



INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI

(Company formed by ICAI under Section 8 of the Companies Act 2013)

IBC Case Law Capsule

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(October 31, 2022)

Kotak Mahindra Bank Limited Vs. Jotindra Steel and Tubes.

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

Date of NCLT's Judgement: October 21, 2022.

Letter of comfort cannot be treated as Letter of guarantee

Facts of the Case: -

Kotak Mahindra Bank Limited hereinafter referred as ("Applicant") filed petition under Section 7 of the IBC for initiating CIRP against M/s Jotindra Steel and Tubes Limited hereinafter referred as ("Respondent"). The applicant had advanced credit facilities to M/s Mauria Udyog Limited (associate company of the respondent, hereinafter referred as "Borrower") for an amount of Rs. 17,50,00,000. The respondent stood as Corporate Guarantor for the said loan and furnished an unconditional corporate guarantee to the applicant expressly stating and undertaking that it would make due payment on behalf of the borrower. Cause of continuous payment defaults made by the borrower in, the applicant classified the borrower as NPA. Thereafter, the applicant invoked the guarantee furnished by the respondent to pay the financial debt on behalf of the borrower to the tune of Rs.14,48,48,132.15.

The Respondent contended that it never stood as Corporate Guarantor and no contract of guarantee was ever executed. Further it was stated that the 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, or to provide any guarantee. The respondent stated that the letter of comfort was not stamped and as per section 35 of the Indian Stamp Act it cannot be tendered as evidence. Further, the respondent quoted section 185 of the Companies Act 2013 which strictly bars the company from granting loan/guarantee to any other person in whom director of the company are interested.

The question raised before the AA is that whether letter of comfort allegedly issued by the respondent/ amounts to contract of guarantee or not.

NCLT's Observations:-

The AA held that bare reading of the Section 126 of the Contract Act reveals that in a contract of guarantee, there are three different entities i.e., i)'surety' ii)'principal debtor' and iii)'creditor'. And the said letter of comfort cannot be termed



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termed as letter of contract of guarantee because it is neither signed by the creditor nor by the borrower. 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. Thus, the said letter of comfort is not in conformity with the provisions of Section 179 and Section 185 of the Companies Act, 2013.

The AA citing Laxmi Pat Surana case was of the view that there is no dispute that petition under Section 7 is maintainable against the corporate guarantors, but findings given in Lucent Technologies 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 to create the liability of guarantee in favour of the petitioner by the respondent.

Further, AA cited that Coordinate Bench of the 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 versus M/s ASF Insignia SEZ Pvt. Ltd., held that letter of comfort cannot be treated as letter of guarantee.

Order:- The respondent 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.

Case Review:- Appeals Dismissed.