

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 362 of 2022

[Arising out of an order dated 3rd February, 2022 passed in Interlocutory Application(IB). No.113/CB/2021 in TP No.255/CTB/2019 in CP (IB) No.593/KB/2017 by the Adjudicating Authority (National Company Law Tribunal, Cuttack Bench)]

IN THE MATTER OF:

K.V. Jayaprakash

S/o K. Vishwanadh Sethy
Residing at No. 166, K.R./S. Road,
V.V. Puram, Basavanagudi,
Bangalore – 560 004

.. Appellant

Versus

1. State Bank of India,

Stressed Assets Management Branch-II,
Hyderabad, D. No. 3-4-1013/A.
New Bus station, 1st Floor,
Commuter Amenity Centre,
TSRTC, Kachiguda,
Hyderabad- 500 027

.. Respondent No. 1

2. Ravi Sankar Devarakonda

Liquidator of Coastal Projects Ltd.,
At D-602, Prestige St. Johnwood Apartment,
No. 80, Tavarakere Main Road,
Chikka Adugodi,
Bangalore- 560 029.

.. Respondent No. 2

Present:

For Appellant: Dr. Menaka Guruswamy, Sr. Adv. With Mr. D.V. Raghuvamsy, Mr. Yash S Vijay, Mr. Utkarsh Pratap, Advocates

For Respondent: Mr. Ramji Srinivasan, Sr. Adv. With Mr. Avrojyoti Chatterjee, Mr. Rajiv S. Roy, Ms. Rajshree Choudhary, Ms. Megha Dugar, Ms. Jayasree Saha, Advocates for R-1. Ms. Samiksha Godiyal, Mr. Govind Manoharan, Ms. Sugandha Yadav, Advocates for R-2.

J U D G M E N T*[30th September, 2022]***(Per Hon'ble Mr. Justice M. Satyanarayana Murthy)**

This appeal under Section 61 (1) of the Insolvency and Bankruptcy Code, 2016 (for short "IBC") is filed by K.V.Jayaprakash, who is a personal guarantor of corporate debtor, aggrieved by the order dated 03.02.2022 passed by the National Company Law Tribunal (Adjudicating Authority), Cuttack Bench in INTERLOCUTORY APPLICATION(IB).No.113/CB/2021 in TP No.255/CTB/2019 in CP (IB) No.593/KB/2017, whereby the INTERLOCUTORY APPLICATION filed by the petitioner for various reliefs was dismissed by the Adjudicating Authority.

2. The factual matrix is as follows:

The appellant filed the INTERLOCUTORY APPLICATION before the Adjudicating Authority with a request to direct respondent No.1 to abstain from proceeding with the public auction of properties belonging to the appellant on 11.11.2021 under Section 60 (5) of IBC read with Rule 11 of the NCLT Rules, 2016 in view of the liquidation order dated 06.12.2018 passed by the NCLT admitting Coastal Projects Limited (Corporate Debtor) into liquidation (Liquidation Order).

The Corporate Debtor availed loan facility to a tune of Rs.774.12 Crore from respondent No.1 bank, to which the appellant stood as a

guarantor for the Corporate Debtor and the appellant's property was taken as collateral security by respondent No.1. Upon default by the Corporate Debtor in repayment of the debt, respondent No.1 declared the debt as a Non-Performing Asset (for short "NPA") on 25.01.2017, thereafter, filed application in terms of Section 7 of the IBC for initiation of Corporate Insolvency Resolution Process (for short "CIRP") against the Corporate Debtor. The NCLT, Kolkata Bench by its order dated 05.01.2018 admitted respondent No.1's petition initiating the CIRP against the Corporate Debtor and appointed respondent No.2 as resolution professional.

During the CIRP process, respondent No.1 had submitted its claim, most of which was admitted by the resolution professional. The list of creditors and their corresponding claims admitted by the resolution professional (RP) was uploaded on the website of the Corporate Debtor on 26.09.2018. Due to unsuccessful CIRP, the Corporate Debtor was admitted into liquidation vide Liquidation Order on 06.12.2018 by the Adjudicating Authority and respondent No.2 was appointed as Liquidator.

Respondent No.1 submitted its claim to the Liquidator in response to the public announcement under Section 33 (1) (b) (ii) of the IBC for liquidation of the Corporate Debtor. Major of the amount claimed by respondent No.1 was also admitted and formed part of the claims consolidated by the Liquidator under Section 38 of the IBC and submitted a report to the Adjudicating Authority under Regulation 13

of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (for short "Liquidation Process Regulations, 2016")

Respondent No. 1 filed an application under Section 14 of SARFAESI Act before the Court of XXXVII Additional Chief Metropolitan Magistrate, Bangalore (for short "XXXVII ACMM") against the Corporate Debtor and its guarantors, including the appellant herein, for taking possession of the Property, without honouring or even disclosing the fact that the Corporate Debtor was under liquidation, fraudulently suppressing and concealing the fact that the moratorium was in force under Section 33(5) of the IBC. Accordingly, the XXXVII ACMM, Bangalore allowed the said application under Section 14 of SARFAESI Act to take possession of the Property vide order dated 03.08.2021. Thereafter, the appellant filed an appeal against respondent No.1 under Section 17 of SARFAESI Act, challenging the order passed under Section 14 of SARFAESI Act, before the Debts Recovery Tribunal, Bangalore (for short "DRT") in S.A. No. 258/2021. During pendency of the said appeal, respondent No.1 on the strength of the order passed under Section 14 of SARFAESI Act, issued notice dated 29.09.2021 under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 to conduct public auction of the Property on 11.11.2021. The said notice was followed by a sale notice dated 06.10.2021 published in the 'Deccan Herald' and '**Prajavani**' newspapers on 07.10.2021 at Bengaluru and also on the websites of respondent No. 1 and the Indian Banks Auctions

Mortgaged Properties Information ("IBAPI") portal. In the meantime, the appeal of the appellant before the DRT was dismissed on 04.10.2021, confirming the order passed under Section 14 of SARFAESI Act.

The appellant filed Interlocutory Application before NCLT, Cuttack challenging the action of the Respondent No. 1 and sought the following reliefs:

a) The Respondent No.1 has erroneously sought to proceed against the Appellant, a personal guarantor to the Corporate Debtor's debt, prior to the expiry of the moratorium imposed in terms of the Liquidation Order under Section 33 of the IBC, as any recovery of the Corporate Debtor's debt from the Appellant would result in a consequential violation of the moratorium imposed vide the Liquidation Order dt. 06.12.2018

b) The actions of the Respondent No.1 are in contravention of the provisions of the IBC as the Respondent No.1 has failed to follow the procedure prescribed therein for recovery of debt by a financial creditor during the liquidation of the Corporate Debtor.

c) In terms of section 60(2) of the IBC (as amended with effect from 06.06.2018), where a liquidation proceeding of the Corporate Debtor is pending before the Tribunal, an application relating to liquidation or bankruptcy of a personal guarantor of such Corporate Debtor shall be filed before such Tribunal. Therefore, the Respondent No.1 erroneously invoked the provisions of the SARFAESI Act by approaching a forum other than the Tribunal.

d) In view of section 60(5)(c) of the IBC, the Tribunal shall have jurisdiction to entertain or dispose of any question of law or fact arising out of or in relation to the liquidation proceeding of the Corporate Debtor.

e) Section 238 has an overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. The inconsistency between the IBC and the SARFAESI Act is that when under Section 101, the IBC provides moratorium, the provision of SARFAESI Act allows the sale of Property. Therefore, when there is an inconsistency the provisions of IBC shall prevail

f) There is difference between a surety (u/s 128 of the Contract Act) and a guarantor. The surety's liability is co extensive with that of the principal borrower whereas, the guarantor's liability is secondary to that of the principal borrower.

The Tribunal dismissed the Interlocutory Application, by impugned order on the following grounds.

a) The IA was neither maintainable nor sustainable as the Appellant personal guarantor was a stranger to the insolvency and bankruptcy proceedings pending between the Respondent No. 1 and the Corporate Debtor and could not invoke Section 60(5)(c) of the IBC to file the IA.

b) The Notification No.S.O.4126(E) dated 15.11.2019 (for short "Notification") has the effect that only insolvency proceedings initiated against the personal guarantor of a corporate debtor are to be instituted under the IBC as opposed to the provisions of the Presidency-Towns Insolvency Act, 1909 (for short "PTA Act") and the

Provincial Insolvency Act, 1920 (for short "PIA Act"). The said Notification does not prohibit the financial creditor from proceeding against the personal guarantor of a corporate debtor by instituting recovery proceedings permissible under any other existing and applicable law

c) The proceedings initiated by the Respondent No.1 against the Appellant under the SARFAESI Act need not be quashed as such proceedings are not proceedings under the IBC and there is no bar against the Respondent No.1 in continuing the SARFAESI proceedings against the Appellant.

3. The appellant challenged the said findings raising several contentions on various grounds. However, the specific questions of law arise for consideration in the appeal are also formulated by the appellant in Paragraph No.8.2 of the grounds of appeal.

4. The main grounds urged before this Tribunal, in the grounds of appeal and in the written submissions are that, the insolvency of the Corporate Debtor that resulted in its inability to meet loan repayment obligation towards its financial creditor, ie, the Respondent No.1. It was only when the Respondent No.1 was unable to recover its financial debt from the Corporate Debtor, respondent No.1 pursued all legal remedies available to it for the recovery of such bad debts accordingly. In addition to initiating appropriate proceedings under the IBC, respondent No.1 also sought to recover such amount from the Appellant.

5. The moratorium declared in the Liquidation Order under Section 33 of the IBC is identical to the moratorium prescribed under Section 14 read with 31 of the IBC in case of CIRP of the Corporate Debtor, imposes an embargo on the institution of any suit or other legal proceedings against the Corporate Debtor, which includes prohibition in transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein.

6. As per Section 140 of the Indian Contract Act, 1872, where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor. Thus, the appellant is having right to proceed against the assets of corporate debtor to recover the amount he paid or discharged as part of his obligation being a guarantor, but due to moratorium, the appellant cannot proceed against the corporate debtor. However, the Code is silent as to the right of the appellant to recover the amount from the corporate debtor when the entire assets of the corporate debtor were liquidated in the liquidation process. Therefore, there is interplay between the provisions of IBC and the Contract Act. In such circumstances, the appellant cannot be deprived of remedy to recover the amount he paid as part of his obligation under the agreement of guarantee under the Indian Contract Act, from the Corporate Debtor.

7. The proceedings under the SARFAESI Act are independent and separate, though is unquestionable, the same is not applicable to the present case. It is the same creditor i.e. respondent No. 1, at whose behest the Corporate Debtor went into liquidation earlier. During the pendency of the same liquidation proceeding, the same creditor has pursued the instant actions under the SARFAESI Act suppressing the factum of pendency of the liquidation proceedings. Therefore, both proceedings are related and not independent of each other, and have been initiated pursuant to the insolvency of the Corporate Debtor. Accordingly, the Tribunal erroneously dismissed the petition and the Tribunal strongly relied on the law laid down by the Apex Court in "**Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta**"¹ (hereinafter referred to as "Gujarat Urja Judgment") and concluded that the Interlocutory Application filed by the appellant under Section 60 (5) was neither maintainable nor sustainable.

8. The Apex Court at paragraph No.69 of the said Gujarat Urja Judgment, relied on its earlier judgment in "**Arcelor Mittal (India) (P) Ltd. Vs. Satish Kumar Gupta**"², wherein the following observations were made:

"The non-obstante clause in Section 60 (5) is designed for a different purpose to ensure that NCLT alone has jurisdiction when it comes to applications and proceedings by or against a Corporate Debtor covered by the Code, making it clear that no other forum has Jurisdiction to entertain or dispose of such applications or proceedings."

¹ (2021) 7 SCC 209

² (2019) 2 SCC 1

9. In view of the principles laid down in the above judgment, Section 60 (2) of the IBC was amended with effect from 06.06.2018. From the reading of amended provision, it is evident that Section 60(2) which came into effect from 06.06.2018, includes liquidation and bankruptcy of a corporate debtor or personal guarantor within the fold of Section 60 of IBC. Therefore, the aforementioned observations in the Gujarat Urja Judgement have to be read in tandem with the amended Section 60(2) of IBC, whereby the logical deduction is that the Tribunal is the only forum which has the jurisdiction to entertain any application or proceeding relating to a personal guarantor of a corporate debtor. But, the Tribunal erroneously held that the IA filed by the Appellant under Section 60(5) was neither maintainable nor sustainable, dismissed the petition erroneously.

10. It is also contended that the principle laid down by the Hon'ble Apex Court in "**State Bank of India Vs. V.Ramakrishnan**"³ has no application as it is prior to the amendment of Section 60 (2). But, based on the principle laid down in the above judgment, the Adjudicating Authority dismissed the petition on erroneous appreciation of law.

11. It is further contended that the Tribunal failed to appreciate that respondent No.1 has acted in breach of the liquidation order as well as provisions of IBC since moratorium is deemed to be in force to proceed against the appellant, who is a guarantor of corporate debtor.

³ (2018) 17 SCC 394

Similarly, Adjudicating Authority did not appreciate the interplay between the provisions of IBC and the Indian Contract Act based on the principle laid down in “**Amulya Lal Choudhury Vs. Tripura Industrial Development**”⁴ Thus, committed a grave error in dismissing the Interlocutory Application filed by the petitioner under Section 60 (5) of the IBC read with Rule 11 of the NCLT Rules, 2016.

12. The appellant brought on record few additional facts by filing INTERLOCUTORY APPLICATION No.1427 of 2022, wherein the appellant submitted that the auction of the property in question was held on 29.04.2022 and the bid was knocked down in favour of M/s. Bagmane Developers Private Limited for Rs.135,50,00,000/-. A letter dated 29.04.2022 bearing No.SAMB-II/HYD/MMK/2022-23/72 issued by the State Bank of India to M/s. Bagmane Developers Private Limited communicating about the knocking the bid in its favour. In the said letter also, it is intimated that the auction is subject to outcome/result of the appeal pending before this Tribunal.

13. Respondent No.1 filed reply admitting about the passing of liquidation order, appointment of respondent No.2 as liquidator and also admitted about the proceedings initiated under Section 14 of the SARFAESI Act before Court of XXXVII Additional Chief Metropolitan Magistrate, Bangalore, obtaining order for taking possession, issue of notice etc.

⁴ AIR 2007 Gau 113

14. The main objection raised by respondent No.1 is that the appellant indulged in “forum shopping” as the appellant lost its remedy both before the XXXVII ACMM, Bangalore and DRT in the appeal filed under Section 17 of the SARFAESI Act. It is further submitted that Section 60 (5) does not permit the Adjudicating Authority to decide such issues which are not between the Corporate Debtor and the Creditor, thereby the petition is not maintainable under Section 60(5) of IBC.

15. Respondent No.1 supported the order passed by the Adjudicating Authority based on the principle laid down in “**State Bank of India Vs. V.Ramakrishnan**” (referred supra) while accepting the purpose of amending Section 60 (2) enabling the creditor to proceed against the personal guarantor of corporate debtor.

16. It is further contended that when the similar issue came up before the High Court of Delhi in “**Kiran Gupta Vs. State Bank of India [W.P.(C) No.7230/2020]**”, wherein the Court held as under:

“The view expressed by the Supreme Court amply demonstrates that neither Section 14 nor Section 31 of the IB Code place any fetters on Banks/Financial Institutions from initiation and continuation of the proceedings against the guarantor for recovering their dues. That being the position, the plea taken by the counsel for the petitioner that all proceedings against the petitioner, who is only a guarantor, ought to be stayed under the SARFESI Act during the continuation of the Insolvency Resolution process qua the Principal Borrower, is rejected as meritless. The petitioner cannot escape her liability qua the respondent/Bank in such a manner. The liability of the principal borrower and the

Guarantor remain co-extensive and the respondent/Bank is well entitled to initiate proceedings against the petitioner under the SARFESI Act during the continuation of the Insolvency Resolution Process against the Principal Borrower.”

17. The legislative intent and the object of the Code has been to permit the creditor to proceed for both recovery action under the SARFAESI Act and/or to initiate insolvency resolution process qua the personal guarantor, and leave the same unfettered as a commercial discretion of the creditor. Had the same not been the intent and had the legislative intent been to exclude the rights of the creditor to initiate recovery actions under SARFAESI Act, upon promulgation of Part III of the Code, the applicable provisions of the SARFAESI Act would also have been repealed under Section 243 of the Code. However, the same not being the legislative intent, the provisions of the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 only were repealed in terms of Section 243 of the Code, leaving the SARFAESI Act, intact.

18. When similar issue came up before the Apex Court in “**Lalit Kumar Jain Vs. Union of India**⁵”, the Apex Court held in paragraph No.111 as follows:

“In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this court, the release or discharge of a principal borrower from the debt owed by it to its

⁵ (2021) 9 SCC 321

creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.”

19. While coming to the aforesaid conclusion, the Hon'ble Supreme Court of India has referred and relied on the aforesaid judgment of “**State Bank of India Vs. V.Ramakrishnan**” (referred supra) but also on other judgments. Notably, the Hon'ble Apex Court had also considered the provisions of Section 128 the Indian Contract Act 1872 as well as the rights of the guarantor under Section 140 of the Indian Contract Act 1872 and thereafter held that **“the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.** In view of the same, it is contended that the submission of the appellant that in view of the liquidation of the corporate debtor, upon auction of the property under the SARFAESI Act, he remains remediless (in spite of the rights envisaged under Section 140 of the Indian Contract Act 1872), is also wrong, illegal, untenable and deserves to be rejected.

20. Respondent No.1 denied the contention of the appellant that respondent No.1 has acted in breach of the liquidation order dated 06.12.2018. It is contended that the argument of the appellant that respondent No.1 could not proceed against the appellant/personal

guarantor, in terms of Section 33 (5) of the Code is also incorrect and erroneous in view of sub-section (5) of Section 33 of the Code, which is as follows:

"(5) Subject to Section 52, when a liquidation order has been passed, no suit or other legal proceedings shall be instituted by or against the corporate debtor,

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with prior approval of the Adjudicating Authority."

21. Respondent No.1 contended that the proceedings under SARFAESI Act is not barred in view of the overriding provision i.e. Section 238 of the Code. In the present case, an initiation of insolvency resolution process against the principal borrower and/or the guarantor under the provisions of the Code and initiation of recovery actions under the SARFAESI Act being distinct and separate statutory legal remedies available to the creditor, the applicability of the provisions of Section 238 of the Code or the question of any 'inconsistency' ipso facto does not arise. That the Appellant herein endeavours to mislead this Tribunal by equating 'insolvency resolution process' with 'recovery action'.

22. It is contended that in terms of the agreed clauses/covenants of the last executed deed of guarantee dated 26.06.2014 by the Appellant, in favour of this Respondent bank, as security for the debts of the corporate debtor, the liability of the appellant was agreed to be co-extensive with that of the principal debtor/ corporate debtor, to the

extent of the value of the mortgaged asset (i.e.Rs. 164.06 Crores) plus interest, charges etc. The guarantor/ Appellant in acknowledgement of the nature of his liability had agreed as under:

7. In order to give effect to the Guarantee herein contained the Bank shall be entitled to act as if the Guarantors were principal debtors to the Bank for all payments guaranteed by them as aforesaid to the Bank.

23. In view of the above agreed terms of contract, the Appellant is now estopped from taking a contrary stand.

24. On the basis of the above grounds, respondent No.1 sought dismissal of the appeal as not maintainable, upholding the order passed by the Adjudicating Authority.

25. Respondent No.2 – Liquidator filed reply admitting his appointment as liquidator, dismissal of applications etc. by the DRT and by the Adjudicating Authority in various proceedings.

26. Respondent No.2 contended that respondent No.1 has initiated proceedings against the appellant under Chapter III of the SARFAESI Act in his capacity as a personal guarantor for the debts owed by the Corporate Debtor to respondent No.1. In terms of the deed of guarantee dated 26.06.2014, (i) the appellant has mortgaged his personal property to secure the debt owed by the Corporate Debtor to respondent No.1; and (ii) the appellant has an independent, co-

extensive and primary obligation to pay respondent No.1 to the extent of the value of the mortgaged asset i.e. Rs.164.06 crores.

27. Respondent No.1 initiated insolvency resolution proceedings against the Corporate Debtor under Section 7 of the IBC, which culminated into passing of liquidation order by Adjudicating Authority on 06.12.2018. In terms of the liquidation order as well as provisions of the IBC, respondent No.2 is requested to proceed with the liquidation process in the manner laid down in Chapter III of the Code. As set out in this Chapter, more particularly Section 36, the liquidator is required to form a “liquidation estate” and hold the liquidation estate as a fiduciary for the benefit of all creditors. The liquidator has no power or authority to deal with any assets outside the liquidation estate of the corporate debtor. Section 36 stipulates that only properties belonging to, or vested in, the corporate debtor can form part of the liquidation estate. Personal assets of third parties including shareholders, members and guarantors cannot be included in the liquidation estate of a corporate debtor and the liquidator cannot deal with such assets at all. Admittedly, the property mortgaged to respondent No.1 under the deed of guarantee is the appellant’s personal property. It does not belong to, or vest in, the Corporate Debtor. As such, it is not part of the liquidation estate of the Corporate Debtor and respondent No.2 has no authority to deal with it.

28. Since the property sold by respondent No.1 under the SARFAESI Act is the appellant's personal property, respondent No.2 has no power under Section 52 of the IBC or otherwise, to verify respondent No.1's security interest in this regard and to permit its realization as contemplated in Section 36 read with Section 52 of the IBC.

29. Finally, respondent No.2 contended that respondent No.2 being statutory officer appointed under the Act acted in accordance with law and not liable for the acts of the Creditors, requested to dismiss the appeal.

30. During argument, Ms. Menaka Guruswamy, learned senior counsel, would contend that on account of proceeding against the Corporate debtor while moratorium is in force, he is deprived of his right to recover the amount from the principal debtor and that Section 146 of the Indian Contract Act provides a remedy to proceed against the principal debtor by the guarantor for indemnification. On account of liquidation of assets of the corporate debtor (principal debtor), the petitioner is deprived of his right to recover the amount he paid to the secured creditor (respondent No.1) and became remediless. But the Tribunal did not consider the conflict between the provisions of the Indian Contract Act and the IBC.

31. It is further contended that while moratorium is in force, Section 14 and 36 prohibits proceeding with any suit or proceedings

against the corporate debtor, but without considering the same, the property of the appellant was sold in the public auction as per the provisions of SARFAESI Act, which is illegal and arbitrary.

32. She also submitted written briefs reiterating the contentions urged in the grounds of appeal and mainly contended that the judgment of the Hon'ble Apex Court in "**State Bank of India Vs. V.Ramakrishnan**" (referred supra) has no application since the amendment was given effect from 06.06.2018, whereas the proceedings against the appellant were initiated on 17.08.2018. The amended Section 60 (2) now included the liquidation or bankruptcy of a personal guarantor. On 15.11.2019, vide notification No.S.O.4126(E) dated 15.11.2019, insolvency proceedings against personal guarantor were now to be instituted under the IBC and not under the Presidency-Towns Insolvency Act, 1909 (for short "PTA Act") and the Provincial Insolvency Act, 1920 (for short "PIA Act"). Therefore, dismissal of application filed by the appellant by applying the principle laid down in "**State Bank of India Vs. V.Ramakrishnan**" (referred supra) is an illegality.

33. Section 60 of the IBC permits the creditor to proceed against the personal guarantor, but did not look into the remedies available to the personal guarantor to proceed against the Corporate debtor and she formulated the following propositions of law.

"A seeks to canvass the following propositions before this Tribunal:

- a) *A has been bereft of all remedies against CD due to the liquidation of CD by the CoC headed by R1. Such a situation renders S. 140 of the ICA meaningless and must be addressed through the residuary powers under S. 60(5) (c), IBC.*
- b) *The IBC has been used strategically by the creditor (R1) only to ensure the non inclusion of A, a personal guarantor, as a creditor.*
- c) *The scheme of the IBC cannot ignore the place of the PG as a potential guarantor, and the wide powers under S. 60(5)(c) are meant to provide a remedy to parties affected by the moratorium and the overriding nature of the IBC.”*

34. The judgments in “**Lalit Kumar Jain Vs. Union of India**”, “**State Bank of India Vs. V.Ramakrishnan**” (referred supra), did not deal with such issue.

35. The Hon’ble Supreme Court in “**Amrit Lal Goverdhan Lalan Vs. State Bank of Travancore**”⁶ elaborated the scope of Section 140 of Indian Contract Act. The Hon’ble Supreme Court relied upon the exposition by the Court of Chancery in “**Craythorne Vs. Swinburne**”⁷, which suggested as follows:

"The surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment, to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into (1) without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor. This right of a surety also stands, not upon contract, but upon a principle of natural justice."

36. Finally, it is contended that personal guarantor entered contracts of guarantee after assessing risk including the securities

⁶ AIR 1968 SC 1432

⁷ (1807) 14 Ves.160

held by the creditor, which would, if parted with, reduce the liability of the personal guarantor. Even if such securities are unknown to the personal guarantor, it is entitled to discharge to the extent of the loss of security. Section 60 (5) (c) of the IBC is only the provision, which permits the Adjudicating Authority to determine such issues, thereby learned Adjudicating Authority failed to appreciate these contentions in proper perspective.

37. Learned senior counsel Sri Ramji Srinivasan, appearing for respondent No.1, vehemently contended that all the questions raised in the present appeal were answered by the Apex Court in “**Lalit Kumar Jain Vs. Union of India**”, “**State Bank of India Vs. V.Ramakrishnan**” (referred supra). Even otherwise, the High Court of Delhi in “**Kiran Gupta Vs. State Bank of India [W.P.(C) No.7230/2020]**” made it clear that the proceedings under the SARFAESI Act and the IBC are independent, even during subsistence of moratorium none of the provisions of IBC prevent the creditor to proceed against the personal guarantor, since, moratorium protects action against the corporate debtor not against the 3rd party. Therefore, the bar under moratorium has nothing to do with the issue. Therefore, the appellant is disentitled to claim any relief on any of the grounds.

38. Yet, another contention raised by the learned counsel for respondent No.1 is that Section 60 (5) permits the Adjudicating Authority to decide the disputes falling within clause (a), (b), and (c)

pertaining to corporate insolvency between the parties to the petition, but not between 3rd party and parties to the petition, requested to dismiss the appeal.

39. Respondent No.2 also filed written brief supporting the order passed by the Adjudicating Authority reiterating the contentions urged in the reply filed in the appeal, while referring to Section 52 of the IBC, and Regulation 37 of the Liquidation Process Regulations, 2016, requested to dismiss the appeal against respondent No.2.

40. **Considering rival contentions and perusing the material available on record, the points need be addressed by this Tribunal are as follows:**

- (1) Whether Section 60 (5) of IBC permits 3rd party to file an application and redress the grievance in the present appeal?***
- (2) Whether the Moratorium imposed under the provisions of IBC during liquidation process is a bar to proceed against the personal guarantor under the SARFAESI Act to recover the debt due by the Corporate Debtor?***
- (3) Whether respondent No.2 is under obligation to include the personal guarantor as a secured creditor in terms of Section 36 (4) of IBC?***
- (4) Whether the provisions of IBC overrides the provisions of Indian Contract Act, more particularly, Section 140 of Contract Act? If not, whether the appellant is entitled to include himself as secured creditor in the list of***

creditors prepared under Section 36 of IBC by respondent No.2 herein so as to recover the amount he paid to the corporate debtor due to non-payment of debt due to respondent No.1 by the corporate debtor?

POINT NO.1:

41. The undisputed facts are that the appellant filed petition under Section 60(5) of I.B.C read with Rule 11 of NCLT Rules, claiming various reliefs. Admittedly, appellant is a personal guarantor, as defined under Section 5(22) of I.B.C i.e. an individual, who is the surety in a contract of guarantee to a corporate debtor. The creditor advanced loan to the corporate debtor, the appellant herein, executed agreement of guarantee in favour of the bank for repayment of loan borrowed by the corporate debtor, as security. Since the corporate debtor failed to repay the loan amount, initiated proceedings under Section 7 of I.B.C, later the same was admitted by the adjudicating authority. However, since the resolution plan was not accepted by the Committee of Creditors, the order for liquidation was passed by the adjudicating authority for realization of the debt due to various creditors by the corporate debtor. At the same time, the creditor initiated proceedings under Section 14 of the SARFAESI Act, 2002, against the appellant and another, before the XXXVII Additional Chief Judicial Magistrate, Bangalore, who in-turn, allowed the application. Accordingly, the creditor took possession of the mortgaged property, but the challenge thereto under Section 17 before the Debt Recovery

Tribunal was unsuccessful. Later, the property was brought to sale during pendency of the appeal and bid was knocked down in favour of M/s. Bagmane Developers Private Limited, who was declared as highest bidder in the auction and the confirmation was made subject to the outcome or the result of the present appeal vide letter dated 29.01.2022 bearing No.SAMB/VI/HYD/MNK/2022-23/72 issued by the creditor/first applicant, who initiated proceedings both under Section 7 of I.B.C against the corporate debtor, so also under SARFAESI Act, 2002, against the appellant and others. The adjudicating authority concluded that the petition under Section 65(c) of I.B.C read with Rule 11 of NCLT Rules is not maintainable. The same is now challenged before this Tribunal based on the principle laid down in “**Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta**” (referred supra) and **Arcelor Mittal (India) (P) Ltd. Vs. Satish Kumar Gupta** (referred supra)

42. During hearing, Smt. Menaka Guruswamy learned Senior Counsel would submit that the application under Section 60(5) of I.B.C is maintainable in view of the law declared by the Hon’ble Apex Court in Arcelor Mittal(India) (P) Ltd referred in “**Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta**” (referred supra).

43. A bare look at the order passed by the adjudicating authority, a specific point is framed for determination as to maintainability of an application under Section 60(5) of I.B.C, answerd the same against

the appellant herein adverting to the principle laid down in “**Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta**” (referred supra). For better appreciation of the facts, it is necessary to extract Section 60(5) of I.B.C, and it reads as follows:

“Section 60: Adjudicating Authority for corporate persons.

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.”

44. The first respondent herein is a financial creditor who disputed the maintainability of application under Section 60(5) of I.B.C, since it is residuary in nature. In view of the specific plea raised by the appellant and first respondent, it is necessary to advert to the law laid down by the Hon’ble Apex Court in “**Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta**” (referred supra), wherein the Court held as follows:

“.....we hold that the NCLT was empowered to restrain the appellant from terminating the PPA. However, our decision is premised upon a recognition of the centrality of the PPA in the present case to the success of the CIRP, in the factual matrix of

*this case, since it is the sole contract for the sale of electricity which was entered into by the Corporate Debtor. In doing so, we reiterate that the NCLT would have been empowered to set aside the termination of the PPA in this case because the termination took place solely on the ground of insolvency. **The jurisdiction of the NCLT under Section 60(5)(c) of the IBC cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the corporate debtor.....***”

Though Arcelor Mittal (India)(P) Ltd. was referred, the principle was not completely accepted in “**Gujarat Urja Vikas Nigam’s** case. Hence, the law laid down in “**Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta**” is binding precedent

45. A perusal of the principle laid down in the above judgment, the Hon’ble Apex Court cautioned NCLT and NCALT to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of the Corporate Debtor. Applying the same principle to the present facts of the case, now we shall examine the present issue.

46. The appellant is a personal guarantor of corporate debtor for repayment of loan borrowed from first respondent herein. Creditor initiated proceedings under SARFAESI Act, sold the property in public auction for Rs.125.80 crores as the bid was knocked down in favour of M/s. Bagmane Developers Private Limited. The proceedings under SARFAESI Act against the personal guarantor of the corporate debtor are to realise the debt due to the creditor i.e. bank, whereas, the proceedings under I.B.C is to see that the company must continue as

a going concern or to liquidate the assets and pay the debts due in proportion as per the provisions of I.B.C. The proceedings under SARFAESI Act are independent and purely for recovery of the loan amount. The personal guarantor though related to debt, but not related to the insolvency of the corporate debtor when no insolvency process is initiated. Therefore, the petition filed by the petitioner claiming various reliefs is unrelated to the insolvency of corporate debtor. When once the dispute was not solely relating to insolvency proceedings of the corporate guarantor and purely under SARFAESI Act, in view of the principle laid down in “**Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta**” (referred supra), the Tribunal has no jurisdiction to entertain such an application.

47. Section 60(5)(c) of I.B.C permits all the Tribunals to decide any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person. The language employed in Clause (c) of Section 60(5) made it abundantly clear that the jurisdiction is conferred on the Tribunals or adjudicating authority only to decide the question of fact or law arising out or in relation to the insolvency resolution or liquidation proceedings. But, the proceedings under SARFAESI Act are independent against the personal guarantor of corporate debtor and they are purely recovery proceedings. Therefore, it is difficult to conclude that the dispute raised by the appellant would fall within the ambit of Section 60(5)(c)

of I.B.C. The adjudicating authority rightly held that the application under Section 60(5) is not maintainable and even after re-appreciating the law laid down by the Courts and upon consideration of argument, we find no ground to interfere with the finding recorded by the adjudicating authority about maintainability of the application under Section 60(5) of I.B.C.

48. In view of our foregoing discussion, we find no ground, warranting interference with the finding recorded by the adjudicating authority as to the maintainability of the application under Section 60(5) of I.B.C. Accordingly, the finding recorded by the adjudicating authority is hereby confirmed, holding this point in favour of the respondents and against the appellant.

POINT No.2:

49. The major contention of the learned Senior Counsel for the appellant before this Tribunal is that, when moratorium was imposed during insolvency resolution process or during liquidation process, the proceedings or suits pending before the other Court or Tribunal or Forum shall not be continued.

50. Undoubtedly, there is a bar under Section 14 from proceeding against the corporate debtor in any suits or proceedings pending before the Court, Tribunal or any other Forum. Similarly, Sub-section (5) of Section 33 of I.B.C interdicted pending suits or proceedings before the Courts or Tribunals or other Forums during liquidation

process. For better appreciation of law, it is apposite to extract Section 14 and Section 33(5) of I.B.C and they are as under:

Section 14. (1) *Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—*

(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;

(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.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

Section 33(5)

Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.'

51. Thus, it is clear from both the provisions under Section 14 and Section 33(5) that the proceedings against 'corporate debtor' alone are to be interdicted. There is subtle distinction between Section 14 and Section 33(5). According to Section 14(a), the Adjudicating Authority shall declare moratorium prohibiting 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. At the same time, Clause (3) incorporated by amendment of Act.26 of 2018 with effect from 06.06.2018, says that, Sub-sections (1) and ((2) of Section 14 have no application to such transactions, as may be notified by the Central Government in consultation with any financial sector regulator or any other authority and a surety in a contract of guarantee to the corporate debtor.

52. It is clear from Sub-section (3) of Section 14 that the Moratorium imposed under Section 14 will have no application to enforce the liability against a surety in a contract of guarantee to a corporate debtor. The exemption contained under Sub-section (3) is

squarely applicable to the present facts of the case. However, Section 33(5) of I.B.C restricts filing of suit or other legal proceeding by or against the “corporate debtor”. But, the rider attached to it permits the liquidator to institute a suit or other legal proceeding on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority. Thus, it restricts only filing of suits or other proceedings, but did not impose any restriction on the pending proceedings against corporate debtor. In any view of the matter, the language employed in both the sections is clear that, the interdict is only against institution of suits or proceedings and prosecuting those suits or proceedings in any Court or Tribunal or other Forums instituted against the corporate debtor, but not against third party since sub-Section 3 of Section 14 excludes the surety in a contract of Guarantee specifically. But here, the appellant is the personal guarantor to corporate debtor, as defined under Section 5(22) of I.B.C, who is an independent person mortgaged his property as a security for due performance of the obligation by the corporate debtor. Therefore, the Moratorium imposed either under Section 14 or the interdict contained under Section 33(5) has no application and it is not a bar to proceed against the appellant for recovery of the debt in a different Forum i.e., before the Debts Recovery Tribunal under SARFAESI Act.

53. A similar issue came up for consideration before the Division Bench of Delhi High Court in “**Kiran Gupta Vs. State Bank of India**”⁸, wherein, the Court after adverting to various judgments, including Sections 14 & 31 of I.B.C and Sections 128 & 140 of the Indian Contract Act, based on the law laid down in “**State Bank of India Vs. V.Ramakrishnan**” (referred supra) concluded as follows:

“The view expressed by the Supreme Court amply demonstrates that neither Section 14 nor Section 31 of the IB Code place any fetters on Banks/Financial Institutions from initiation and continuation of the proceedings against the guarantor for recovering their dues. That being the position, the plea taken by the counsel for the petitioner that all proceedings against the petitioner, who is only a guarantor, ought to be stayed under the SARFESI Act during the continuation of the Insolvency Resolution process qua the Principal Borrower, is rejected as meritless. The petitioner cannot escape her liability qua the respondent/Bank in such a manner. The liability of the principal borrower and the Guarantor remain co-extensive and the respondent/Bank is well entitled to initiate proceedings against the petitioner under the SARFESI Act during the continuation of the Insolvency Resolution Process against the Principal Borrower.”

54. In view of the law laid down by the Division Bench of the Delhi High Court, Moratorium under Section 14 or restriction under Section 33(5) of I.B.C is not a bar to proceed against this appellant herein under SARFAESI Act for recovery of debt based on mortgage created in favour of 1st Respondent executing agreement of guarantee.

⁸ W.P.(C) No.7230/2020)

55. In “**Rakesh Kumar Gupta v. Mahesh Bansal**”⁹ decided on 20-02-2020 (NCLAT)], the NCLAT held that the pending proceedings under SARFAESI Act shall not hinder the proceedings triggered by the financial creditor under the IBC. Therefore, even when proceedings under SARFAESI Act have already been initiated, fresh proceedings under IBC can still be accepted because of the non obstante Clause in Section 238 of IBC. Thus the provision of IBC will prevail over SARFAESI.

56. The effect of Moratorium was considered by the Courts in various judgments, more particularly, in “**Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of India**”¹⁰, the Court held as follows:

*The State Finance Corporation Act 1951, is a special statute vis-a-vis the Sick Industrial Companies (Special Provisions) Act 1985. Both are special statutes dealing with different situations notwithstanding a slight overlap here and there, for example, both of them provide for grant of financial assistance though in different situations. The Sick Industrial Companies (Special Provisions) Act, 1985 being a subsequent enactment, the non-obstante clause therein would ordinarily prevail over the non-obstante clause found in Section 46 B of the State Finance Corporation Act 1951 unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one. In that event the maxim **generalia specialibus non-derogant** would apply*

⁹ Company Appeal (AT) (Insolvency) No. 1408 of 2019

¹⁰ [1993] 2 SCC 144

59. In “**Schweitzer Systemtek India Private Limited vs Pheonix ARC Pvt. Ltd. & Ors**”¹¹, the corporate debtor in this case had with the aim to scuttle the proceedings of SARFAESI Act 2002 moved application u/s 10 of the IBC. The tribunal took stock of Section 14 (1)(c) which states that a moratorium is to be declared to “*prohibit any action to recover or enforce any security interest created by the Corporate Debtor in respect of its property*”. That because the language employed in Section 14 of IBC, the moratorium declared under Section 13 read with Section 14 would only restrict proceedings against properties of corporate debtor and proceedings against personal guarantor were not restricted by Section 13 read with Section 14. The Application was therefore admitted, subject to this exception.

60. In **M/s Innoventive Industries Ltd. vs ICICI Bank & Another**¹², the Hon’ble Apex Court had an occasion to decide the clauses relating to overriding effect contained in both IBC and Maharashtra State and finally concluded that in view of Section 238 of IBC, the provision of IBC will prevail over the provision of the enactments that the legislature promised to have taken cognizance of provision of other enactments which were passed in IBC. In “**P.R. Commissioner of Income Tax vs Monnet Ispat & Energy Limited**”, in this case Supreme Court in quite clear terms observed that

¹¹ Company Appeal (AT) (Insolvency) No. 129 of 2017

¹² (2018) 1 SCC 407

“given Section 238 of the IBC, 2016, it is obvious that the Code will override anything inconsistent contained in any other enactment, including Income Tax Act.”

61. In March 2018 “Report of the Insolvency Committee” was published in which committee on para 5.11 of its report stated following:

“The Committee concluded that section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in section 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only.”

62. Finally, this matter came before the the Apex Court in the case of “**State Bank of India vs V. Ramakrishnan & Anr.**” (referred supra). The Hon’ble Apex Court differentiated between moratorium mentioned u/s 14 of the code and interim moratorium and moratorium mentioned under sec 96 & 101 respectively (under part III) of the IBC 2016 and made following observation”

“We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a personal guarantor. When an application is filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due..... The object of the Code is not to allow such guarantors to escape from an independent and coextensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them.”

63. In view of the law declared by the Apex Court and other Courts, SARFAESI Act and I.B.C contained non-obstante clauses, in view of the principles laid down in “**M/s Innoventive Industries Ltd. vs**

ICICI Bank & Another” & “P.R. Commissioner of Income Tax vs Monnet Ispat & Energy Limited”, (referred supra), the provisions of I.B.C will prevail over any other statute. Consequently, we find that imposition of Moratorium either in corporate insolvency process or liquidation process interdicts only the proceedings against corporate debtor, but not against third party like the appellant herein who is a personal guarantor of a corporate debtor. Therefore, the finding recorded by the adjudicating authority cannot be interfered by this Tribunal, while exercising jurisdiction under Section 61 of I.B.C. Accordingly, the point is answered against the appellant and in favour of the respondents.

POINT Nos.3 & 4:

64. As both the points are inter-connected, we find that it is appropriate to decide both the points by common discussion.

65. The main endeavour of the appellant is that, when insolvency or liquidation proceedings are initiated against the corporate debtor and if the property of personal guarantor is sold for recovery of debt under the SARFAESI Act, he is entitled to recover the amount from the corporate debtor under Section 140 of the Indian Contract Act and the liability of the surety is coextensive with that of the Principal Debtor, thereby, he is entitled to be included as a Secured Creditor in the list of creditors under Section 36 of I.B.C. This contention was not

specifically raised before the adjudicating authority, but before this Tribunal. Such contention is urged for the first time.

66. Section 128 of the Indian Contract Act says that, the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

67. Section 140 of the Indian Contract Act deals with rights of surety on payment or performance. Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

68. A guarantor will get invested with all the rights which the creditor had only **“upon payment or performance of all that he is liable for”**. A guarantor is liable for any payment or performance of any obligation only to the extent the principal debtor has defaulted (vide **C.K.Aboobacker v K.P.Ayishu**¹³). In any view of the matter, in view of Section 140 of the Indian Contract Act, the appellant herein, on payment of debt due under the guaranteed debt, is entitled to recover the same as if he is a creditor. Taking advantage of Section 140 of the Indian Contract Act, Smt. Menaka Gyuruswamy, learned Senior Counsel contended that, in case the entire assets of the

¹³ AIR 2000 Ker 29(NOC)

corporate debtor are liquidated and the amount realised on sale of assets of debtor shall be distributed among the creditors of different kinds, the appellant will be denuded to realise the debt. Therefore, he shall be included in the list of secured creditors, but this was not specifically urged in the petition before the Tribunal.

69. In view of the specific contention raised for the first time before the Tribunal, it is apposite to advert to the definition of corporate guarantor and secured creditor and security interest, as defined under the I.B.C.

*“Section 5 (5A) **“corporate guarantor”** means a corporate person who is the surety in a contract of guarantee to a corporate debtor;*

Section 3(30) ‘secured creditor, means a Creditor in favour of whom security interest is credited.

Section 3 (31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee”

70. On conjoint reading of the words ‘corporate guarantor’, ‘security interest’ and secured creditor to claim that he is a secured guarantor as defined under Section 3(30), he must satisfy that he has got security interest as defined under Section 3 (31) of I.B.C. The word ‘secured creditor’ is also defined under Section 3(30) of I.B.C, which

means a creditor in favour of whom security interest is created. Here, no security interest, as defined under Section 3(31) was created by the corporate debtor, in any of the specified modes, thereby he cannot claim to be a secured creditor to include him as secured creditor in the creditors list to pay his share of amount.

71. Section 36 of I.B.C. obligates the second respondent/liquidator on his appointment as liquidator to prepare list of assets to liquidate the corporate debtor. For the purpose of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor. The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors. Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following:-

“(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

(c) tangible assets, whether movable or immovable;

(d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;

(e) assets subject to the determination of ownership by the court or authority;

(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;

(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and

(i) all proceeds of liquidation as and when they are realised.

71. But, Sub-section (4) of Section 36 exempted assets to be included in the liquidation estate i.e. assets owned by a third party which are in possession of the corporate debtor, including the assets held in trust for any third party. It is as follows:—

(a) assets owned by a third party which are in possession of the corporate debtor, including-

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.”

72. However, as per Section 38, the liquidator shall receive or collect the claims of creditors within a period of thirty days from the date of the commencement of the liquidation process. A financial creditor may submit a claim to the liquidator by providing a record of such claim with an information utility: Provided that where the information relating to the claim is not recorded in the information utility, the financial creditor may submit the claim in the same manner as provided for the submission of claims for the operational creditor under sub-section (3). An operational creditor may submit a claim to the liquidator in such form and in such manner and along with such supporting documents required to prove the claim as may be specified by the Board. A creditor who is partly a financial creditor and partly an operational creditor shall submit claims to the liquidator to the extent of his financial debt in the manner as provided in sub-section (2) and to the extent of his operational debt under sub-section (3). A creditor may withdraw or vary his claim under this section within fourteen days of its submission. Section 39 of I.B.C obligates the liquidator to verify the claims submitted under section 38 within such time as specified by the Board. In any view of the matter, the appellant cannot claim as a secured creditor to include his claim in the list of secured creditors in the claims list prepared under Section 38 as no security interest is created in his favour.

73. The main endeavour of the learned Senior Counsel for the appellant is that, the proceedings were initiated prior to Amendment Act No.26 of 2019 came into force and the judgment of the Apex Court in “**State Bank of India Vs. V.Ramakrishnan**” (referred supra) has no application. This similar contention was urged before the Apex Court in “**Lalit Kumar Jain vs. Union of India**” (referred supra), which is a persuasive judgment on all issues raised by the appellant herein. In “**Ghanshyam Mishra & Sons Pvt. Ltd. Vs. Edelwiss Asset Reconstruction Company Ltd. & Ors.**”¹⁴, in paragraph 95(ii) held 2019 amendment is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect”. Hon’ble Apex Court considered the scope of 2019 amendment to IBC discussed about Ramakrishnan Judgment regarding sureties liability and concluded that it will have retroactive effect. In view of the law laid down in above judgment, the contention of learned Sr. Advocate is rejected. But the contention of the learned Senior Counsel for the appellant was that, the issue relating to the liability of corporate debtor for payment of amount to the personal guarantor was not addressed. However, this contention is refuted by the learned Senior Counsel Sri Ramji Srinivasan drawing our attention to various paragraphs of the judgment in “**Lalit Kumar Jain vs. Union of India**” (referred supra), wherein, it is held as follows:

¹⁴ (2021) 9 SCC 657

98. This court was clearly cognizant of the fact that the amendment, in so far as it inserted Section 2(e) and altered Section 60(2), was aimed at strengthening the corporate insolvency process. At the same time, since the Code was not made applicable to individuals (including personal guarantors), the court had no occasion to consider what would be the effect of exercise of power under Section 1(3) of the Code, bringing into force such provisions in relation to personal guarantors.

74. Later, the Apex Court discussed about the effect of notification issued by the Government of India amending certain provisions. A reference was also made to Sections 128, 138 and 140 of the Indian Contract Act, 1872. The contention of the appellant before this Court was that, once a resolution plan was accepted, the corporate debtor as discharged of the liability. As a consequence, the guarantor whose liability is co-extensive with the principal debtor, i.e. the corporate debtor, too is discharged of all liabilities. It was urged therefore, that the impugned notification which has the effect of allowing proceedings before the NCLT by applying provisions of Part III of the Code, deprives the guarantors of their valuable substantive rights. But, the Court did not agree with the contention and various paragraphs, concluded as follows:

104. All creditors and other classes of claimants, including financial and operational creditors, those entitled to statutory dues, workers, etc., who participate in the resolution process, are heard and those in relation to whom the CoC accepts or rejects pleas, are entitled to vent their grievances before the NCLT. After considering their submissions and objections, the resolution plan is accepted and approved. This results in finality as to the claims of creditors, and others, from the company (i.e. the company which undergoes the insolvency process). The question which the petitioners urge is that in view of this finality, their liabilities would be extinguished; they rely on Sections 128, 133 and 140 of the Contract Act to urge that creditors cannot therefore, proceed against them separately.

105. In *Vijay Kumar Jain v. Standard Chartered Bank*⁶⁷, this court, while dealing with the right of erstwhile directors participating in meetings of Committee of Creditors observed that:

“we find that Section 31(1) of the Code would make it clear that such members of the erstwhile Board of Directors, who are often guarantors, are vitally interested in a resolution plan as such resolution plan then binds them. Such plan may scale down the debt of the principal debtor, resulting in scaling down the debt of the guarantor as well, or it may not. The resolution plan may also scale down certain debts and not others, leaving guarantors of the latter kind of debts exposed for the entire amount of the debt. The regulations also make it clear that these persons are vitally interested in resolution plans as they affect them”

106. The rationale for allowing directors to participate in meetings of the CoC is that the directors’ liability as personal guarantors persists against the creditors and an approved resolution plan can only lead to a revision of amount or exposure for the entire amount. Any recourse under Section 133 of the Contract Act to discharge the liability of the surety on account of variance in terms of the contract, without her or his consent, stands negated by this court, in *V. Ramakrishnan* where it was observed that the language of Section 31 makes it clear that the approved plan is binding on the guarantor, to avoid any attempt to escape liability under the provisions of the Contract Act. It was observed that:

“25. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may well include provisions as to payments to be made by such guarantor....” And further that:

“26.1 Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is 67 2019 SCC OnLine SC 103 why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor — often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor.”

107. In *Committee of Creditors of Essar Steel (I) Ltd. v. Satish Kumar Gupta*⁶⁸ (the “Essar Steel case”) this court refused to interfere with proceedings initiated to enforce personal guarantees by financial creditors; it was observed as follows:

“106. Following this judgment in *V. Ramakrishnan* case [*SBI v. V. Ramakrishnan*, (2018) 17 SCC 394], it is difficult to accept Shri Rohatgi's argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile Directors of the corporate debtor. So far as the present case is concerned, we hasten to add that we are saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, NCLAT judgment being contrary to Section 31(1) of the Code and this Court's judgment in *V. Ramakrishnan* case [*SBI v. V. Ramakrishnan*, (2018) 17 SCC 394], is set aside.”

108. It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In *Maharashtra State Electricity Board* (*supra*) the liability of the guarantor (in a case where liability of the principal debtor was discharged under the insolvency law or the company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realize the same from the guarantor in view of the language of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act. This court observed as follows:

“7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Indian Contract Act, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract. A

surety is no doubt discharged under Section 134 of the Indian Contract Act by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability (see Jagannath Ganeshram Agarwala v. Shivnarayan Bhagirath [AIR 1940 Bom 247; see also In re Fitzgeorge Ex parte Robson [(1905) 1 KB 462]).”

75. Finally, In **Re Kaupthing Singer and Friedlander Ltd.** the UK Supreme Court reviewed a large number of previous authorities on the concept of double proof, i.e. recovery from guarantors in the context of insolvency proceedings. The court held that:

"The function of the rule is not to prevent a double proof of the same debt against two separate estates (that is what insolvency practitioners call "double dip"). The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. It is for that reason sometimes called the rule against double dividend. In the simplest case of suretyship (where the surety has neither given nor been provided with security, and has an unlimited liability) there is a triangle of rights and liabilities between the principal debtor (PD), the surety (S) and the creditor (C). PD has the primary obligation to C and a secondary obligation to indemnify S if and so far as S discharges PD's liability, but if PD is insolvent S may not enforce that right in competition with C. S has an obligation to C to answer for PD's liability, and the secondary right of obtaining an indemnity from PD. C can (after due notice) proceed against either or both of PD and S. If both PD and S are in insolvent liquidation, C can prove against each for 100p in the pound but may not recover more than 100p in the pound in all.

In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.

76. Thus, the view taken by the Hon'ble Apex Court is that the approval of a resolution plan does not *ipso facto* discharge a personal guarantor of a corporate debtor of her or his liabilities under the contract of guarantee and it will not discharge or release the Principal Debtor from the debt owed by it to its creditor by an involuntary process i.e by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability which arises out of an independent contract.

77. From the principle laid down in the above judgment, almost all the contentions raised by the learned Senior Counsel for the appellant were addressed. More so, the contention of the appellant which was left unaddressed is without any merit.

78. In any view of the matter, the appellant being a Personal Guarantor discharged part of the loan payable by the Corporate Debtor, he is entitled to recover the amount under Section 140 of the Indian Contract Act, as if he is a creditor, but not a 'Secured Creditor' as defined under Section 3(30) of the I.B.C, since no security interest was created in favour of the creditor.

79. No doubt, when the assets of the corporate debtor is sold, he may not have any chance of recovery of amount proceeding against the 'Corporate Debtor', but, there are different modes of recovery of the debt due by the 'Corporate Debtor' under the general law. Therefore, the appellant who stepped into the shoes of creditor in

terms of Section 140 of the Indian Contract Act, is entitled to recover the debt irrespective of sale of assets of corporate debtor in liquidation process in any of the recognized modes. Therefore, he cannot be included in the list of secured creditors, as no security interest was created in favour of the guarantor and he would not fall within the definition of 'Secured Debtor' as defined under Section 3(31) of I.B.C consequently, cannot be included in the list of secured creditors in the liquidation process, so as to claim share.

80. The Hon'ble Apex Court made certain observations in para-99 of Judgment in "**Lalit Kumar Jain Vs. Union of India**", referred supra, in paragraph-111 of the same Judgment held that approval of a Resolution Plan does not ipso facto discharge a personal guarantee of a Corporate Debtor of her or his liabilities under the contract of guarantee as it arises out of independent contract. At the same time, based on the principles laid down in "**Innoventive Industries Ltd. Vs. ICICI Bank Ltd. and Anr.**", "**P.R. Commissioner of Income Tax vs Monnet Ispat & Energy Limited**", Hon'ble Apex Court is of confirmed view that the provisions of IBC will prevail over provisions of the laws in view of non-obstante clause contained in Section 238 of IBC, the same view is taken by full bench of Apex Court again in "**Sundaresh Bhatt, Liquidator Of ABG Shipyard Vs. Central Board of Indirect Taxes and Custom**"¹⁵ dated 26.08.2022 while considering the liability to pay Custom duty to release the imported goods held that provision of IBC

¹⁵ Civil Appeal No. 7667 of 2021

will prevail over the general or special laws. Thus, it is settled that the provision of IBC will have overriding effect on the provisions of general or special laws, thereby provision of IBC overrides the provision of Indian Contract Act, more particularly, provisions relating to surety's liability and right of surety as guarantor in a contract of guarantee.

81. In Lalit Kumar Jain's case, the Hon'ble Apex Court took note of the provision of Indian Contract Act relating to sureties or guarantor's liability and rights, finally concluded that the provision of IBC will override the other laws.

82. In view of law laid down by Apex Court, we have no hesitation to hold that the provisions of IBC will prevail over the provision of Indian Contract Act, thereby surety may take appropriate steps to claim as creditor to recover the amount he discharged to the Creditor under the agreement of guarantee in view of clause 'h' and 'I' of Section 5(8) of IBC, but not as secured creditor, before the liquidator if the 2nd Respondent did not finalise the list of Creditor, subject to permissibility under Section 38, Chapter III of IBC and limitation. Accordingly, the point is held against the Appellant and in favour of Respondents.

83. In view of complexity of questions raised, we summed up our findings as follows:

- (1) Petitioner/Appellant is not entitled to claim any relief under Section 60(5) of IBC being 3rd Party to IBC proceedings.

- (2) Imposition of moratorium is not a bar to recover the amount proceeding against the guarantor under SARFAESI Act, since the agreement of guarantee is an independent contract.
- (3) Petitioner/Appellant is entitled to claim as Creditor of Corporate Debtor in view of Section 140 of Indian Contract Act, but not as Secured Creditor as no security interest is created in his favour, subject to limitation provided in Chapter III of IBC.
- (4) The provisions of IBC will override the provisions of Indian Contract Act.

In view of the findings summed up above, the Appeal fails as it is devoid of any merit and liable to be dismissed.

In the result, the Appeal is dismissed, but without cost in the circumstances.

[Justice Ashok Bhushan]
Chairperson

[Justice M. Satyanarayana Murthy]
Member (Judicial)

[Mr. Barun Mitra]
Member (Technical)

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