanding interest including penal interest of USD 869,277.84 as on 3<sup>rd</sup> January, 2017 within 7 days of the said demand. A copy of this letter was marked to the Respondent stating that in the event of default by the 'principal borrower', the Appellant may take steps for invocation of the corporate guarantee.

20. On 6<sup>th</sup> January, 2017, the Economic Court at Dushanbe by its order directed for suspension of obligations under the loan and mortgage agreement until consideration of the claim is done on its merits. According to Respondent, on 6<sup>th</sup> January, 2017, the letter dated 4<sup>th</sup> January, 2017 had not been delivered. Further, the Order dated 6<sup>th</sup> January, 2017 was passed much prior to the expiry of 7 days period for payment as per the letter dated 4<sup>th</sup> January, 2017. The Appellant, in terms of the Agreement, submitted itself to the jurisdiction of Economic Court at Dushanbe, filed its written statement, and also made an application seeking certain orders against the 'principal borrower'. The Economic Court rejected this application by an Order dated 29<sup>th</sup> March, 2017. Thereafter, the Appellant issued a letter dated 2<sup>nd</sup> May, 2017 to the 'principal borrower' purportedly re-calling the loans granted to the 'principal borrower' along with interest (including additional penal interest), totalling to USD 35,164,530.13 in violation of the order dated 6<sup>th</sup> January, 2017. Importantly, as on that date, the proceedings at Dushanbe were pending. The Loan Agreement was suspended and, as such, there could not be any 'default' by the 'principal borrower'. Further, prior to issuing this notice, only a Letter dated 4<sup>th</sup> January, 2017 was issued whereby outstanding interest including penal interest of USD 869,277.84 as on 3<sup>rd</sup> January, 2017 was sought from the 'principal borrower', within 7 days of the said demand, which demand also got suspended along with the loan agreement in view of the order dated 6<sup>th</sup> January, 2017. The aforesaid suspended amount of USD 869,277.84



was mystically increased to USD 35,164,530.13, when in fact the obligations of the 'principal borrower' in terms of the Loan Agreement stood suspended on 6<sup>th</sup> January, 2017. Despite the fact that there was no debt due and payable by the principal borrower, on 1<sup>st</sup> June, 2017, the Appellant sent guarantee invocation letter to the Respondent purportedly demanding an amount of USD 35,164,530.14.

21. The aforesaid chronology and the proceedings before the Economic Court, Dushanbe show that the Appellant has been restrained from taking any coercive proceedings in terms of the loan contracts and from supplements and appendices. These admittedly include the Corporate Guarantee furnished by the Respondent. Further, the 'principal borrower' moved another application dated 2<sup>nd</sup> October, 2017, on which an Order was passed on 3<sup>rd</sup> October, 2017, by the Dushanbe Court stating that the suspension order is applicable on loan agreements, mortgage agreements and any other arrangement obligations arising from such agreements, which impliedly includes the Corporate Guarantee executed towards the principal loan. This order was again reiterated on 17<sup>th</sup> November, 2017 by the Dushanbe Court. Pursuant to this, the Economic Court at Dushanbe passed its final judgment on 1<sup>st</sup> May, 2018. The said Judgment was challenged before the Supreme Economic Court of Dushanbe by the Appellant which upheld the Judgment and dismissed the appeal vide its judgment dated 14<sup>th</sup> August, 2018.

22. The 'principal borrower' has already made representations to the Appellant for reconciliation of account but the Appellant has not come forward to reconcile till date. Only upon this reconciliation, the Appellant is entitled to demand the recalculated interest component from the 'principal borrower', if any or adjust any surplus amount which have been received by the Appellant. If in the event, the 'principal borrower' fails to pay the interest component, if any, as per the fresh demand made on reconciliation, only then the Appellant will be entitled to invoke the 'corporate guarantee' of the Respondent in terms of specific and contingent contract between the Appellant and the Respondent.

23. Significantly, the 'Corporate Guarantees' given by the Respondent can be invoked only "In the event of a default on the part of the borrower". The said 'Corporate Guarantee' cannot be invoked as on date, since there is no fresh demand made by the Appellant to the 'principal borrower' for the recalculated interest and consequently there is no debt that is due and/or payable hence there is no default by the 'principal borrower' with respect to interest.

24. There is another aspect, which disentitles the Appellant to proceed in the present appeal. The process under the 'I&B Code', once set in motion, is irreversible and leads to exceptional and serious consequences. If the appeal is allowed that would mean suspension of the Board of Directors of the 'Corporate Guarantor', appointment of 'Interim Resolution Professional', so on and so forth. A running business,

which has made no default, would be put under resolution process. On the other hand, if the 'principal borrower' pays the amount, if any, found payable upon reconciliation of accounts, it would confirm that there never existed any debt which is due and payable or defaulted by the 'Corporate Guarantor'. The actions that would follow on allowing of this appeal cannot be reversed and the 'Corporate Guarantor' cannot be compensated in any manner.

25. In view of the aforesaid findings and in absence of any merit, the appeal is dismissed. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)  
Chairperson

(Justice Bansi Lal Bhat)  
Member(Judicial)

NEW DELHI

16<sup>th</sup> January, 2019

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