NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 179 of 2019

[Arising out of order dated 11th January, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in C.P. (IB) No. 23/KB/2018]

IN THE MATTER OF:

State Bank of India,
Corporate Office at:
Madame Cama Road,
Nariman Point,
Mumbai – 400 021.

One of its Branch At:
Stressed Assets Management Branch,
Nagaland House, 8th Floor,
11 and 13, Shakespeare Sarani,
Kolkata – 700 071.

....Appellant

Vs

Visa Infrastructure Ltd.,
Registered Office at:
8/10, Alipor Road,
Kolkata – 700 027
West Bengal.

....Respondent

Present:

For Appellant: Mr. Ramji Srinivasan, Sr. Advocate with Mr. P. B. A Srinivasan, Mr. Parth Tandon, Ms. Sylona Mohapatra, Mr. Nikhil Ramdev, Mr. Avinash Mohapatra and Ms. Ichchaa Kalash, Advocates.

For Respondent: Mr. S. N. Mukherjee, Sr. Advocate with Mr. V. V. Sastry, Mr. Sabyasachi Chowdhury, Mr. Rakesh Sinha, Mr. Jeemon Raju and Mr. K. S. Avinash Singh, Advocates.

J U D G M E N T

BANSI LAL BHAT, J.

Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') filed by the Appellant – 'State Bank of India' (Financial Creditor) for initiation of Corporate Insolvency Resolution Process against the Respondent- 'Visa Infrastructure Ltd' (hereinafter referred to as 'Corporate Debtor') stands rejected in terms of the order dated 11th January, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata on the ground that the Corporate Debtor discharged the obligation as per the terms of the guarantee and therefore there was no debt due from the Corporate Debtor. Aggrieved thereof, the Financial Creditor has impugned the aforesaid order of rejection of his application through the medium of instant appeal assailing the impugned order, inter-alia on the grounds that the Adjudicating Authority erred in holding that the inflation of assets valuation is equal to the infusion of additional equity and that the additional equity of Rs.125 Crore had to be brought in by the Promoter in the form of cash/equity.

2. For appreciating the grounds raised in this appeal it is apt to refer to the controversy involved at the bottom of the case. The Corporate Debtor, standing as a Corporate Guarantor for 'Visa Steel Limited' (in short 'VSL'/

'Borrower Company') in whose favour loan and various credit facilities were granted by the Financial Creditor, executed 'Deed of Guarantee' and 'Letter of Guarantee' in terms whereof the Corporate Debtor rendered itself liable to repay the outstanding dues. The debt was restructured by the Financial Creditor in the year 2012. According to the Financial Creditor, the Corporate Debtor in his capacity as a Corporate Guarantor failed to repay the Principal Amount alongwith the interest to the Financial Creditor, default being alleged to the tune of Rs.726,69, 23,749.79/- as Principal Amount with interest calculated upto 13th December, 2017 thereby aggregating the debt in default to Rs.982,82,01,341.70/-.

3. For better understanding of the controversy further elucidation of the facts appears to be inevitable. 'Visa Infrastructure Limited' is a public limited company. The Appellant alongwith other lenders granted various credit facilities to 'VSL' which were renewed from time to time. 'VSL' was referred to the Corporate Debt Restructuring Forum (CDR) for the efficient restructuring of its corporate debt. The CDR empowered group in its meeting dated 26th September, 2012 approved restructuring of the existing financial assistance/debt to the borrower 'VSL'. According to Appellant, the Promoter of the borrower company contributed Rs.325 Crores as the Promoters contribution. In addition thereto Promoter was to bring in additional equity of Rs.125 Crores. According to Appellant, it was in pursuance of Board Resolution dated 28th September, 2012 passed by the Board of Directors of the Borrower 'VSL' that the lenders restructured the

existing financial facilities and guarantee as per the terms and conditions set out in the CDR package. Borrower 'VSL' executed various documents in this regard. In addition thereto Borrower Company also furnished the Corporate Guarantee of Respondent Company which is also a Promoter of the Borrower Company. In terms of the Guarantee Deed, the Corporate Debtor guaranteed due repayment of the debts of Borrower Company to the lenders. The Corporate Debtor also passed the Board Resolution dated 29th September, 2012 agreeing to execute a Corporate Guarantee in favour of the lenders and also create negative lien on the Respondent's property situated at Visa House, Alipor Road, Kolkata to secure the restructured debt. Deed of Corporate Guarantee dated 19th December, 2012 came to be executed by the Respondent favouring the lenders. According to Appellant, the terms of CDR Package provided for infusion of equity by way of unsecured loans/ preference share capital or by fresh share through the structured investments of investor by merging/ demerging of some of the business divisions of the Borrower Company. However, according to Appellant, the condition of bringing the additional equity of Rs.125 Crores over and above the Promoter's contribution of Rs.325 Crores was not fulfilled by the Borrower Company as per the CDR Package of 2012. CDREG approval for business reorganisation of the Borrower Company was made in the year 2014, in pursuance whereof, the Borrower Company executed and arranged execution of financial documents including corporate guarantee furnished by Respondent Company. In terms of letter of approval dated 31st December, 2014, the Borrower Company's steel business had to be

demerged into a separate company i.e. 'Visa Special Steel Limited' (VSSL) through a scheme of arrangement. One of the subsidiaries of Borrower Company 'Visa Bao Limited' (VBL), which is a joint venture company, was to be merged with the Borrower Company i.e. Visa Steel Limited (VSL). Admittedly, the Promoters of Borrower Company had infused Rs.325 Crores in terms of CDR Package of 2012 in the form of equity as 'slump sale'. The Respondent Company passed Board Resolution dated 23rd March, 2015 for executing a corporate guarantee in favour of the lenders and create a negative lien on the Respondent's property situated at 'Visa House, Alipor Road, Kolkata' to secure debts of the Borrower Company. The Deed of Guarantee came to be executed on 28th March, 2015 which inter alia acknowledged Guarantor's liability to the tune of Rs.3405.31 Crores plus interest.

4. It appears that there was no demerger of the steel business division of the Borrower Company as agreed upon in terms of the CDR Package though the Borrower Company has merged its subsidiary VBL with the Borrower Company. At this stage, Respondent Company issued letter dated 18th November, 2017 to Appellant informing it that the liability under the Guarantee Agreement has been discharged as upon merger of assets and liabilities of VBL with Borrower Company's assets, an amount of Rs.5705 Crores was infused as per the fair value of the assets of the merging company – VBL in terms of Assets Valuation Report. The Respondent Company maintained that the Guarantee Agreement dated 19th December,

2012 has been discharged as the additional equity of Rs.125 Crores was brought by merger in the form of assets valuation. The Appellant appears to have responded by way of letter dated 13th December, 2017 denying that the Guarantee has been discharged as it disputed the contention that the merger did not contemplate any additional infusion.

5. Appellant claims to have filed CP (IB) No. 24/KB/2018 before the Adjudicating Authority, (National Company Law Tribunal), Kolkata Bench under Section 7 of the I&B Code against the Borrower Company, which is pending admission as the Borrower Company has challenged the initiation of Corporate Insolvency Resolution Process against it by the Appellant Bank before Hon'ble High Court of Orissa through the medium of a Writ Petition being WP (C) No. 2511 of 2018. Appeal against vacation of interim order of stay is stated to be pending with the Appellate Bench in WA No. 237/2018 wherein an interim order restraining initiation of Corporate Insolvency Resolution process against the Borrower Company has been granted till disposal of the Writ Petition, which has been reserved for order since 29th June, 2018. Another petition of similar nature filed against one of the Corporate Guarantors for the same default of the Borrower Company stands admitted before Adjudicating Authority, (National Company Law Tribunal), Kolkata Bench. In which such Corporate Guarantor (Corporate Debtor) has been ordered to be liquidated vide order dated 31st August, 2018. The Appellant issued letter dated 13th December, 2017 demanding from the Respondent Company the outstanding debt of Rs.977,61,86,875.84 and as

the demand in terms of aforesaid letter was not met, the Appellant filed CP (IB) No. 23/KB/2018 before the Adjudicating Authority leading to passing of order of rejection of application under Section 7 impugned in this appeal.

6. On behalf of Appellant it is contended that on plain interpretation of the CDR approval, it is amply clear that the additional equity funds of Rs.125 Crore over and above Rs.325 Crore had to be infused in the similar form as Rs.325 Crore were infused at the outset i.e. as Cash. Learned counsel for Appellant further submits that the Borrower Company, in terms of the initial arrangement of CDR Package, was to be demerged into two entities i.e. VSL which deals in Ferro-chrome business, while VSSL deals in steel business and the Borrower Company in its letter dated 13th September, 2013 categorically mentioned that for infusion of funds by inviting strategic investor in the Ferro-chrome business, it was necessary to consolidate the Ferro-chrome business of VSL and VBL by merging VBL into VSL. According to learned counsel for Appellant such merger could not be carried out without being preceded by a demerger of VSL. Therefore, the Appellant was asked to obtain necessary approval from CDR EG for merger of VBL into VSL for the purpose of inviting strategic investors. In this regard, letters of undertaking were also executed by the Promoters and Guarantors of VSL on 23rd March, 2013, wherein they agreed to **infuse further funds** in the Borrower Company in the specified forms **for meeting any cash flow shortage** to meet the repayment obligations of the Borrower to the lenders. According to learned counsel for Appellant, the term 'equity' and 'funds'

have been used interchangeably and therefore same cannot be given different interpretation. It is further contended that in terms of the scheme of amalgamation of VBL with VSL as approved by NCLT, Kolkata, all loans raised and all liabilities and obligations incurred by the Transferor Company after the appointed date shall be deemed to have been raised or incurred on behalf of the Transferee Company to the extent they are outstanding and shall become the debts and liabilities of Transferee Company. It is further contended that the 'cost or asset based method' applied by the Valuer to value the equity stocks of VBL and reflected in the amalgamation order dated 12th August, 2017 shows net assets of Rs.31.593 Crores as on 31st March, 2015 thereby clearly establishing that merger of VBL with VSL has lead to infusion of 31.593 Crores which is far less than Rs.125 Crores as approved in the CDR Package. It is therefore submitted that there was no infusion of funds amounting to Rs.125 Crores by the merger of VBL with VSL.

7. Per contra learned counsel for Respondent submitted that the Respondent being the Corporate Guarantor to the financial facilities availed by VSL had discharged its obligations under the contract of guarantee and the guarantee stands discharged. Repelling the argument advanced on behalf of Appellant that the additional equity to be infused had to be only in 'Cash', it is pointed out that in the letter issued by CDR Cell to Appellant reference is made to initial contribution of Rs.325 Crores by the Promoters as 'equity funds' but while dealing with additional equity of Rs.125 Crores, it

does not use the expression 'additional equity funds'. It is submitted that the letters of undertaking relied upon by the Appellant have been executed by the 'Promoters' and not in the capacity as a 'Corporate Guarantor'. It is further pointed out that the Deed of Guarantee refers to only 'additional equity' and there is no reference to 'funds or cash infusion'. Reference is made to letter dated 13th September, 2013 issued by the Borrower Company to Appellant for merger of VBL into VSL wherein no reference is made to infusion of additional equity of Rs.125 Crores. It is further submitted that the said letter does not say that inviting strategic investors will be the way in which the obligation of the Guarantor will be fulfilled or the additional equity of Rs.125 Crore had to be by way of cash infusion **alone**. It is further submitted that even otherwise with coming in of Bao Steel (China's largest Government owned steel manufacturer) as a Strategic Investor in VSL, consequent to the merger, it fair value post-merger would exceed Rs.125 Crores infusion in equity of VSL. It is further submitted that infusion of additional equity has got nothing to do with the valuation of VBL stated to be only at Rs.31.95 Crores which has been done by 'Asset based method' to determine share exchange ratio while additional equity has to be determined on the basis of financial statements as per the sanctioned scheme which reflects additional equity in excess of Rs.125 Crores. It is further submitted that there being no liability or obligation as the Guarantee stood discharged prior to issuance of demand notice, there is no debt due as the same is not payable in law on account of having been discharged. It is submitted that the Deed of Guarantee is an independent contract between the Appellant

and the Respondent and its terms have to be interpreted independently. Equity infusion post-merger has to be considered in terms of provisions of Companies Act, 2013 under Schedule III Part I dealing with the balance sheet format under the heading 'Equity and Liabilities' shareholders funds include Share Capital, Reserves and Surplus, which also includes Capital Reserves. Since in the instant case Capital Reserves post merger had increased by Rs.460 Crores, the condition of additional equity of Rs.125 Crores has been fulfilled. Reference is made to the financial statement of VSL for year 2016-17 in this regard. It is pointed out that the Appellant has admitted this factual position in its reply dated 30th November, 2017 where only grievance made is that this infusion has to be by way of cash. Learned counsel for Respondent has referred to **the approved scheme of amalgamation which provides that the merger will amount to fulfilment of the obligation of additional equity of Rs.125 Crores**. It is submitted that the approved scheme has statutory force and binds all creditors including the Appellant and in view of the same not only in law but also in fact there is no liability to pay. In the alternative it is argued that initiation of Corporate Insolvency Resolution Process against 'Visa International Limited' (another Corporate Guarantor) by the Appellant in regard to the same debt would preclude the Appellant from initiating CIRP against the Respondent.

8. Heard learned counsel for the parties at length and perused the record. Initiation of Corporate Insolvency Resolution Process by Financial

Creditor is regulated by the provision engrafted in Section 7 of I&B Code, which reads as under:

> *"**7. Initiation of corporate insolvency resolution process by financial creditor.**—(1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*
>
> *Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.*
>
> *(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.*
>
> *(3) The financial creditor shall, along with the application furnish—*
>
> *(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;*

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be."

Dealing with the ambit and scope of Section 7 of I&B Code in *"Innoventive Industries Ltd. Vs. ICICI Bank and Ors."– (2018)1 SCC 407*, the Hon'ble Apex Court observed as under:

*"**28.** When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the*

explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of

the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

The Hon'ble Apex court further observed as under:-

"30. *.....x.x.x, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no*

matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

9. Insolvency Resolution Process, as envisaged under the I&B Code, arises out of default in payment of debt which has become due. Section 3(11) defines 'debt' as a liability or obligation in respect of a claim which encompasses a right to payment even if disputed. 'Default' as defined under Section 3(12) postulates non-payment of a due and payable debt including part thereof or an instalment amount. Insolvency Resolution Process can be triggered, if the default is to the tune of Rs.1 Lakh or more. In so far as triggering of Insolvency Resolution Process at the hands of a 'Financial Creditor' is concerned, same can be initiated in respect of a debt owed to any Financial Creditor in respect whereof default has been committed though the debt may not be owed to the applicant Financial Creditor. Once a Financial Creditor approaches the Adjudicating Authority for initiation of Corporate Insolvency Resolution Process with an application under Section 7 of I&B Code filed in Form 1 accompanied by documents, records and evidence of default, he is required to dispatch a copy of the application to the registered office of the Corporate Debtor by registered post or speed post.

Within 14 days thereof the Adjudicating Authority is required to ascertain the existence of a default. This is to be done on the basis of record of information utility or evidence produced by the Financial Creditor. The Adjudicating Authority must be satisfied as regards occurrence of default. The Corporate Debtor is entitled to show that the debt is not payable in law or in fact and there is no default. If the Adjudicating Authority is satisfied that a default has occurred and the application is complete, will pass order admitting the application. In the event of the application being incomplete, the Adjudicating Authority will put the Financial Creditor on notice to remove the defect within 7 days.

10. After wading through record, we find that the factum of Appellant – Financial Creditor alongwith other lenders having extended credit facilities to the Borrower Company (VSL) and referring of the VSL to the CDR Forum for efficient restructuring of its corporate debt materializing in a CDR Package in terms of letter of approval dated 27th September, 2012 is not in controversy. It is also not disputed that as one of the conditions of the CDR Package the Promoter of VSL contributed Rs.325 Crores as its contribution besides being required to bring in additional equity of Rs.125 Crores. Board Resolution of the VSL following the debt restructuring and execution of various instruments referred to hereinabove as a sequel to the approved CDR Package too is not questioned. It is also not in controversy that VSL furnished Corporate Guarantee of the Respondent Company, which is also stated to be a Promoter of VSL. It further appears that in terms of Board

Resolution dated 29th September, 2012, Respondent Company executed a Corporate Guarantee in favour of lenders and also created a negative lien on its property – 'Visa House' situated at Alipor Road, Kolkata to secure the restructured debts. Deed of Guarantee came to be executed on 19th December, 2012 which, in unambiguous and unequivocal terms, guaranteed repayment of the full restructuring facilities together with interest and costs etc. The Respondent Company accepted the liability as Guarantor to the tune of Rs.3053.25 Crores plus interest. The dispute relates to the terms of CDR Package qua infusion of equity. The condition of bringing of additional equity of Rs.125 Crores over and above the Promoter's contribution of Rs.325 Crores was not fulfilled by the Borrower Company as per the CDR Package of 2012. The CDR EG approval for business reorganization of VSL was subjected to review and in consequence of fresh letter of approval the Borrower Company executed and arranged various instruments including Corporate Guarantee furnished by the Respondent Company. Letter of approval dated 31st December, 2014 envisaged demerger of VSL's steel business into a separate company styled as VSSL through a scheme of arrangement while its subsidiary VBL was to merge with VSL. It is the admitted position in the case that the Promoters of VSL had infused Rs.325 Crores in the form of equity. Respondent Company, in terms of its Board Resolution dated 23rd March, 2015 executed 'Deed of Corporate Guarantee' dated 28th March, 2015 in favour of the lenders which was to be a continuing guarantee subsisting till the Borrower Company repays the full restructured facilities alongwith interest and costs etc. Respondent –

Corporate Guarantor accepted the liability to the tune of Rs.3405.31 Crores plus interest. Admittedly, demerger of Steel Business Division of the Borrower Company did not take off in terms of the CDR Package though the Borrower Company merged its subsidiary VBL with VSL. The question arising for consideration is whether the liability under the 'Deed of Corporate Guarantee' stands discharged in view of the merger of VBL and VSL as according to Respondent upon the merger of assets and liabilities of VBL with VSL's assets an amount of Rs.5705 Crores was infused as per the fair value of assets of VBL in terms of the Assets Valuation Report prepared by SLI Financial Services Limited thereby satisfying the condition of bringing in of additional equity of Rs.125 Crores in the form of assets valuation.

11. Learned counsel for the Appellant vehemently stressed that the Guarantee did not stand discharged as the additional equity to be infused had to be in the form of 'cash infusion'. We have fathomed through the Convenience Compilation filed by the Appellant to appreciate the arguments advanced on this score. The CDR package as approved by the Empowered Group, in clause (viii), provides that the Promoters will infuse additional equity funds of Rs.325 Crore under the debt restructuring package. It further provides that such infusion of equity may be brought in the form of unsecured loan/ preference shares or by issuing fresh shares or by merging/ demerging some business divisions into separate companies/SPVs thorough scheme/slump sale and inviting strategic investor [page 10 & 11 of the Convenience Compilation (hereinafter referred to as CC)]. It further

provides that the Corporate Guarantee of the Respondent with negative lien on Visa House shall be provided as security till the Company brings in additional equity of Rs.125 Crore over and above Rs.325 Crore. (page 12 & 13 of CC). It is manifestly clear that the provision does not talk of infusion of 'additional equity funds' but only 'additional equity'. It is also amply clear that the additional equity of Rs.125 Crores does not restrict the infusion of equity to the manner indicated in clause (viii) after merger and demerger. In so far as Letter of Undertaking qua Restructuring Package is concerned, same having been executed by the Promoter and not by the Corporate Debtor, in regard to infusion of further funds for meeting any cash flow shortage does not bind the Corporate Guarantor, in as much as the 'Deed of Guarantee', though linked with the credit facilities advanced by the Financial Creditor to the Borrowing Company is an independent contract in itself so far as the obligations and liabilities of Guarantor are concerned. Clauses 32 and 37 of the CDR Package refer only to additional equity with the expression 'funds' being conspicuously absent (page 33 of CC). As regards letter dated 13th September, 2013 issued by VSL to Appellant (page 58 to 60 of CC), be it noticed that the same only speaks of consolidation of Ferro-chrome business of VBL and VSL, thereby making 'Bao Steel' a shareholder in VSL. It also refers to fund raising by inviting strategic investor in the Ferro-chrome business. It is amply clear that the letter only deals with the proposal of merger of VBL into VSL and inviting of strategic investor. The letter in no manner advances the argument of Appellant that the strategic investor will be the way with which the obligation of the

Guarantor will be fulfilled or that the obligation to provide additional equity of Rs.125 Crores would be only in the form of 'cash infusion'. Even otherwise post-merger fair value of the assets of VSL shown to be in excess of Rs.125 Crore in pursuance of merger/ demerger when 'Bao Steel' came in as a strategic investor, satisfies the condition as regards infusion of additional equity of Rs.125 Crores. So far as the Appellant's contention as regards infusion of additional equity in the form of valuation of assets from 'Visa Bao' worth only Rs.31.95 Crores is concerned, such valuation being only determinative of the share exchange ratio has no bearing on infusion of additional equity which depends on financial statements as per the sanctioned scheme which admittedly exceeds Rs.125 Crores (pages 111, 121, 122 & 142 of the CC). It is amply clear that the Appellant has not been able to establish that additional equity of Rs.125 Crore in addition to initial contribution of Rs.325 Crores by the Promoters was to be by way of cash infusion only and that the Guarantor had failed to discharge its obligation, its liability being co-extensive with that of the Borrower Company.

12. There is force in the contention put forward on behalf of Respondent that the 'Deed of Guarantee' in question has to be interpreted independently and that the expression 'additional equity' not having been defined under the 'Deed of Guarantee' has to be understood in the context of the legislative intent manifested in Schedule III of the Companies Act, 2013 where, in the balance sheet format under the heading 'Equity and Liabilities', shareholders funds include share capital, reserves and surplus and moneys

received against share warrants. Reserves and surplus includes capital reserves. With reference to pages 50 to 52 of the reply affidavit, the Respondent has been able to demonstrate that post-merger the capital reserves have increased by Rs.460 Crores, thereby satisfying the condition of infusion of additional equity of Rs.125 Crores. Learned counsel for Respondent referred to the reply dated 30th November, 2017 emanating from the Appellant in response to the letter of Respondent dated 24th November, 2017 (page 215 of CC) which admits infusion of additional equity and consequent accounting entry reflected in the balance sheet though raising grievance that such infusion had to be by way of Cash only. It would be of great relevance to refer to the scheme of amalgamation sanctioned by the Tribunal vide its order dated 12th October, 2017 which is reproduced as under:

> *"The business value of Visa Bao Limited as included in the books of account of the Transferee Company shall be treated as infusion by way of additional equity by reason of the merger in terms of the restructuring package approved by the CDR EG vide letter dated 27th September, 2012."*

The provision in the approved scheme of amalgamation is loud and clear that the business value of VBL as reflected in the books of account of the Transferee Company shall be treated as infusion by way of additional

equity on account of merger as per CDR Package. Thus, there is no escape from the conclusion that the merger will have the effect of fulfilling the obligation of additional equity of Rs.125 Crores. It is well settled that an approved scheme of amalgamation/ merger has the statutory force and is binding on all stakeholders including the creditors, the order of Tribunal sanctioning such scheme operating as a judgment in rem. It is not in dispute that the Respondent had brought to the notice of the Appellant that the merger of VBL would result in discharge of the obligation of bringing in additional equity of Rs.125 Crores as reflected in Letter dated 8th December, 2017 (page No. 2247 of the paper book). Viewed in this background, it can be safely stated that the Respondent – Corporate Guarantor, in the face of provision in the approved scheme of amalgamation and consequent merger, justifiably pleaded that there was no debt payable in law or in fact as the condition of additional equity of Rs.125 Crores had been fulfilled and the obligation stood discharged. There being no debt payable in law or in fact, question of default does not at all arise. The conclusions drawn by the Adjudicating Authority leading to rejection of the application under Section 7 of the I&B Code cannot be termed erroneous. On consideration of the material on record we find no sufficient reasons to adopt a view different than the one taken by the Adjudicating Authority as such view and finding based on appreciation of the relevant material placed before it is the only probable view warranted in the circumstances of the case. We are accordingly of the view that the impugned order does not warrant interference in this appeal. That apart the initiation of Corporate Insolvency

Resolution Process against 'Visa International Limited' (another Corporate Guarantor) by the Appellant in regard to the same debt would preclude the Appellant from initiating CIRP against the Respondent herein i.e. 'Visa Infrastructure Limited'.

13. For what has been stated hereinabove, the appeal being devoid of merit is dismissed. There shall be no order as to costs.

[Justice Bansi Lal Bhat]
Member (Judicial)

I disagree with the decision above for reasons recorded in my separate judgment

[Mr. Balvinder Singh]
Member (Technical)

NEW DELHI
25th September, 2019

AM

MR. BALVINDER SINGH, (MEMBER TECHNICAL)

I have gone through the contents of the judgement recorded by Hon'ble Justice Bansi Lal Bhat, Member (Judicial) but with due respect I differ with same and my judgement is as under:

The brief facts of the case are that the appellant- State Bank of India-Financial Creditor, filed application under Section 7 of I&B Code for initiation of Corporate Insolvency Resolution Process against the Respondent, Corporate Debtor, -Visa Infrastructure Ltd. The said application was rejected by the Adjudicating Authority, National Company Law Tribunal, Kolkata Bench, Kolkata vide order dated 11th January, 2019 on the ground that the Corporate Debtor discharged the obligation as per the terms of guarantee and therefore there was no debt due from the Corporate Debtor. Financial Creditor, being aggrieved of the said order of rejection of application under Section 7 of the I&B Code, has filed the present appeal assailing the impugned order, on the grounds that the Adjudicating Authority erred in holding that the inflation of assets valuation in equal to the infusion of additional equity and that the additional equity of Rs.125 crore had to be brought in by the Promoter in the form of cash/equity.

2. The case is that the Corporate Debtor stood as Corporate Guarantor for 'Visa Steel Limited' (Borrower Company) in whose favour loan and various credit facilities were granted by the Financial Creditor. The Corporate Debtor executed Deed of Guarantee and Letter of Guarantee and the Corporate Debtor rendered itself liable to repay the outstanding dues.

The debt was restructured by the Financial Creditor in the year 2012. As per Financial Creditor, the Corporate Debtor being Corporate Guarantor failed to repay the amount of Rs.982,82,01,341.70 (Page 142 to 144 of appeal).

3. The case is also that the appellant alongwith other financial institutions granted various credit facilities to Visa Steel Ltd which were renewed from time to time. Visa Steel Ltd (VSL) was referred to Corporate Debt Restructuring Forum for the efficient restructuring of the corporate debt. The Corporate Debt Restructuring Group in its meeting dated 26th September, 2012 approved restructuring of the existing financial assistance/debt to the VSL. According to appellant, the promoter of the borrower company contributed Rs.325 crores as the promoters contribution and the promoter was to bring in additional equity of Rs.125 crores. VSL executed various documents and also furnished the Corporate Guarantee of Respondent Company which is also a promoter of borrower company. Respondent company also agreed to create negative lien on the Respondent's property situated at Visa House, Alipor Road, Kolkata to secure the structured debt. The terms of CDR package provided for infusion of equity by way of unsecured loans/preference share capital or by fresh share through the structured investments of investor by merging/demerging of some of the business divisions of the Borrower Company. As per appellant, the condition of brining the additional equity of Rs.125 over and above the promoter's contribution was not fulfilled by the Borrower company as per the CDR Package of 2012. The Borrower company demerged it steel

business into a separate company i.e. Visa Special Steel Ltd through a scheme of arrangement. One of the subsidiaries of Borrower Company namely Visa Bao Ltd (VBL) which is a joint venture company was to be merged with the Borrower Company. It is admitted that the Borrower company had infused Rs.325 crores in terms of CDR package of 2012 in the form of equity as 'slump sale'. The Respondent Company passed Board Resolution dated 23rd March, 2015 (Page 135-136 of appeal paper book) for executing a corporate guarantee in favour of the lenders and create a negative lien on the Respondent's property at Visa House, Alipor Road, Kolkata to secure debts of the Borrower Company. One of the Resolutions is as under;-

> ***"Resolved further that the aforementioned corporate guarantee and the negative lien shall be valid till the infusion of funds aggregating to Rs.125 crores over and above Rs.325 crores either in VISA Steel Ltd or in VISA Special Steel Limited (after transfer of special steel Business to VISA Special Steel Limited) in the form of unsecured loan/preference share capital or by issue of fresh shares through QIP/FPO/PE/Strategic Investment etc or by merger/demerger/slump sale of some business divisions of VISA Steel Limited into separate companies/SPV's through scheme/slump sale or inviting strategic investors."***

4. The Respondent Company vide its letter dated 25th October, 2017 (Page 2240 Vol XII of appeal) informed the appellant that the liability under the Guarantee Agreement has been discharged as upon merger of assets and liabilities of VBL with Borrower Company. The contents of the letter dated 25th October, 2017 are as under:

> ***"This is with reference to the Guarantee dated 19th December, 2012 pursuant to CDR LOA dated 27th September, 2012 valid till infusion of Rs.125 crores in VISA Steel Limited which may be brought in the form of unsecured loan/preference shares or by issuing fresh shares through QIP/FPO/PE/Strategic investment etc., or by merging/demerging some business divisions into separate Companies/SPVs through Scheme/Slump Sale and inviting Strategic Investor.***
>
> ***We would like to inform you that the aforesaid infusion has been made consequent to merging of VISA Bao Ltd (SPV) with VSL through Scheme.***
>
> ***Consequently, the aforesaid Guarantee stands discharged."***

5. Appellant vide letter dated 30th November, 2017 (Page 2246 of Volume XII of Paper Book) rejected the LSI report through balance sheet engineering instead of infusion of funds by cash flow as per Corporate Guarantee and Common Loan Agreement), Therefore, the appellant vide letter dated 13th December, 2017 (Page 142-144 of Volume I of Paper Book) issued recall notice upon the Respondents. Thereafter the appellant filed

application under Section 7 of I&B Code against the Corporate Debtor for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor before the Adjudicating Authority, NCLT, Kolkata.

6. Reply was filed by the Corporate Debtor. After hearing the arguments advanced on both sides, the Adjudicating Authority observed the following two points for consideration:-

i) Whether the Corporate Debtor committed default in making the payment of the amount mentioned in the demand notice in terms of the guarantee executed by the Corporate Debtor?

ii) Whether the debt to be repaid/obligation to be performed as per the terms of guarantee executed by the Corporate Debtor has been discharged as alleged by the Corporate Debtor?

7. The Adjudicating Authority, NCLT, Kolkata took both the points together for convenience and for avoiding repetition of facts. After hearing the parties, learned Adjudicating Authority rejected the application filed by the appellant under Section 7 of I&B Code vide its order dated 11th January, 2019. The relevant portion of the impugned judgement is as under:-

"69.To sum up, by considering the demand made by the Applicant as per demand letter dated 13.12.2017 issued by the Applicant Bank requesting the corporate debtor to make payment of the amount mentioned in the notice in terms of the guarantee executed by the corporate debtor company; that the obligations to be discharged by the corporate debtor shall

continue in full force and would be valid only till the happening of the events mentioned in Clause 24 of the guarantee agreement dated 28.3.2015; that the promoter borrowers discharged its obligation to be performed as per the terms of the guarantee agreements dated 19.12.2012 and 28.3.2015, that there is no further obligations to be performed by the corporate guarantor/corporate debtor; that upon performance of the obligations as per the terms of the guarantee there is no default in discharging the obligations created as per the guarantee agreements; that the non obstante clause 37 in the guarantee agreement is valid and binding on the applicant bank and that the acknowledgement of liability issued by the principal borrower is not binding on the corporate debtor because on the date of issuance of acknowledgement of liability by the principal borrower, the guarantee remained not in force or subsisting on account of performance of obligations as referred to above by the principal borrower, are factors proving the contentions of the corporate debtor that the demand to make payment by the corporate debtor is against the terms of obligations liable to be performed by the corporate debtor.

70. In the light of the above said discussion, I have come to a conclusion that the Corporate Debtor discharged the obligation as per the terms of the Guarantee and therefore there is no debt due as claimed by the Financial Creditor from the Corporate

Debtor. The applicant being failed in proving existence of a default in terms of the guarantee agreements, this application is liable to be rejected. However, without any order of cost.

71. In the result, the application is rejected. No order as to cost. CP is disposed of accordingly."

8. Being aggrieved by the said impugned order dated 11th January, 2019 passed by the Adjudicating Authority, NCLT, Kolkata in CP(IB) No.23.KB/2018, the appellant has preferred the instant appeal under Section 61 of the Insolvency & Bankruptcy Code, 2016 seeking the following relief:-

i) Set aside the impugned order dated 11.01.2019 passed by the NCLT Kolkata in CP(IB) No.23/KB/2018.

ii) Direction be given to initiate the Corporate Insolvency Resolution Process (CIRP) against the Respondents Company.

iii) Pass any other such order as this Hon'ble Appellate Authority may deem fit in the intent of justice, equity and good conscience.

9. Notice was issued to Respondent who appeared and filed their reply. Rejoinder was filed by the appellant. After completing the pleadings, the matter was heard.

10. Arguments were advanced by both the parties at length. After hearing the parties and perusing the record the following two points that arises for determination are:-

i) Whether the debt to be repaid/obligation to be performed as per the terms of the guarantee executed by the corporate debtor has been discharged as alleged by the Corporate Debtor?

ii) Whether the Corporate Debtor committed default in making the payment of the amount mentioned in the demand notice in terms of the guarantee executed by the corporate debtor?

11. If it is proved that the Corporate Debtor has discharged the guarantee executed then there is no need to go into the issue that the Corporate Debtor committed default.

12. Learned counsel for the appellant argued that it is not disputed that the financial credit facilities were availed by the Borrower Company and Corporate Debtor executed Corporate Guarantee. Learned counsel argued that one of the conditions of the Corporate Guarantee as accepted in the CDR package dated 27.9.2012 (Page 1774, Volume 9 of Paper Book) was ***"Corporate Guarantee of Visa Infrastructure Ltd with negative lien on "Visa House" situated at Alipore, Kolkata to be provided till the company brings in additional equity of Rs.125.00 crores over and above Rs.325.00 crore as considered in our proposal"***. The same has been reiterated in para 32 and 37 of Deed of Guarantee dated 19th December, 2012 signed by the Corporate Debtor at page 109 of Appeal Paper Book. The same has been again reiterated in para 12 of the Guarantee Agreement dated 28th March, 2015 duly signed by Corporate Debtor at Page 124 of Appeal Paper Book. This has also been reiterated in para (v) & (vi) of Common Loan Agreement dated 28th March, 2015 duly signed/executed by

Financial Creditors and the Respondents at Page 1365, Volume VII of appeal paper book. Learned counsel for the appellant argued that the CDR approval states that the additional equity funds ofRs.125.00 crores over and above Rs.325 crores has to be infused in the similar form as Rs.325 crore was infused at the outset i.e. cash. Learned counsel for the appellant further argued that the initial arrangement of CDR package was that the borrower company has to be demerged into two entities i.e. Visa Steel which deals in Ferro Chrome business while Visa Special Steel Ltd deals in steel business. Learned counsel for the appellant argued that the Borrower Company vide letter dated 13th September, 2013 (Page 137 of Appeal Paper Book) addressed to Appellant categorically mentioned that for infusion of funds by inviting Strategic Investor in the Ferro Chrome business, it is necessary to consolidate the Ferro Chrome Business of Borrower Company and Visa Bao Ltd, a joint venture of Borrower company and M/s Baosteel Resources Co Ltd (Baosteel) China in which the Borrower company holds 65% stake and the rest 35% stake in Vis Bao Ltd is held by the China company. Learned counsel for the appellant argued that the aforesaid merger cannot be carried out without being preceded by a demerger of VSL and in the same letter the appellant was requested for obtaining necessary approval from CDR Empowered Group for merger of VBL into VSL for the purpose of inviting the Strategic Investors. Learned counsel for the appellant further argued that vide letter and undertaking both dated 23.3.2013 (Page 494 of Appeal) the promoters and guarantors agreed that "I/*We shall infuse further funds in the Borrower in the form of unsecured loan/Preference Shares or by issuing fresh shares through QIP/FPO/PE/Strategic Investment etc or by*

merging/demerging some business division of the borrower into separate Companies/SPV's through scheme/slump sale and inviting strategic investor for meeting any cash flow shortage to meet the repayment obligations of the Borrower to the Lender and/or to meet interest payment due by the Borrower of the ; if required by CDR EG:" (Page 490, 494, 498 and 502 of Appeal Paper Book). Learned counsel for the appellant further argued that the terms "equity" and "funds" have been used interchangeably and, therefore, separate interpretation cannot be given to the said terms nor would it be appropriate to do so. Learned counsel for the appellant argued that there is a debt due from the Principal Borrower, which was guaranteed by the Corporate Debtor, and the said guarantee continues to subsist, and has not been discharged, due to failure to bring in additional funds of Rs.125 crores to meet the shortage of cash flow, to service debts, and therefore, there is Debt Due from the Corporate Debtor and there is a default and the ingredients of Section 7 of I&B Code are satisfied.

13. Learned counsel for the appellant further argued that as per the Scheme of Amalgamation of Visa Bao Ltd with VSL as approved by Learned NCLT Kolkata all the loan and liabilities etc of Visa Bao Ltd stand transferred to VSL and it is the duty and obligation of Transferee Company to discharge and satisfy the same. Learned counsel for the appellant argued that valuation of Visa Bio Ltd to value the equity stocks was based Cost or Asset Based Method wherein it was mentioned that the asset base represents the fair value of the business. Learned counsel argued that as per this method the Valuation of Visa Bio Ltd as on 31.3.2015 was

Rs.315.93 lakhs (Page 2732 of Appeal Paper Book). Learned counsel for the appellant further argued that the Chartered Accountant so appointed by the Borrower Company to determine Share Exchange Ratio between VSL and Visa Bio Ltd gave its opinion and stated that the fair value of VBL is INR 3.47 per equity share of face value of INR 10 and fair value of VSL is Rs.19.09 per equity shares of face value INR 10. Learned counsel for the appellant argued that on this basis the BRCL (company of China who was having shareholding in Visa Bio Ltd) was issued 57,89,500 shares of Visa Steel Ltd.(Page 2734 of Appeal Paper Book). Learned counsel for the appellant also relied upon the Judgement namely *Ferro alloys Corporation Ltd and Ors Vs Rural Electrification Corporation Ltd & Ors II(2019)BC1,* and argued that it is always open to the Financial Creditor to initiate CIRP under Section 7 of I&B Code against the Corporate Guarantor. Learned counsel for the appellant also relied upon the Judgement namely *State Bank of India Vs Ramakrishnan & Ors AIR 2018 SC 3876* of Hon'ble Apex Court.

14. Learned counsel for the appellant further argued that in the instant case the equity was limited only to the sum of Rs.31.593 Crores and further argued that the Annual Financial Statement 2016-17 of Borrower Company, the net Asset Value of Visa Bao Ltd has been high exaggerated by Visa Steel Ltd. At last learned counsel for the Appellant argued that the it is clear that there was no infusion of funds amounting to Rs.125 crores by the merger of Visa Bao Ltd with Visa Steel Ltd. Therefore, the Corporate Debtor is not discharged from the corporate guarantee executed by it. Lastly learned

counsel prayed that the appeal may be allowed and the application filed by the appellant under Section 7 of the I&B Code be admitted.

15. Argued were advanced by the Respondents and he argued that the appeal filed by the appellant is liable to be rejected. Learned counsel for the Respondent argued that the letter issued by CDR Cell to SBI (Pages 1771 & 1772 of Appeal Paper Book) refer to the initial contribution of Rs.325 crores by the Promoters and stressed that here expression used as "equity funds". Learned counsel for the Respondents further argued that at Page 1774 of appeal paper book it is stated that additional equity of Rs.125.00 crores and it does not use expression "additional equity funds". Learned counsel for the Respondents further argued that the letters of undertaking have been executed by the promoters and not in the capacity as a corporate guarantor. Learned counsel for the Respondents further argued that the Deed of Guarantee dated 19.12.2012 refer to only "additional equity" and there is no reference to funds or cash infusion. Learned counsel for the Respondents argued that infusion of the additional equity of Rs.125 crores does not mean that the equity will be cash infusion alone. Learned counsel for the Respondent argued that in the instant case BaoSteel comes in as a Strategic Investor in Visa Steel consequent to the merger with proper valuation which valuation when undertaken post merger on fair vlue basis shows in excess of Rs.125 crores. Learned counsel for the Respondent further argued that the valuation of Visa Bao is by asset based method. The infusion of additional equity has got nothing to do with such valuation. According to learned counsel additional equity has to be determined on the basis of the

preparation of financial statements as per the sanctioned scheme which reflects additional equity in excess of Rs.125 crores.

16. Learned counsel for the Respondent further argued that the scope of Section 7 of the I&B Code is very limited and the only consideration that is required to be seen is where there has been any default. Learned counsel argued that in the instant case there is no debt. Learned counsel further argued that a default has not occurred and also that the debt is not due in law and in fact. Learned counsel further argued there was no liability or obligation as the Guarantee stood discharged prior to 13th December, 2017 when the Demand Notice was issued.

17. Learned counsel for the counsel further argued that Deed of guarantee is a separate and independent contract between the appellant and the Respondent and the terms of guarantee have to be interpreted independently. Learned counsel for the Respondent argued that the appellant had also been informed that the merge of Visa Bao would result in discharge of the obligation of bringing in additional equity of Rs.125 crores by letter dated 18th April, 2017which is referred in letter of 8th December, 2017 (Page 2247 and 2248 of appeal).

18. At last learned counsel for the Respondent argued that even if there was debt payable by the Respondent, the CIRP having been admitted against Visa International Ltd for the same debt another Corporate Guarantor cannot be proceeded with and the learned counsel for Respondent has placed reliance upon this Appellate Tribunal Judgement namely *Dr. Vishnu Kumar Agarwal Vs Piramal Enterprises Ltd dated 9.1.2019 in Company*

Appeals No.346 and 347 of 2018. Learned counsel for the Respondent prayed that the appeal filed by the appellant may be dismissed with costs.

19. I have heard the parties and perused the record. It is not disputed that the Borrower company availed credit facilities from the appellant and corporate guarantee was given by the Corporate Debtor. The fact is confirmed by the Corporate Debtor itself vide its own letter dated 25th October, 2017 (Page 2240 of Appeal) that the Corporate Debtor had given the corporate guarantee.

20. The next issue before my consideration is that whether the infusion of Rs.125 crores in VISA Steel Ltd is to be met in cash or assets etc. As per CDR letter to SBI at page 1774 of Appeal it is stated "*Corporate Guarantee of Visa Infrastructure Ltd with negative lien on Visa House situated at Alipore, Kolkata to be provided till the company brings in additional equity of Rs.125 crore over and above Rs.325/- crore as considered in our proposal."* Learned counsel for the appellant argued and drawn our attention to deed of guarantees and letter of undertaking to stress that the Respondents have agreed to infuse the equity of Rs.125 crores in cash. On the other hand learned counsel for the Respondent have argued that deed of guarantee also refers to only "additional equity" and there is no reference to funds or cash infusion. Learned counsel for the Respondent argued that the letter dated 13.9.2013 of Borrower company to SBI for merger of Visa Bao into Visa Steel does not refer to infusion of the additional equity of Rs.125 crores but it only highlights that the consolidation of Ferro Chrome Business of VISA Bao and Visa Steel will make Bio Steel a shareholder in VISA Steel and offer further

fund raising opportunities from other Strategic Investors. Learned counsel for Respondent further argued that it does not say that inviting Strategic Investor will be the way with which the obligation of the Guarantor will be fulfilled or the additional equity ofRs.125 crores had to be by way of cash infusion alone.

I have considered the submissions made by the parties and in my view infusion of equity can be taken by both the routes bringing in cash or bringing in the assets, net asset value of which is excess value of the assets over liabilities to be met by the assets.

21. The next issue came for consideration is whether the additional equity of Rs.125 crores has been infused and the Corporate Debtor stands discharged on account of guarantee given by it on behalf of Borrower Company.

As per Learned counsel for the appellant the Respondent company was to infuse additional equity of Rs.125 crores over and above Rs.325 crores has to be infused in the similar form as Rs.325 crores was infused at the set. Learned counsel for the appellant argued that the Visa Bao Ltd was merged with the Borrower Company and the valuation was carried out by a Chartered Accountant on *"Cost or Asset Based Method'* and as per valuation of the said Chartered Accountant the net assets of the Visa Bao Ltd as on 31.3.2015 was Rs.31.593 crores (Page 2732 of Appeal) and as per Share Exchange Ratio (Page 2734 of Appeal) 5789500 shares of Visa Steel were allotted to BRCL, who was holding 35% stake in Visa Bao Ltd. and value of these shares in Visa Steel was Rs.11,05,19, 500/- as on 31.3.2015.

Learned counsel for the appellant argued that merger of Visa Bao Ltd with Visa Steel Ltd has led to an infusion of Rs.31.593 crores which is far less than Rs.125 crores as approved in the CDR. Learned counsel for the appellant further argued that in the Annual Financial Statement of 2016-17, the net asset value of Visa Bao Ltd has been highly exaggerated by Visa Steel Ltd. Learned counsel for the appellant argued that additional equity has not been infused but the new valuation has been done by LSI Financial Services Ltd. Learned counsel for the appellant further argued that no additional equity in cash or kind has been infused except merger of Visa Bao Ltd which has net asset value of 31.593 crores, therefore, the new valuation conducted by Borrower Company is nothing but a book entry. Learned counsel for the appellant argued therefore, there is debt and default and the Learned NCLT have committed an error in not admitting the application under Section 7 of the I&B Code.

On the other hand learned counsel for the Respondent argued that pursuant to a merger/demerger in the instant case Bao Steel, China comes in as a Strategic investor in Visa Steel consequent to the merger, with proper valuation which valuation when undertaken post merger on fair value basis shows in excess of Rs.125 crores infusion in equity of Visa Steel. Learned counsel for the Respondent further argued that Valuation of Visa Bao is by asset based method. Learned counsel for the Respondent further argued that additional infusion of additional equity has got nothing to do with such valuation and additional equity has to be determined on the basis of the preparation of financial statements as per the sanctioned scheme which

reflects additional equity in excess of Rs.125 crores. Learned counsel for the Respondent argued more than Rs.125 crores equity has been infused, therefore, the appeal may be dismissed.

I have considered the submissions made by the parties. The Corporate Debtor had given guarantee that the guarantee and the negative lien on their Alipore, Kolkata property shall be valid till the infusion of funds aggregating to Rs.125 crores over and above Rs.325 crores either in VISA Steel Ltd or in VISA Special Steel Limited (after transfer of special steel Business to VISA Special Steel Limited). The Borrower Company and Corporate Debtor vide their letters 23.3.2013 (Page 488 and 498 of the appeal) addressed to appellant have agreed and undertook to infuse further fund in the Borrower company in the form of

i) Unsecured loan
ii) Preference Shares or by issuing fresh shares through QIP/FPO/PE/Strategic Investment etc; or
iii) By merging/demerging some business division of borrower into separate Companies
iv) SPV's through scheme/slump sale; and
v) Inviting strategic investor for meeting any cash flow shortage to meet the repayment obligation.

From the above it is clear that almost all above possible methods that can be adopted for meeting out the obligation for infusion of funds aggregating to Rs.125 crores. I have noted that Visa Bao Steel has been merged with the Borrower whose net assets as on 31.3.2015 is Rs.31.593 crores. It is noted that value has been determined by Mr. Rajesh Chaudhury Chartered Accountant appointed by the borrower company. The borrower company has also obtained fairness opinion on scheme of

amalgamation of Visa Bao Ltd with Visa Steel Ltd from M/s Intelligent Money Managers Pvt Ltd who have confirmed the scheme of amalgamation is fair and reasonable to the equity shareholders of the Visa Steel Ltd. Therefore, it can safely be taken that net asset value of the company are taken at Rs.31.593 cores. Only this much assets has been infused in the Borrower company. Further in this net assets of Rs.31.593, 65% stake is held by the Borrower company itself and 35% stake is held by Bao Steel (China). Therefore, only 35% share of net assets of Visa Bao Ltd has been merged in the Borrower company amounting to Rs.11.052 crores which is less than additional equity of Rs.125 crores.

However, the borrower has claimed that in keeping with the scheme of amalgamation the borrower company has accounted for the difference between the fair value of net assets of VBL (so acquired) and face value of equity shares issued being Rs.4601.46 million as capital reserve and reflected under the heading "other equities" thus meeting out its obligation of bringing Rs.125 crores as per CDR. However, I have noted that this mechanism has not been envisaged in any of the options listed above in the guarantee/undertaking. It seems to be an attempt to creatively show through book entry that the obligation under the CDR has been met without following it in letter and spirit. Therefore, I am of the firm opinion that Corporate Debtor has not met its obligation.

22. During the arguments Learned counsel for the Respondent placed a copy of order dated 7th August, 2019 passed in CP(IB)No.759/LB/2017 –SBI Vs Visa International Ltd and argued that even if there was debt payable by

the Respondent, the CIRP Process having been admitted against Visa International Ltd for the same debt, another Corporate Guarantor cannot be proceeded with. Learned counsel for Respondent placed reliance on the Judgement of NCLAT in the case of Dr.Vishnu Kumar Agarwal Vs Piramal Enterprises Ltd dated 9.1.2019 in Company Appeals No.346 and 347 of 2018.

I have considered his argument. This logic, suggested by Respondent, does not stand on his leg as on the date of rejection of present application on 11.01.2019 by NCLT, there was no admission of CIRP against another guarantor by this date and the subsequent admission of CIRP on 7.8.2019 against another guarantor will not come in its way in deciding this appeal on merit.

As I have observed that there was no admission of CIRP against another guarantor on the date of rejection of appellant application, as there can not be two CIRP against the same debt in terms of this Appellate Tribunal judgement namely *Dr. Vishnu Kumar Agarwal Vs Piramal Enterprises Ltd dated 9.1.2019 in Company Appeals No.346 and 347 of 2018,* therefore, an option be given to the appellant either to proceed against the present Corporate Debtor or Visa International Ltd.

Conclusion:

23. Having considered the submissions and perusing the record and impugned order, I have come to the conclusion that there is debt and default and the Corporate Debtor has not discharged the obligation as per

the terms of the Guarantee and, therefore, there is debt due as claimed by the Financial Creditor from the Corporate Debtor. The appellant has succeeded in proving the existence of a default in terms of the guarantee agreements. The NCLT has committed error in rejecting the application filed under Section 7 of I&B Code by the appellant.

24. In view of the aforegoing observations and discussions the following order is passed:-

a) The appeal filed by the appellant deserves to be allowed. It is accordingly allowed.

b) No order as to costs.

(Mr. Balvinder Singh)
Member (Technical)

New Delhi
Dated:25th -9-2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 179 of 2019

IN THE MATTER OF:

State Bank of India & Anr. **...Appellants**

Vs

Visa Infrastructure Ltd. **...Respondent**

O R D E R

25.09.2019: After final arguments were concluded on 29.08.2019, this appeal was reserved for judgment. Today, the judgment has been pronounced. The lead judgment has been delivered by Shri Justice Bansi Lal Bhat, Member (Judicial) and dissenting judgment delivered by Shri Balvinder Singh, Member (Technical). As the members composing this Bench differ in their judgments and are equally divided on the material issue of "debt" and "default", the Registry is directed to immediately place the record before His Lordship the Hon'ble Chairperson for constituting an appropriate Bench (Third Judge) for his opinion so that the judgment is rendered in accordance with the opinion of the majority.

(Justice Bansi Lal Bhat)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

am/nn