

2022 PLRonline 396

NATIONAL COMPANY LAW TRIBUNAL CHANDIGARH BENCH, CHANDIGARH

Coram: MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL) MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)

Kotak Mahindra Bank Limited. - Petitioner-Financial Creditor

Versus

Jotindra Steel and Tubes. - Respondent-Corporate Debtor.

CP (IB) No.12/Chd/HRY/2021

21.10.2022

Insolvency and Bankruptcy Code, 2016, S. 7 - [Contract Act](#), S. 126 - Letter of comfort - Contract of guarantee - Which is undated, without seal and authorization on behalf of the respondent-company, cannot be termed as letter or contract of guarantee, particularly in presence of another corporate guarantee - S. 126 reveals that in a contract of guarantee, there are three different entities i.e. i) 'surety' ii) 'principal debtor' and iii) 'creditor' - The said letter of comfort cannot be termed as letter of contract of guarantee because it is neither signed by the creditor nor by the borrower and to the contrary, the sanction letter is signed by all the three i.e. creditor, borrower and guarantor - There is no evidence to show that the said letter of comfort was signed in pursuance of any resolution passed by the Board of Directors of the respondent/corporate debtor - Thus, it can be safely said that the said letter of comfort, if any, issued, is not in conformity with the provisions of Section 179(3)(f) and Section 185 of the Companies Act, 2013 - Even if at the time of issuing no dues certificate in favour of respondent/corporate debtor, for its own loan account by the bank/financial creditor, if there is any reference of such liability created by the present undated letter of comfort then it is of no consequence as document itself is not valid - No doubt, there can be two guarantors for a single loan facility or cash credit facility, but this fact should have been fairly clarified in the sanction letter wherein only one corporate guarantor has been mentioned and in presence of the said corporate guarantee, the present letter of comfort is of no significance. [Para 19, 20, 21]

Contract Act, S. 126 - Evidence Act, 1872, Section 92 - Deed of guarantee - Oral - Although, there is no performatum prescribed for deed of guarantee and even guarantee can be oral as per Section 126 of the Contract Act, but once it is reduced into writing either in the form of letter or contract then it must fulfil all the ingredients of contract of guarantee and should be signed by surety, principal debtor and creditor as well - No oral evidence in presence of writing can be taken into consideration as per Section 92 of the Indian Evidence Act, 1872.[Para 21]

For the Petitioner/Financial Creditor : Mr. Manish Jain, : Mr. Anuj Agarwala, Mr. Nitin Kant Setia,

For the Respondent/Corporate Debtor : Mr. Anand Chhibbar, Senior Advocate, Mr. Arora Vishwas Kumar,

PER: HARNAM SINGH THAKUR, MEMBER (JUDICIAL)

JUDGMENT

The present petition has been filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short hereinafter referred to as '**Code**') read with Rule 4 of the

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Kotak Mahindra Bank Limited (for short hereinafter referred to as '**petitioner/financial creditor**') for initiating the Corporate Insolvency Resolution Process (for short hereinafter referred to as the '**CIRP**') against Jotindra Steel and Tubes Limited (for short hereinafter referred to as the '**respondent/corporate debtor**'). The petition is signed by Mr.Lalit Rankawat, who has been authorized by Board Resolution dated 20.03.2020 (Annexure 1) and the affidavit verifying the contents of the application is on page 18-19 of the petition.

2.The corporate debtor, namely, Jotindra Steel and Tubes Limited, is a company incorporated on 16.03.1970 under the Companies Act, 1956, having CIN L27104HR1970PLC005240 and its registered office is at 14/3, Mathura Road, Faridabad, Haryana. Therefore, the matter falls within the territorial jurisdiction of this Adjudicating Authority. Copy of master data of the corporate debtor is at Annexure 2 of the petition.

3.The brief facts, as stated in the petition, are that the petition is being filed against M/s Jotindra Steel and Tubes Limited, who is a corporate guarantor to its associate company M/s Mauria Udyog Limited (for short hereinafter referred to as '**borrower**'), who had obtained credit facilities from the applicant to the tune of Rs.17,50,000/- (Rupees Seventeen Crores Fifty Lacs only) through Loan Account No.4329TL0100000035, by way of Sanction Letter dated 22.08.2017 (Annexure 5) along with Master Facility Agreement dated 30.08.2017 (Annexure 6). It is stated in the petition that the credit facilities were granted by the financial creditor on the basis of assurances and representations of the corporate debtor that the borrower is in sound financial position to fully repay the loan. The corporate debtor also furnished an unconditional corporate guarantee (Annexure 9) to the financial creditor expressly stating and undertaking that it would make due payment on behalf of the borrower to the financial creditor in order to ensure that the obligations of the borrower to the financial creditor under the said credit facility are fully

met in terms thereof. However, in view of the continuous defaults made by the borrower in repayment of the loan amount, as per the schedule, the financial creditor in accordance with the Reserve Bank of India, directives and guidelines, classified in its books the account of the borrower as Non-Performing Asset ('NPA') on 04.02.2020.

4. Thereafter, the financial creditor recalled the loan facility vide Notice dated 11.02.2020 (Annexure 10) and invoked the corporate guarantee furnished by the corporate debtor. It is stated that the financial creditor, on several occasions, called upon the borrower and the corporate guarantor to repay the entire loan amount, however, the corporate debtor failed to comply with its obligation to repay the entire loan amount to the financial creditor in complete violation of the corporate guarantee. Resultantly, the account of the borrower remains NPA in the books of the financial creditor. Thus, the financial creditor is constrained to file the present petition on account of the failure of the corporate debtor to pay the financial debt due to the financial creditor on behalf of the borrower to the tune of Rs.14,48,48,132.15 as on 31.12.2020 as the corporate debtor is a guarantor to the borrow and therefore, co-extensively liable to repay the financial debt due to the financial creditor. Thus, it is prayed that since, the corporate debtor is unable and/or unwilling to pay its creditors, it is just and equitable that insolvency proceedings be initiated against the corporate debtor under Section 7 of the Insolvency and Bankruptcy Code, 2016.

5. In the reply filed by the respondent/corporate debtor, vide Diary No.00063/4 dated 23.06.2021, it is stated by the respondent/corporate debtor that it never stood as Corporate Guarantor to the loan facility granted to the borrower by the financial creditor and no contract of guarantee was ever executed by the respondent. Further, it is stated that a '**letter of comfort**' in issue is a document signed by an individual, is undated and is not supported by an authentication of the Board of Directors and no resolution was ever passed by the Board of Directors in support of the said letter of comfort, or to

provide any guarantee which conforms Contract of Guarantee under the Contract Act.

6.It is also stated that the petitioner/financial creditor has filed the present petition alleging itself as a 'financial creditor', however, it does not fall under the definition of the financial creditor as the document in issue i.e. the **letter of comfort** provided by an individual person, can never conform a 'financial debt' for the respondent/corporate debtor, as is defined under the Code. Further, it is stated that sanction letter to advance loan to the borrower, expressly points out two different documents, which are/were required to be executed included:

- i.) The corporate guarantee of Strawberry Star India P. Ltd.; and ii.) Letter of Comfort from respondent

Therefore, it is averred that since, the sanction letter itself provides the difference between the 'corporate guarantee' and 'letter of comfort', which were required to be provided by separate entities/companies, thus, in such scenario, both the documents cannot be treated as corporate guarantee.

7.It is contended on behalf of the respondent/corporate debtor that Article 5 of the Schedule I of the Indian Stamp Act, provides that agreement and memorandum of agreement must be mandatorily stamped. Thus, is submitted that if a contract of guarantee is supposed to be executed, it must be stamped as a contract or an agreement, as per the specific provisions of Article 5 of Schedule I of Indian Stamp Act and '**Letter of Comfort**' is not a stamped document, which is being relied upon as corporate guarantee by the financial creditor. It is further mentioned that Section 35 of the Indian Stamp Act, 1899, states that any document which is either not duly stamped, as mandated under the provisions of the Indian Stamp Act, 1899, cannot be tendered as evidence. Thus, such documents cannot be taken into consideration.

8.It is also contended that provisions of Section 179(3)(f) of the Companies Act,

mandates that passing of resolution by the company, in the meeting of Board of Directors, in order to grant loan or give guarantee or provide security in respect of loans, and the letter of comfort is not backed by any due resolution from the Board of Directors, which is mandatory in accordance with Section 179(3)(f). Further, it is contended by the respondent that in order to conform a guarantee, there is a need of a contract of guarantee in accordance with the provision of the Indian Contract Act and accordingly, there is a need for proposal, acceptance and consideration as the basic ingredients of a contract. However, in the present case, there has been no such contract/agreement executed by the respondent. Also, the **letter of comfort** being shown as corporate guarantee, is executed by an individual and not by the company and there is no seal/stamp/common seal affixed to the same and it is not supported by any Board Resolution. Therefore, in the absence of any contract of guarantee between the respondent and the financial creditor, the respondent cannot be held liable for the default of the borrower.

9. It is further stated in the reply that the sanction letter dated 22.08.2017 specifically mentions (at internal page 4 of the sanction letter) that 'confirmation from the guarantor that the issuance of the guarantee complies with the provisions of Section 185 and other application provisions of the Companies Act, 2013 (applicable in case of the corporate guarantee)'. However, in case of the respondent/corporate debtor no such confirmation was ever sought by the petitioner/financial creditor and can never be provided keeping in view the bar to provide corporate guarantee by respondent/corporate debtor against the loan borrowed by the borrower. According to the respondent, Section 185 of the Companies Act bars providing loans and guarantees by a company to any director or to 'any other person where the director is interested'. Reliance has been placed on the explanation (d) and (e), mentioned in Section 185, which provides that '*to any other*

person in whom director is interested' means any body corporate at a general meeting of which not less than twenty five percent of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; and/or, any body corporate, the Board of Directors, managing director or manager, whereof is accustomed to act in accordance with law with the directions or instruction of the Board, or of any director or directors, of the lending company. Thus, it is submitted that respondent/corporate debtor and borrower are group companies and accordingly, borrower falls under the category of body corporate, where the Board of Directors, Managing Director or Manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company/company providing the corporate guarantee. Therefore, in such scenario, where law creates a bar in providing the corporate guarantee, then how the respondent/corporate debtor could have given the corporate guarantee.

10. It is also submitted by the respondent/corporate debtor that during the sanctioning of the loan, a detailed board resolution was passed by the borrower, which in detail mentions about the securities and or the personal/corporate guarantees to be provided to the financial creditor against the sanction of the loan. However, it nowhere mentions or even whispers in respect to the alleged guarantee given by the respondent. Thus, it is prayed that the present company petition be dismissed with exemplary costs.

11. We have heard the learned counsel for the parties and have carefully perused the contentions taken on behalf of the parties in the short written submissions placed on record.

12. During the course of arguments, it is contended by learned counsel for the respondent that the present petition is maintainable against the respondent/corporate

debtor, who is otherwise a corporate guarantor as per **letter of comfort**. In support of the arguments, learned counsel for the petitioner has relied upon a decision of the Hon'ble Supreme Court in **Laxmi Pat Surana v. Union Bank of India; (2021) 8 SCC 481**.

13. It is argued by learned counsel for the petitioner that **letter of comfort** amounts to guarantee, particularly when the same is admitted in the reply filed by the respondent/corporate debtor vide Diary No.063/4 dated 23.06.2021, wherein it has been stated that **letter of comfort** was issued by the petitioner in order to introduce borrower to the petitioner/financial creditor. It is further argued that by virtue of **letter of comfort**, the respondent has created contract obligation. In support of this argument, learned counsel for the petitioner has placed reliance on **Lucent Technologies v. ICICI Bank; 2009 SCC OnLine Del 3213**, wherein Hon'ble Delhi High Court after placing reliance upon decision of Australian Courts reported at **Banque Brussels Lompert S.A. (BBL) v. Australian National Industries** reported at **(1989) 21 NSW LR 502**, held as under:-

"xxxx xxxx xxxx xxxx

the whole thrust of the law today is to attempt to give proper effect to commercial transactions. It is for this reason that uncertainty, a concept so much loved by lawyers, has fallen into disfavour as a tool for striking down commercial bargains. If these statements are appropriately promissory in character, courts should enforce them when they are uttered in the course of business, and there is no clear indication that they are not intended to be legally enforceable."

xxxx xxxx xxxx xxxx

So far as the letter of comfort is concerned, the Court laid down the following principles which give valuable guidance on the subject. The Learned Chief Justice of Australia held that:-

"1. In determining whether a letter of comfort gives rise to contractual obligations;

(a) the ordinary rules of construction and interpretation relating to contracts apply;

(b) The overriding test is that of the intention of the parties as

deduced from the document as a whole, seen against the background of the practices of the particular trade or industry and in the events surrounding its inception;

(c) the prima facie presumption that in respect of commercial transactions there is an intention to create legal relations applies, and the onus of proving the absence of such intention rests with the party who asserts that no legal effect is intended.

2. In the circumstances, and taking into account the negotiations leading to the final versions of the letter of comfort, and a close textual analysis of its terms, the letter of comfort contained 2 enforceable contractual promises, breach of which gave rise to a liability in damages where the shares ... were sold without the plaintiff being given 90 days notice."

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14. Through the rejoinder, filed vide Diary No.00063/5 dated 05.07.2021, it is pointed out by learned counsel for the petitioner that petitioner/financial creditor had issued no due certificate to the respondent/corporate debtor in relation to its own Loan Account No.4329TL0100000031, vide letter dated 18.01.2021, (executed on 05.02.2021), which reveals that while obtaining no due certificate, the corporate debtor agreed and acknowledged that it continues to remain liable to the bank/financial creditor for loan granted to the borrower by virtue of the guarantee provided by the corporate debtor. It is further submitted that the factum of this letter has been concealed by the respondent/corporate debtor and not brought to the notice of this Bench.

15. It is also submitted by learned counsel for the petitioner that as per Section 26 of the Indian Contract Act, 1872 (for short hereinafter referred to as the '**Contract Act**'), there is no specific performatum of the contract of guarantee, rather a guarantee may be either oral or written. Thus, the petition is maintainable on the basis of said **letter of comfort**.

16. On the other hand while repelling the contention of learned counsel for the petitioner, it is argued by learned counsel for the respondent/corporate debtor that the petition is not maintainable and the letter of comfort cannot be termed as contract of guarantee because the said letter, which is undated, was issued by an individual and there is support of the resolution of the Board of Director(s) to that effect, which is violative of

Section 179(3)(f) and Section 185 of the Companies Act, 2013. Copies of number of resolutions passed by the Board of Directors, have been placed on record through IA No.474/2022 but there is no such resolution passed by the Board of Directors of the respondent corporate debtor for authorizing the person signing this letter of comfort as to be a guarantor on behalf of Jotindra Steel and Tubes Limited, for availing credit facilities by the borrower. The said letter also does not bear stamp/seal of the respondent-company/corporate debtor.

17. Lastly, it is argued by learned counsel for the respondent/corporate debtor that the alleged letter of comfort cannot be read in evidence because it is not properly stamped under the Indian Stamp Act. More so, as per the sanction letter dated 22.08.2017 (Annexure 5), it is mentioned at page 36 that two different documents were required to be executed i.e. corporate guarantee of Strawberry Star India Pvt. Ltd. and **letter of comfort** from the respondent/corporate debtor. Therefore, according to learned counsel for the respondent/corporate debtor in presence of the corporate guarantee on behalf of Strawberry Star India Pvt. Ltd., **letter of comfort** cannot be treated as corporate guarantee. Thus, the authority *Lucent Technologies (supra)* relied upon by the learned counsel for the petitioner is not applicable to the facts and circumstances of the case in hand and is thus, distinguishable. Also the said authority is of the year 2009, whereas Insolvency and Bankruptcy Code, 2016, came into existence in the year 2016.

18. After hearing learned counsel for the parties and careful perusing the record, we are of the considered view that the cardinal point for determination in the present issue of maintainability of the petition is whether **letter of comfort** allegedly issued by the respondent/corporate debtor amounts to contract of guarantee.

19. After giving thoughtful consideration to the rival contentions raised by learned counsel for the parties, we are of the view that the said letter of comfort, which is

undated, without seal and authorization on behalf of the respondent-company, cannot be termed as letter or contract of guarantee, particularly in presence of the corporate guarantee on behalf of Strawberry Star India P. Ltd., as mentioned in the sanction letter dated 22.08.2017 (Page 36 of the petition). For ready reference, Section 126 of the Contract Act, is reproduced hereinbelow:-

126. 'Contract of guarantee', 'surety', 'principal debtor' and 'creditor'— *A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written. —A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written."*

A bare reading of the said definition reveals that in a contract of guarantee, there are three different entities i.e. i) 'surety' ii) 'principal debtor' and iii) 'creditor'. In the case in hand, the said letter of comfort cannot be termed as letter of contract of guarantee because it is neither signed by the creditor nor by the borrower and to the contrary, the sanction letter dated 22.08.2017 is signed by all the three i.e. creditor, borrower and guarantor. More so, there is no evidence placed on record to show that the said letter of comfort was signed in pursuance of any resolution passed by the Board of Directors of the respondent/corporate debtor. Thus, it can be safely said that the said letter of comfort, if any, issued, is not in conformity with the provisions of Section 179(3)(f) and Section 185 of the Companies Act, 2013. Even if at the time of issuing no dues certificate in favour of Jotindra Steel and Tubes Ltd., respondent/corporate debtor, for its own loan account by the bank/financial creditor, if there is any reference of such liability created by the present undated letter of comfort then it is of no consequence as document itself is not valid. No doubt, there can be two guarantors for a single loan facility or cash credit

facility, but this fact should have been fairly clarified in the sanction letter dated 22.08.2017, wherein only one corporate guarantor i.e. Strawberry Star India Pvt. Ltd. has been mentioned and in presence of the said corporate guarantee, the present letter of comfort is of no significance.

20. So far as the authorities relied upon by the learned counsel for the petitioner in *Laxmi Pat Surana (supra)* and *Lucent Technologies (supra)* cases are concerned, there is no dispute that petition under Section 7 is maintainable against the corporate guarantors, as held in *Laxmi Pat Surana (supra)*, but the findings given in *Lucent Technologies (supra)* are not binding on the facts and circumstances of the case in hand because no inference can be drawn from the said letter that there was intention, if any, to create the liability of guarantee in favour of the petitioner/financial creditor by the respondent/corporate debtor. Rather, it is held in Para 79 of the said judgment that there is no absolute rule as to whether a letter of comfort can create a legal relationship. The relevant para of the judgment is reproduced as under:-

“79. Based on the consideration of several judicial pronouncements including those noted hereinabove, Butterworths has clearly stated that there is no absolute rule as to whether a letter of comfort can or cannot create a legal relationship.”

21. Although, it is argued by learned counsel for the respondent/corporate debtor that no performa is prescribed for deed of guarantee and even guarantee can be oral as per Section 126 of the Contract Act, yet this contention of learned counsel for the petitioner is not much convincing because no doubt the guarantee may be oral but once it is reduced into writing either in the form of letter or contract then it must fulfil all the ingredients of contract of guarantee and should be signed by surety, principal debtor and creditor as well. No oral evidence in presence of writing can be taken into consideration as per **Section 92 of the Indian Evidence Act, 1872.**

22. It may be noted that a Coordinate Bench of this Tribunal, recently in its order dated

05.08.2022 passed in the matter of **IB-197/ND/2022; M/s Shapoorji Pallonji and Company Private Limited v. M/s ASF Insignia SEZ Pvt. Ltd.**, held that letter of comfort cannot be treated as letter of guarantee.

23.As a sequel to above discussion and reasons recorded hereinabove, the present respondent/corporate debtor, taken from any angle, cannot be termed as a corporate guarantor on the basis of alleged **letter of comfort**. Therefore, the present petition is not maintainable against the respondent/corporate debtor and the same is dismissed on the ground of maintainability.

24.In the peculiar circumstances of this petition, there is no order as to costs.

Sd/- Sd/-

**(Subrata Kumar Dash) (Harnam Singh Thakur) Member
(Technical) Member (Judicial)**

October 21st, 2022

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