NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1422 of 2019

[Arising out of order 21st October, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in C.P. (IB) No. 1167(PB)/2019]

IN THE MATTER OF:

IFCI Ltd.
Having its Registered Office at:
IFCI Tower, 61 Nehru Place
New Delhi – 110019.

....Appellant

Vs

M/s ACCIL Hospitality Ltd.
Having its Registered Office at:
204, Nirmal Tower,
26 Barakhamba Road,
Cannaught Place,
New Delhi - 110001.

....Respondent

Present:

For Appellant: Mr. P. V. Dinesh, Ms. Sindhu and Mr. Ashwini Kr. Singh, Advocates.

J U D G M E N T

BANSI LAL BHAT, J.

Appellant – the Financial Creditor filed application under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') seeking to trigger Corporate Insolvency Resolution Process against the

Corporate Debtor – 'M/s ACCIL Hospitality Ltd.' on the ground that the Corporate Debtor was the Corporate Guarantor for the Principal Borrower - 'Asian Colour Coated Ispat Limited', who had defaulted in clearing its outstanding liability of loan facility of Rs.150 Crores extended to it by the Financial Creditor. The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, vide its judgment dated 21st October, 2019 dismissed the application on the ground that since claim lodged by the Financial Creditor before Mr. Kuldeep Kumar Bassi, Resolution Professional in CIRP against the Principal Borrower - 'Asian Colour Coated Ispat Limited' has already been collated and admitted, it is not permissible to allow the same claim to be again made the basis for triggering Corporate Insolvency Resolution Process and on account of duplicity of claims the petition cannot be entertained. Aggrieved thereof the Appellant has preferred the instant appeal.

2. Assailing the impugned judgment, learned counsel for Appellant submitted that the Adjudicating Authority landed in error in ignoring the fact that the liability of Corporate Debtor was joint and coextensive with that of the Principal Borrower and the mere filing of claim by the Financial Creditor in Corporate Insolvency Resolution proceedings could not absolve the Corporate Guarantor of its contractual obligation of discharging the liability.

3. Section 128 of the Indian Contract Act, 1872 dealing with Surety's liability provides that the liability of the Surety is coextensive with that of the Principal Debtor unless it is otherwise provided by the contract. The provision

engrafted in this section renders the Guarantor liable for the debt taken by the Principal Borrower unless otherwise provided by the contract. It therefore follows that unless there is an express stipulation in the Loan Agreement that the liability of the Guarantor is not coextensive with that of the Principal Borrower, the Guarantor cannot wriggle out of its liability for repayment of the debt taken by the Principal Borrower. However, any variance in terms of contract between the Principal Borrower and the Creditor, made without the consent of Surety, discharges the surety qua the transactions subsequent to such variance. This is specifically provided under Section 133 of the Indian Contract Act.

4. Adverting to the factual matrix of the case in hand be it seen that the Corporate Loan Agreement was executed inter-se 'Asian Colour Coated Ispat Limited' (Principal Borrower) with the Appellant – 'IFCI Ltd.' (Financial Creditor) for grant of loan facility to the tune of Rs.150 Crores with Respondent – M/s ACCIL Hospitality Ltd. (Corporate Debtor) executing deed of Corporate Guarantee guaranteeing the repayment of loan. That apart, personal guarantees were executed by Shri Pradeep Agarwal and Shri Vikas Agarwal, Promoters/ Directors of the Corporate Debtor. Loan amount was disbursed in two tranches, first tranche of Rs.35.07 Crores on 28.08.2014 and second tranche of Rs.114.93 Crores on 20.09.2014. As default was alleged, the Financial Creditor filed application under Section 7 of the I&B Code seeking to trigger CIRP against the Corporate Debtor which came to be dismissed in terms of the impugned order assailed in the instant appeal.

5. It emerges from record that the Principal Borrower Company faltered in discharging its obligations under the Loan Agreement culminating in its account being classified as Non-Performing Asset (NPA) on 30.09.2016. Loan was recalled in terms of notice dated 16.02.2016 emanating from the Financial Creditor. This was followed by invocation of Corporate Guarantee of the Corporate Debtor and Personal Guarantee of Promoters/ Directors. The Financial Creditor appears to have initiated steps for recovery by taking resort to serving notice of demand under Section 13(2) of SARFAESI Act, 2002 on 03.05.2017. Meanwhile, one of the Lenders namely State Bank of India filed application under Section 7 of I&B Code before the Adjudicating Authority (National Company Law Tribunal) Principal Bench, New Delhi against the Principal Borrower for triggering of Corporate Insolvency Resolution Process. C.P. (IB) No. 562/2018 filed in this regard came up for consideration before the Adjudicating Authority which admitted the application in terms of its order dated 20.07.2018. The Financial Creditor (Appellant) submitted its claim for a sum of Rs.227,48,91,019.15 on 20.07.2018 before the IRP, who admitted the full amount of claim. Admittedly, a Resolution Plan approved by 79.3% of voting share of the Committee of Creditors is pending approval before the Adjudicating Authority. It is at this stage, that the Financial Creditor sought triggering of CIRP against the Guarantor (Corporate Debtor herein) which has been declined by the Adjudicating Authority.

6. Learned Adjudicating Authority, while declining initiation of CIRP against Guarantor at the instance of Financial Creditor when its claim has

been admitted in CIRP Process initiated against the Principal Borrower, observed that in terms of the dictum of this Appellate Tribunal in **'*Dr. Vishnu Kumar Agarwal Vs. Piramal Enterprises Ltd.', Company Appeal (AT) (Insolvency) No. 346 of 2018 decided on 08.01.2019***, the self-same claim of the Financial Creditor could not be made the basis for triggering of CIRP when the claim of Financial Creditor had been collated and admitted as it amounts to duplicity of the claims. It has relied upon the following para in the aforecited judgment of this Appellate Tribunal:-

> *"..... However, once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' is 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower'). Further, though there is a provision to file joint application under Section 7 by the 'Financial Creditors', no application can be filed by the 'Financial Creditor' against two or more 'Corporate Debtors' on the ground of joint liability ('Principal Borrower' and one 'Corporate Guarantor', or 'Principal Borrower' or two 'Corporate Guarantors' or one 'Corporate Guarantor' and other 'Corporate Guarantor'), till it is shown*

that the 'Corporate Debtors' combinedly are joint venture company."

7. This proposition of law holds the field as of now. Once the Financial Creditor's claim has been collated and admitted by the IRP in its entirety, invoking of jurisdiction of the Adjudicating Authority at its instance for triggering a fresh Corporate Insolvency Resolution Process against the Corporate Guarantor would amount to duplicity of claims being pressed. The fact that the Resolution Plan is yet to be approved by the Adjudicating Authority and the Financial Creditor may be faced with the prospect of taking a haircut is no ground to trigger a fresh resolution process against the Corporate Guarantor. Assuming but not holding that the Corporate Guarantors liability is coextensive with that of the Principal Borrower in the instant case with no proof of record that there is no contract to the contrary within the meaning of Section 128 of the Indian Contract Act and there has been no subsequent variance in terms of contract between the Financial Creditor and the Principal Borrower, apprehension of Financial Creditor that in the resolution process initiated against the Principal Borrower, which is still underway, its total claim will not be satisfied has to be termed as speculative and a figment of imagination. This being a second application for same set of claim and arising out of the same default cannot be admitted against the 'Corporate Guarantor' while CIRP initiated against the 'Principal Borrower' is still subsisting.

8. For the aforesaid reasons, we are of the considered view that the ratio of Dr. Vishnu Kumar Agarwal's case (supra) squarely applies in the facts and circumstances of case in hand. Thus viewed, the impugned order does not suffer from any legal infirmity. There being no merit in the appeal same is dismissed. There shall be no orders as to cost.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI
17th February, 2020

AM