



**NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT – V**

IA/4194/2024 IN C.P. (I.B) No. 119/MB/2021

[In the matter of the Insolvency and Bankruptcy Code, 2016 read with Section 12-A of Insolvency and Bankruptcy Code, 2016 read with Regulation 35-A of the Banking Regulation Act, 1949]

Seeta Neeraj Shah

375 A, Vidhut Building, 1st Floor, Room No. 1A,
Girgaum, Chira Bazar, Mumbai - 400002

...Applicant

Vs

ICICI Bank Ltd.

Registered Office at ICICI Bank Tower, Bandra
Kurla Complex, Mumbai, Maharashtra – 400051

...Respondent No. 1

Trupalkumar Patel,

Resolution Professional of Ushdev Engitech
Limited,

Having office at C/505, The First B/h ITC
Narmada, Near Keshav Baug Party Plot Vastrapur,
Ahmedabad.

... Respondent No. 2



In the matter of

ICICI Bank Ltd.

...Petitioner/Financial Creditor

Vs

Ushdev Engitech Limited

... Respondent/Corporate Debtor

Order Pronounced on : 29.04.2025

Coram:

Sh. Sushil Mahadeorao Kochey, Hon'ble Member (Judicial)

Sh. Charanjeet Singh Gulati, Hon'ble Member (Technical)

Appearances:

For the Applicant: Adv. Nikhil Rajan (PH)

For the Petitioner: Adv. Nausher Kohli (PH)

For the Respondent: Adv. Prakshal Jain (R-1) (PH)

For the Respondent: Adv. Saurabh Bachawat (R-2) (PH)

ORDER

1. This is an IA filed by the Applicant seeking a decision from this Tribunal that as per Clause 33 of the Corporate Guarantee dated 10.08.2016. The liability of the Company is limited to Rs. 25 Crores.

Contentions of Applicant.

2. The Applicant is a Suspended Director of Ushdev Engitech Limited (UEL) which is undergoing Corporate Insolvency Resolution Process pursuant to admission order dated 26.04.2023 passed by this Hon'ble Tribunal.



3. Respondent No.1-ICICI Bank Limited, is the Financial Creditor of the Corporate Debtor. The Corporate Debtor has executed a Corporate Guarantee dated 10.08.2016 in favour of ICICI Bank to secure the repayment of certain loan facilities availed by its parent company Ushdev International Limited (UIL). Clause 33 of the Corporate Guarantee provides the liability of Ushdev Engitech Limited under the Corporate Guarantee capped to Rs. 25 Crores.
4. Pursuant to defaults committed by Ushdev International Limited (UIL), ICICI Bank invoked the Corporate Guarantee on 16.10.2017 demanding payment of Rs. 25 Crores from UEL under the Corporate Guarantee i.e. Invocation Notice was issued. However, UEL failed to discharge its debt within the stipulated timeline.
5. Pursuant to various communications with the Resolution Professional, on 24.06.2024, ICICI Bank filed a revised claim form with the RP for an amount of Rs. 68,02,09,865.13/-. The claim comprised of Rs. 25 Crores towards its principal dues and Rs. 43,02,09,865.13/- towards default interest under the Corporate Guarantee.
6. On 02.07.2024, RP admitted an amount of Rs. 67,98,65,048/- as the claim of ICICI Bank (admitted amount). Therefore, the present Application is filed contending that the liability of the Guarantor under the Deed of Guarantee is capped Rs. 25 Crores only and, therefore, the admission of claim by RP is not proper.



Forgoing all other contentions raised in the application, the Applicant restricted its claim in the present application to the applicability and interpretation of non-obstante clause contained in Clause 33 of the Corporate Guarantee.

Contentions of R1.

7. The contesting Respondent i.e. ICICI Bank filed its response and contending that the word liability in Clause 33 cannot exclude the liability to pay the interest on Guarantors owned default.
8. Clause 3 of the Corporate Guarantee explicitly provides that, in the event of Guarantor's failure to make the payment as provided in the Deed of Guarantee, the Guarantor shall pay default interest as specified in relation to the Facilities extended to the Principal Borrower. Notably, this liability to pay default interest is the sole and substantial remedy available to ICICI bank in case of default by the Guarantor.
9. The word liability in Clause 33 could not be intended to exclude the liability of the Corporate Debtor to pay interest on its own default, for the reasons that Clause 33 cannot be considered alone and has to be read along with Clause 3 which explicitly provides for default interest. When the parties have provided a remedy for non-payment or late payment by the Guarantor, the same cannot be rendered obsolete by reading the cap of amount in Clause 33 to apply to



default interest as well. The agreement to pay default interest embodied in Clause 3 is a separate agreement whereby the parties have specified when the liability to pay default interest would accrue and how the same would be quantified. UEL Agreement is a commercial document and one must therefore, strive to attribute it to a meaning which accords with business common sense. A construction that the liability to pay default interest falls within the cap would not make commercial sense. This is because such construction would be positive disincentive on the Applicant to pay the sums in a timely manner. It would encourage non-payment of sum due and benefit the wrong doer for late payment. The fact that the liability to pay default interest on late payment was not included in the cap would require clear words because otherwise it is a denial of an obvious right to claim interest upon default in payment. The construction that the word "liability" in Clause 33 includes default interest leads to a very unreasonable result that ICICI Bank would not receive any interest upon UEL's default for nearly eight years. It is mean that, more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it, the more necessary it is that they shall make their intention abundantly clear. The purpose of adding a capping clause is to promote certainty in the Guarantee. If interest for non-payment was included within this cap, then the potential effect of any late payment would be uncertain, because it would never be clear for how long the monies would remain unpaid, and therefore, what interest may become due, and when



or if the limit of the cap may be reached. The overall dues owned by UIL to ICICI Bank never fell below Rs. 218 Crores and hence the UEL Guarantee has not fallen off as per provisions of Clause 33.

Contentions of R2.

10. The Respondent No. 2 is the Resolution Professional of UEL appointed to conduct CIRP. It is contended by the Resolution Professional that throughout the CIRP, the Respondent No. 2 has ensured that the Corporate Debtor operates as a 'going concern' in compliance with Section 20 of the Code under the Respondent No. 2's supervision.

Pursuant to various communications with Respondent No. 2, the ICICI Bank filed revised claim form with the Respondent No. 2 for an amount of Rs. 68,02,09,865/13/-. The claim comprised of principal and the default interest under the Corporate Guarantee.

On 02.07.2024, the Respondent No. 2 admitted the claim of the ICICI Bank after conducting a detailed verification of ICICI Bank's claim and seeking expert legal opinion on the admissibility of interest beyond the INR 250 million i.e. Rs. 25 Crores principal cap.



Point for Consideration: -

11. Considering the rival contentions of the parties, the only point which falls for consideration, is; whether the liability of the Applicant Guarantor under the Corporate Guarantee would not exceed the cap amount of Rs. 25 Crores as per Clause 33 of the Corporate Guarantee?

Submissions: -

12.Ld. Counsel for the Applicant submitted that a perusal of Clause 33 of the Corporate Guarantee unequivocally limits the Guarantor's liability to Rs. 25 Crores. The literal interpretation of the Clause restricts and limits the Guarantor's liability to maximum of Rs. 25 Crores. The operative language of the aforesaid Clause commencing with non-obstante provision deliberately inserted by the parties establishes a permanent limitation on the overall liability of the Guarantor therein and pre-empts any interpretation that would permit liability beyond Rs. 25 Crores. It is the cardinal rule of construction of Guarantee Agreement that, a Guarantor must not be made liable beyond the terms of his engagements and has relied upon the judgment of the Hon'ble Supreme Court in the case of "*State of Maharashtra Vs. Dr. M.N. Kaul reported in AIR 1967 SC 1634*".

13. It is further submitted that to construe Clause 33 otherwise would render the aforesaid Clause 33 and the non-obstante provision nugatory directly



contravening the express intent of the parties at the time of contract formation. The fundamental purpose of a non-obstante clause is to ensure its supremacy in the event of any conflict with other provisions thereby establishing Rs. 25 Crores liability cap as obsolete. Given that the non-obstante clause is the letter of provision, it must, by its very nature, prevail all other clauses of the Guarantee contract. Ld. Counsel for the Applicant placed reliance on the judgment of the Hon'ble Bombay High Court in the case of "*Viraj Electric Corporation Vs. VHB Life Sciences Limited*" to buttress his arguments.

14. The Respondent No. 1 i.e. ICICI Bank Limited also contemporaneously construed Clause 33 in the manner suggested by the Applicant when it issued the Guarantee Invocation notice dated 16.10.2017. However, while lodging the claim in the CIRP, ICICI Bank's claim has been inflated and admitted in the sum of Rs. 67,98,65,043/- In the factual matrix, there exists no genuine conflict with any other clause within the Corporate Guarantee. Clause 33, the non-obstante provision is explicitly designed to incipitulate all potential liabilities including but not limited to principal interest, charges, and default interest. The language "*notwithstanding anything hereinabove stated*" inserted in last clause of the Guarantee after reference to all the earlier clauses signifies the intent of the parties.

15.Ld. Counsel for the Applicant has placed reliance on the provisions of Section 128 of the Indian Contract Act, 1872 and submitted that the liability of the



surety is co-extensive with that of the Principal Debtor unless it is otherwise provided by the Contract Act. In the present case, Clause 33 expressly provides otherwise as contemplated under Section 128 of the Contract Act. Therefore, in strict adherence to Section 128 of the Contract Act, and the principle of contractual autonomy, no interpretation can be permitted that disregards or circumvents this clearly defined contractual limitation. The contractual provision is clear and unambiguous and, therefore, must be given its full legal effect. It is settled law that the party cannot claim anything more than what is covered by the terms of contract, for the reason that a transaction between the two parties has been entered into, with open eyes and understanding the nature of the contract.

16. Learned counsel for the Applicant has placed reliance on the judgment of Hon'ble Supreme Court in the case of "*Rajasthan Industrial Development and Industrial Corporation and another Vs. Diamond and Gem Development Corporation Limited and another reported in 2013 4 SCR 331*". Learned Counsel further relied upon the judgment of Hon'ble Supreme Court in the case of "*Syndicate Bank Vs. Channaveerappa Beleri & Ors. reported in 2006 11 SC 506*" and submitted that the liability of the Guarantor will depend purely on the terms of the Corporate Guarantee.



It is, therefore, submitted that the Guarantor's liabilities are governed solely by the terms of contract. Clause 33 of the Corporate Guarantee clearly and expressly limits the liability of Rs. 25 Crores only.

Submissions of R1: -

17. Learned Counsel for the Respondent No. 1 ICICI Bank submitted that Clause 3 of the Corporate Guarantee explicitly provides that in the event of Guarantor's failure to make payment as provided in the Guarantee, the Guarantor shall pay default interest as specified in relation to the facilities extended to the Principal Borrower.

18. Notably, this liability to pay default interest is the sole and substantial remedy available to ICICI Bank in case of default by the Guarantor. Section 126 of the Indian Contract Act 1872, a Deed of Guarantee is a contract where one party undertakes to discharge the liability of third party upon occurrence of a default by such third party under the Corporate Guarantee, UEL undertook to discharge the liability of UIL upon the occurrence of UIL's default in terms of clause 3A of the Corporate Guarantee. The liability to pay the amounts due from UIL was triggered upon issuance of the invocation notice which provide for a five day's period.

Having failed to discharge the payment obligation within the said period, UEL had another independent liability that is to pay default interest on its own default stood triggered under Clause 3.



19. It is further submitted that the cap contained in Clause 33 is not applicable to UEL's liability to pay default interest on its own default and is only applicable to its liability vis-a-vis the amount owned by the UIL. The word 'liability' in Clause 33 on which the cap of Rs. 25 crores have to be read in view of usage of the term liability in Section 126 of the Indian Contract Act that is liability to discharge the date of Principal Borrower UIL. It is settled rule of interpretation that if there be admissible two constructions of a document, one of which will give effect to all the clauses therein while the other will render one or more of them nugatory, it is the former that should be adopted.

Reliance is placed on the judgment of Hon'ble Supreme Court in the case of *Radha Sunder Datta Vs. Mohd. Jahadur Rahim reported in AIR 1959 Supreme Court Page 24 Para 11.*

20. Clause 33 cannot be considered alone and has to be read harmoniously with Clause 3 which explicitly provides for default interest. When the parties have provided a remedy from non-payment or late payment by the Guarantor, the same cannot be rendered obsolete by reading the cap in Clause 33 to apply to default interest as well. If the applicant's interpretation were to be accepted, then no matter how long UEL delays its payment obligation, clause 3 will never be pressed into effect and will be rendered nugatory. The agreement to pay default interest embodied as a separate agreement whereby the parties



have specified when the liability to pay default interest would occur and how the same would be quantified.

21. The Court of Appeal in *Toppalsson GmbH Vs. Rolls Royce Motor Car (2023) EWHC 1765 (TCC)* was dealing with a similar factual scenario whereby the agreement clause contained capping liability as well as separate clause providing for default interest. The Court held that the capping of liability under an agreement cannot restrict a party from charging default interest which is an independent and self-standing liability separately provided in the agreement.

It is further submitted that the Court must strive to interpret commercial document in a manner which accords its business common sense. Such interpretation must attribute to a meaning which furthers business efficacy of the contract.

22. Learned Counsel has placed reliance on the judgment of the Hon'ble Supreme Court in the case of "*Nabha Power Ltd. Vs. Punjab State Power Corporation Limited (PSPCL) (2018) 11 SCC 508 Para 49*", "*International Fina Services A.G. Vs. Katrina Shipping Limited and Tonen, tanker Kabushiki Kaisha (Page 16)*" and "*Antaios Compania Naviera S.A. Vs. Salen Rederierna A.B. ((1985) A.C. 191; page 201)*" and submitted that the Corporate Guarantee is a commercial document and, therefore, this Tribunal has to strive to attribute it to a meaning which accords with the business common sense. In the present



case, business common sense certainly dictates that default interest ought to be levied on amounts that have been due for more than 7.5 years.

The interpretation that default interest falls within the cap in Clause 33 would not further business efficacy as it would mean that ICICI Bank, which has lent public monies, does not receive any time value money in the form of interest, despite there being default on amounts payable by UEL.

23. This interpretation would be a positive disincentive on the Applicant to pay the sums in a timely manner. It would encourage non-payment of sums due and benefit the wrong doer who has defaulted in the payment. It is settled law that a defaulting party cannot be allowed to take advantage of its default at the cost of innocent party. In view of the same, UEL then not avoid its liability under Clause 3 whilst having already defaulted in discharging its liability under clause 3(a) of the Corporate Guarantee.

24. Hence the interpretation of Clause 33 as suggested by the Applicant does not make business common sense and ought to be rejected on this ground alone.

Submissions of R2: -

25. Learned Counsel for the Respondent No. 2 Resolution Professional submitted that the admission of ICICI's claim is in accordance with law. Clause 3 of the Corporate Guarantee unequivocally states that the Guarantor shall upon demand to the Guarantor, forthwith pay to the Bank without demur all part of



the amounts demanded by the Bank payable by the Borrower under the facility agreement. This clause contains guarantee given by the Guarantor to pay to the bank upon demand, the amount payable by the Borrower to ICICI Bank under the facility agreement. The applicant is incorrectly relying on Clause 33 to claim that in any circumstances, the claim of ICICI Bank cannot be more than Rs. 25 crores.

26. Section 5(8) of the Code, the Financial Debt is defined as “*debt along with interest if any which is disbursed against the consideration for the time value of money*”. The guarantee obligation of the Corporate Debtor is covered under Clause 5(8)(i) of the Code and, therefore, the Guarantee given by the Corporate Debtor to ICICI Bank for payment of amounts due from the Borrower subject to a cap of Rs. 25 crores is covered under Clause 5(8)(i) of the Code. ICICI Bank is entitled to charge interest under Clause 3, in case the Guarantor fails to pay the guaranteed amount within time.

Appreciation and Finding: -

27. Invocation of Deed of Guarantee and demand under the Deed of Guarantee are admitted facts. The only question which falls for determination is whether the Guarantor under the Deed of Guarantee in question is liable only to the extent of the cap provided under the Guarantee in spite of the fact that the Deed of Guarantee stipulates payment of default interest in the event of failure



by the Guarantor by payment as stated in Clause 3(a). For the sake of convenience, Clause 3(a) is reproduced hereunder:

“In the event of any default on the part of the Borrower in payment/repayment of any of the moneys referred to Clause 2 above, or in the event of any default on the part of the Borrower to comply with or perform any of the terms, conditions and covenants contained in the Facility Documents, the Guarantors shall, upon demand to the Guarantors, forthwith pay to the Bank without demur all/part of the amounts as demanded by the Bank payable by the Borrower under the Facility Documents. Any such demand made by the Bank on the Guarantors shall be final, conclusive and binding notwithstanding any difference or any dispute between the bank and the Borrower/arbitration or any other legal proceedings, pending before any court, tribunal arbitrator or any other authority. The enforcement of this Guarantee in part by the Bank, for any reason whatsoever, shall not amount to discharge of the obligations of the Guarantor under this Guarantee to the extent of the balance (unenforced) amount(s) of the Guarantee.

28. This Clause explicitly prescribes that the Guarantor shall upon demand to the Guarantor, forthwith pay to the Bank without demur all/part of the amounts as demanded by the Bank payable by the Borrower under the facility document.

Clause 3 in the same document reads as under: -

“that in the event of failure by the Guarantor to make payment as stated above, the Guarantor shall pay default interest at the same rate as specified in relation to the facility for the Borrower till receipt of the aforesaid amount by the Bank to its satisfaction.”



This Clause prescribes the penal interest also in the event that the Guarantor does not pay the amount as demanded under the Deed of Guarantee. In this backdrop of the specific clauses, the arguments are advanced by the Ld. Counsel for the Applicant that the non-obstante Clause in Clause 33 caps the liability of the Guarantor to the extent of Rs. 25 Crores only and, therefore, the penal interest cannot be charged. Clause 33 reads as under:

“33. Notwithstanding anything herein above stated our liability under this guarantee shall not exceed Rs. 250 Million. This Guarantee will fall off in the event the outstanding of Borrower is less than or aggregate of Rs. 2,180 Million out of Rs. 2,500 Million (due as on date with ICICI Bank Limited under various facilities provided to the Borrower).”

29. The Ld. Counsel for the Applicant has placed reliance on ***Syndicate Bank Vs. Channaveerappa Beleri & Ors.*** cited above, the Hon’ble Supreme has held that *“A guarantor’s liability depends upon the terms of his contract. A ‘continuing guarantee’ is different from an ordinary guarantee. There is also a difference between a guarantee which stipulates that the guarantor is liable to pay only on a demand by the creditor, and a guarantee which does not contain such a condition. Further, depending on the terms of guarantee, the liability of a guarantor may be limited to a particular sum, instead of the liability being to the same extent as that of the principal debtor. The liability to pay may arise, in the principal debtor and guarantor, at the same time or at different points of time. A claim may be even time-barred against the*



principal debtor, but still enforceable against the guarantor. The parties may agree that the liability of a guarantor shall arise at a later point of time than that of the principal debtor. We have referred to these aspects only to underline the fact that the extent of liability under a guarantee as also the question as to when the liability of a guarantor will arise, would depend purely on the terms of the contract”.

30. Therefore, the liability of the Guarantor under the Guarantee Deed would be determined from the terms of the Deed of Guarantee. The Hon’ble Supreme Court in the case of ‘***State of Maharashtra Vs. M.N Kaul reported in AIR 1967 SC 1634***’ has laid down whether a Guarantee is enforceable or not depends on the terms under which the Guarantor bound himself. The Hon’ble Supreme Court in the case of ‘***Rajasthan State Industrial Development and Investment Corporation and another 2013 4 SCR 331***’ has held that the contract is to be interpreted giving the actual meaning to the words contained in the contract. It is not permissible to the Court to make a new contract, however, reasonable if the parties have not made it themselves.

31. Ld. Counsel for the Respondent No. 1 on the contrary has heavily relied upon the case of ‘Topalssons’ and submitted that the cap was designed to promote certainty and if interest for late payment was included within the time then the potential effect of any late payment would be uncertain because it would never be clear how long the money would remain unpaid and, therefore, the interest



become due and the limit of the cap may be reached. It could be contrary to express agreement embodied in those two clauses if interest on late payment was said to be within the cap, it would mean that innocent party was denied the sole and substantial remedy for late payment and the parties had expressly agreed when read together.

It is further held in Topalsson's case that a provision that interest for late payment was included within the cap would require clear words because otherwise it would be an obvious denial of RRMC's common law rights and it was concluded in Topalsson's case that the interest on late payment fell outside the cap.

It is therefore, submitted that the Agreement/contract between the parties should make business common sense even if there is a cap under Clause 33, it would not mean that in spite of invoking Guarantee and non-payment of the demand under the Guarantee, the Guarantor would not be liable to pay the penal interest.

32.As against this submission, Ld. Counsel for the Applicant submitted that in the facts of Topalsson, the clause restricting the liability employed the phrase 'subject to' which is fundamentally distinct from the term notwithstanding use in Clause 33 of the Corporate Guarantee. It is tried that subject to indicates of provision that yields to another whereas notwithstanding signifies the



supremacy and overriding effect of the clause it reproduces. This distinction well established in legal jurisprudence.

33. It is pertinent to note that the Deed of Guarantee is a contract between the Applicant and the Respondent No. 1. Although, Clause 3 and 3(a) stipulate the invocation of deed and the obligation of the Guarantor to pay the amount demanded on failure of the Borrower to pay the amount and it also stipulates penal interest on failure of the Guarantor to pay the amount. However, the parties have consciously executed the Deed of Guarantee by inserting Clause 33 which starts with non-obstante clause; notwithstanding above, which indicates that whatever are the Clauses of the Agreement between the parties, the Guarantor would be liable to the extent of cap mentioned in Clause 33. This is the simple and plain meaning which could follow from the Deed of Guarantee between the parties. Any other interpretation to say that there would be uncertainty of payment in the penal interest is not charged and that it would not make a business commercial common sense would be interpreting the document as against the agreed terms of the contract between the parties and it would amount to inserting something which would not found place in the expressed terms of contract between the parties.

34. The Hon'ble NCLAT in a recent case of '*Shitanj Vipin Vora Vs. Shri Yan H Private Limited and another 25 IBC laws.in 271 NCLAT*' has recently held that the "*Code does not provide Adjudicating Authority with the powers to*



interpret the document as in the facts and circumstances of the case.”

Therefore, the plain and simple meaning based on the expressed terms of the contract between the parties is required to be applied in the case. Clause 33 clearly spells out that notwithstanding anything contained in the Deed of Guarantee i.e. irrespective of the clauses of the Guarantee. The liability of the Guarantor under the Deed of Guarantee would not be more than Rs. 25 Crores and, therefore, the plain and simple meaning is required to be applied in the present case. Hence, we do not find substantial force and merits in the submissions of the Ld. Counsel for the Respondent No. 1 and 2 to interpret the document in a way to insert something which is not expressly agreed upon by the parties to the Deed of Guarantee. Therefore, it can be convincingly held that the Guarantor’s liability under the Deed of Guarantee in question would be limited to the cap agreed by the Parties to the Deed of Guarantee.

35. Therefore, this point answered accordingly, hence the following orders passed. The Application is **allowed** in terms of prayer Clause A.

Sd/-
Charanjeet Singh Gulati
Member (Technical)

/Ziyaul/

Sd/-
Sushil Mahadeorao Kochey
Member (Judicial)