NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.633 of 2020

[Arising out of Order dated 4th March, 2020 passed by National Company Law Tribunal, Hyderabad Bench in CP(IB)No.466/7/HDB/2019] (Appeal mentions number as 446. But see Impugned Order)

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
State Bank of India Stressed Asset Management Branch, Secunderabad Door No.6-2-915, 5th Floor, Rear Block, HMWSSB Compound, Khairthabad, Hyderabad – 500 004		Appellant
Vs.		
Athena Energy Ventures Private Limited Front Side, Third Floor, Part of Property No.E-561, 561A, G.R. Plaza, Palam, Sector 7, Dwarka, New Delhi – 110075		Respondent

For Appellant: **Mr. V.M. Kannan, Mr. Sambit Panja and Mr. Sanjay Kapur, Advocates**

For Respondent: **Mr. Ramesh Babu Paluta, Advocate**

J U D G E M E N T

(24th November, 2020)

A.I.S. Cheema, J. :

1. This Appeal has been filed under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 (IBC – in short) against Impugned Order dated 4th March, 2020 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench) in CP(IB)No. 466/7/HDB/2019. (Appeal and Parties have referred the Number as 446 but Impugned Order (Page 18) mentions number as 466. We will thus refer the number as 466). The Appellant – State Bank of India filed the Application against Respondent – Athena Energy Ventures Private Limited – Corporate Debtor who was Corporate Guarantor for "Athena Chattisgarh Power Ltd." (The Principal Borrower hereafter referred as "Borrower"). The application was filed as Borrower committed default in repayment of the financial assistance provided to the Borrower. Athena Chattisgarh (Borrower) is joint Venture Company promoted by the Respondent – Corporate Debtor. The Borrower availed financial assistance from the Appellant Bank and other banks, in consortium and had executed necessary documents in favour of the Appellant and other consortium banks. When the need of the Borrower increased, the Respondent which is a joint venture and promoter of Borrower came forward and executed corporate guarantee and documents in favour of the Appellant and other consortium of banks. The Respondent was under obligation to see that amounts availed under the finance from the

Appellant were repaid by the Borrower. The Appellant had sanctioned Rs. 3069, 68, 00, 000/- and had actually disbursed Rs. 2769, 19, 05, 767/- to the Borrower. The Borrower committed default and Appellant filed Application under Section 7 of IBC against the Borrower before the Adjudicating Authority. The said Application was numbered as CP(IB)No.616/07/HDB/2018. The same was admitted by Adjudicating Authority by Order dated 15th May, 2019.

2. Appellant claims that the Appellant also filed present Application under Section 7 of IBC having number CP(IB)No.466/07/HDB/2019 to seek initiation of CIRP against Respondent – Corporate Guarantor. The Application was filed before the Adjudicating Authority at Hyderabad in view of provisions of Section 60(2) of IBC although registered office of Respondent is at New Delhi.

3. It appears that the Respondent opposed the Application filed claiming that the Application was arising out of very same transaction and very same common Loan Agreement dated 30th March, 2011 as amended by first Amendment Agreement dated 31st March, 2015 followed by second Amendment Agreement dated 1st September, 2016 and thus the Application filed by the Appellant against Respondent was duplicating the claim which was not permissible. The Respondent relied on the Judgement of this Appellate Tribunal in the case of **"Vishnu Kumar Agarwal vs. Piramal Enterprise Ltd."** – CA (AT) (Ins.) No. 346 &

347 of 2018 dated 8th January, 2019 where it is held that once the petition under Section 7 of IBC is filed against Principal Debtor/Co-Guarantor and CIRP has been initiated, the Financial Creditor cannot file another Application on the very same set of claim.

4. The Adjudicating Authority heard the parties and referred to observations of this Tribunal in the matter of "Piramal". Keeping Judgement in the matter of Piramal in view, the Adjudicating Authority raised question that when Application under Section 7 had been admitted against the Principal Borrower whether the present Application by the same Financial Creditor could be admitted against Corporate Guarantor on same set of claims and default. The Adjudicating Authority relied on Para – 32 of the Judgement in the matter of Piramal and reproduced the same as under:-

> "In para 32of their Judgement (supra) the Hon'ble NCLAT observed as under:-
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> > "There is no bar in the 'I&B Code' for filing simultaneously two applications under Section 7 against the 'Principal Borrower' as well as the 'Corporate Guarantor(s)' or against both the 'Guarantors'. 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' or '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."

Relying on the above paragraph, the Adjudicating Authority discussed and concluded that the Principal Borrower and Respondent could not be called joint venture Company as they were independent Companies having independent Memorandum of Association. Then, relying on the above paragraph in the matter of Piramal, the Adjudicating Authority declined to admit the Application as it was on same set of facts, claim and default for which CIRP was already initiated and was in progress in CP(IB) No.616/7/HDB/2018 and where according to the Adjudicating Authority, the claim of Applicant had already been admitted. Thus, the Application of the Appellant against the Respondent came to be rejected.

5. The present Appeal is against such Judgement.

6. We have heard Counsel for both sides. Counsel for Appellant referred to the Guarantee Agreement and their contents and the fact that Respondent stood Guarantor for the Principal Borrower. He referred to the dues outstanding as on 31st August, 2018.

7. Counsel for Respondent has not disputed the execution of the documents between the parties and the fact that Athena Chattisgarh Power Ltd. is the Principal Borrower and the quantum of amounts outstanding or that they are in default. The filing of the two Applications is also not in dispute as well as the fact that the CIRP has already been initiated against the Principal Borrower.

8. The learned Counsel for Appellant argued that under Section 128 of the Indian Contract Act, 1872, liability of the Principal Borrower and the Guarantor is co-extensive and the Creditor is entitled to proceed against either or both and no sequence is required to be followed. Referring to Section 5(8)(a), (h) and (i) of IBC, it is argued that IBC treats the Principal Borrower and Guarantor similarly. Reliance is placed on Section 60(2) of IBC to submit that simultaneous Application could be filed against the Borrower as well as Guarantor and that the same could also be maintained. The learned Counsel argued that Judgement in the matter of "Piramal" was relating to not Principal Borrower and Guarantor but filing of two separate proceedings against two Guarantors. Thus, according to him, the Judgement did not apply. It is argued that amended Section 60(2) of IBC was not noticed in Judgement of Piramal. It is also argued that Insolvency Law Committee Report of February, 2020 discussed the issue and had observed that proceedings could be maintained against the Borrower as well as Guarantor and Creditor could file claims in both CIRP proceedings. The learned Counsel also relied on

the Judgment in the matter of **"State Bank of India versus V. Ramakrishnan & Anr." (2018) 17 SCC 394** to submit that the Creditor has remedy with regard to his debt against both the Principal Debtor as well as the surety. It is argued by the learned Counsel for Appellant and he has filed copies of Orders passed by Hon'ble Supreme Court in Appeals pending against Judgement in the matter of Piramal and other Judgements of this Tribunal which have followed Judgement of Piramal. It is submitted that the Hon'ble Supreme Court has in the matter of Piramal in the Interim Order directed maintaining of status quo and in other matters, stayed the Judgements of this Tribunal.

9. Learned Counsel for Appellant relied on the observations of the Insolvency Law Committee ((ILC – in short) in its Report of February, 2020 and argued on the lines of observations of the ILC. It is argued that in IBC, the IRP/RP only collates claims. What haircut is taken by the Creditors in the matter of Resolution Plan is what the Appellant would be able to recover in the Resolution Plan or liquidation against the Corporate Debtor. It is argued, that can then be adjusted in the other proceeding. The claims can be reduced and adjusted proportionately in the two CIRP proceedings depending on the liability under the Deeds of Guarantee.

10. Against this, the learned Counsel for Respondent has relied on Reply (Diary No.22427) and it is argued that the soul of the IBC is resolution of the Corporate Debtor and to keep the Corporate Debtor a

going concern to maximise value. The proceedings are not adverse in nature. It is accepted that under Section 128 of Contract Act, 1872, liability of the surety is co-extensive with the Principal Debtor and the Creditor may proceed against Principal Debtor, or the surety or both, in no particular sequence in recovery proceedings. However, it is claimed that this principle is not applicable in insolvency proceedings against the Principal Debtor and surety or against more than one surety, for same set of claims as claims against surety have to be reduced to the extent of claims lodged against the Principal Debtor. It is argued that for same amount, there cannot be two CIRP proceedings, one against Borrower and the other against the surety. The Counsel relied on Judgement in the matter of "Piramal". The learned Counsel referred to Halsburys Laws of England 4th Edition Para – 159 at Page – 87 where it is observed that it was necessary for the Creditor before proceeding against surety to request the Principal Debtor to pay or sue him although solvent, unless this was expressly stipulated. Reference is made to "The Law of Insolvency" by Ian F Fletcher where it is mentioned that where Creditor has already initiated action against Principal Debtor, the liability of surety is reduced to the amount for which Creditor's debt has been admitted. Based on this, it is argued that the amount claimed against the Borrower and the Respondent being same, the Application against Respondent could not be maintained. It is argued that the Appeal deserves to be dismissed.

11. Having heard Counsel for both sides and having gone through the record, it appears appropriate for us to first refer to Judgement in the matter of Piramal.

11.1. The two Appeals Company Appeal (AT) (Ins) No. 346 of 2018 and Company Appeal (AT) (Ins) 347 of 2018 were filed by shareholder against different Orders of Adjudicating Authority by which Orders CIRP was initiated against the two Corporate Guarantors. In that matter, the Principal Borrower was one "All India Society for Advance Education and Research" which was not a Company. Financial Creditor was "M/s. Piramal Enterprises Ltd." which granted amount of Rs.38 Crores to the Borrower which amount was guaranteed by two Corporate Guarantors – Sunrise Naturopath and Resorts Pvt. Ltd. (Corporate Guarantor No.1) and Sun System Institute of Information Technology Pvt. Ltd. (Corporate Guarantor No.2). It appears that two separate Applications under Section 7 of IBC were filed against both the Guarantors and the Application against Guarantor No.2 was admitted on 24th May, 2018 and against Guarantor No.1 on 31st May, 2018. In both the proceedings, same amount was claimed and the debt amount and amount of default and date of default were same.

11.2. Thus, the issues raised in Para – 15 of the Judgement were:-

> "15. The questions arise for consideration in these appeals are:

i. Whether the 'Corporate Insolvency Resolution Process' can be initiated against a 'Corporate Guarantor', if the 'Principal Borrower' is not a 'Corporate Debtor' or 'Corporate Person'? and;

ii. Whether the 'Corporate Insolvency Resolution Process' can be initiated against two 'Corporate Guarantors' simultaneously for the same set of debt and default?"

11.3. The first issue was answered against the Appellant. We are concerned with the second issue. This Tribunal while dealing with the above second issue referred to Judgement in the matter of "**Innoventive Industries Ltd. vs. ICICI Bank"** (2018 1 SCC 407) where scheme of the Code was discussed by the Hon'ble Supreme Court. This Court has then taken note of the definition of Financial Creditor and financial debt and in para – 29 of the Judgement, raised question whether for same very claim and for same very default, the Application under Section 7 against the other Corporate Debtor (Guarantor No.1) can be "initiated". It was then reasoned in para – 30 that moment the Application against Guarantor No.2 was admitted the Guarantor No.1 could say that debt in question was not due as it was not payable in law, having shown the same debt payable by Guarantor No.2 which had already been initiated against Corporate Guarantor No.2. It was observed in para – 31 that admittedly (?) for same set of debt claim cannot be filed by same Financial Creditor in two separate CIRPs and so two applications can not

be admitted simultaneously. With such observation, finding is recorded in para – 32 which paragraph we have reproduced above. The result was that, in Piramal, although Financial Creditor took pains to secure same amount by ensuring that two Corporate Guarantors are there (which is not prohibited by law) the Corporate Guarantor No. 1 simply walked away only because, CIRP had already been initiated against Corporate Guarantor No. 2. Thus Guarantor No. 1 escaped payment (which has not been found to be the object of IBC – See Para 25 of Judgment in the matter of V. Ramakrishna (Supra.)).

12. Considering the issues which were before this Tribunal when matter of Piramal was decided, it is clear that the Issue No.2 was relating to question whether CIRP can be initiated against two Corporate Guarantors simultaneously for same set of debt and default. The issue was not whether Application can be filed against the Principal Borrower as well as the Corporate Guarantor. The observations made in para – 32 of the Judgement that second application for same set of claim and default can not be admitted against the Corporate Guarantor or Principal Borrower was not an issue in the matter of Piramal.

13. Apart from this, the observations in the Judgement in the matter of Piramal do not appear to have noticed Sub-Sections 2 and 3 of Section 60 of IBC. It would be appropriate to reproduce Section 60(1) to (3) which reads as under:-

> **"60. Adjudicating Authority for corporate persons.--**
> (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.
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> (2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or [liquidation or bankruptcy of a corporate guarantor or personal guarantor of such corporate debtor] shall be filed before such National Company Law Tribunal.
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> (3) An insolvency resolution process or [liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor] pending in any Court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor."

In Sub-Section 2, the earlier words were "bankruptcy of a personal guarantor of such corporate debtor". These words were later on substituted by the words "liquidation or bankruptcy of a corporate guarantor or personal guarantor as the case may be, of such Corporate Debtor". These words were substituted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 Act 26 of 2018. This amendment was published in Government Gazette on 17th August, 2018 and this amendment was inserted with retrospective effect from 6th June, 2018.

We have referred to these details as Hon'ble Supreme Court of India in Judgement in the matter of **"State Bank of India versus V. Ramakrishnan & Anr."** (which was pronounced on 14th August, 2018 three days before the above Notification) ((2018) 17 SCC 394) discussed Section 60(2) and (3) as they stood before this amendment was enforced. We will refer to the above Judgement in the matter of "Ramakrishnan" later. At present, we have referred to the above provision which had come on the statute book when Act 26 of 2018 was enforced and the Judgement in the matter of Piramal which was passed on 8th January, 2019 did not notice the above amendment. If the above provisions of Section 60(2) and (3) are kept in view, it can be said that IBC has no aversion to simultaneously proceeding against the Corporate Debtor and Corporate Guarantor. If two Applications can be filed, for the same amount against Principal Borrower and Guarantor keeping in view the above provisions, the Applications can also be maintained. It is for such reason that Sub-Section (3) of Section 60 provides that if insolvency resolution process or liquidation or bankruptcy proceedings of a Corporate Guarantor or Personal Guarantor as the case may be of the Corporate Debtor is pending in any Court or Tribunal, it shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such Corporate Debtor. Apparently and for obvious reasons, the law requires that both the proceedings should be before same Adjudicating Authority.

14. It would be appropriate now to refer to the observations made by the Insolvency Law Committee in its Report of February, 2020. Relevant part of the Report has been filed by the Appellant as Annexure – C (Diary No.23383). Para 7 of the Report is as follows:-

7. ISSUES RELATED TO GUARANTORS

7.1. Under Section 128 of the Indian Contract Act, 1872, the liability of a surety towards a creditor is coextensive with that of the principal borrower. When a default is committed, the principal borrower and the surety are jointly and severally liable to the creditor, and the creditor has the right to recover its dues from either of them or from both of them simultaneously.[26] The Committee discussed whether in light of this rule of co-extensive liability of the surety and the principal borrower, a creditor should be permitted to initiate CIRP against both the principal borrower

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[23] *S. N. Plumbing Pvt. Ltd., (Through RP- Sanjay Kumar Ruia) v IL&FS Engineering & Construction Co. Ltd.*, Company Appeal (AT) (Insolvency) No. 283/2018, NCLAT. Decision date - 7 December 2018

[24] Company Appeal (AT) (Insolvency) No. 786/2019, NCLAT. Decision date - 1 October 2018

[25] Insolvency and Bankruptcy Code Bill, 2015, Notes on Clauses, p. 117. <https://www.prsindia.org/sites/default/files/bill_files/Insolvency_and_Bankruptcy_code%2C_2015.pdf> accessed 26 November 2019

[26] Pollock and Mulla, *Indian Contract and Specific Relief Acts* vol. II (12th edn., LexisNexis Butterworks 2006) p. 1814-1816

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and its surety and whether it should be permitted to file its claims in the CIRPs of both the principal borrower and its surety.

Initiation of Concurrent Proceedings against the Principal Borrower & the Guarantor

7.2. The Committee noted that the Appellate Authority, in *Dr. Vishnu Kumar Agarwal v M/s. Piramal Enterprises Ltd.*,[27] has prevented admission of multiple CIRP applications which were filed by the same creditor for the same set of claims against different corporate debtors by holding that: "*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' or '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').*"[28]

7.3. The Committee noted that while, under a contract of guarantee, a creditor is not entitled to recover more than what is due to it, an action against the surety cannot be prevented solely on the ground that the creditor has an alternative relief against the principal borrower.[29] Further, as discussed above, the creditor is at liberty to proceed against either the debtor alone, or the surety alone, or jointly against both the debtor and the surety.[30] Therefore, restricting a creditor from initiating CIRP against both the principal borrower and the surety would prejudice the right of the creditor provided under the contract of guarantee to proceed simultaneously against both of them.

7.4. Further, Section 60(2) of the Code provides that when a CIRP or liquidation process against a corporate debtor is pending before an Adjudicating Authority, any insolvency resolution, liquidation or bankruptcy proceeding against any guarantor of that corporate debtor should also be initiated before the same Adjudicating Authority. Similarly, Section 60(3) requires transfer of any such proceeding which may be pending before any court or tribunal to the Adjudicating

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[27] Company Appeal (AT) (Insolvency) No. 346/2018, NCLAT. Decision Date - 8 January 2019

[28] *Dr. Vishnu Kumar Agarwal v M/s. Piramal Enterprises Ltd*, Company Appeal (AT) (Insolvency) No. 346/2018, NCLAT. Decision Date - 8 January 2019

[29] *Bank of Bihar Ltd v Damodar Prasad & Another* AIR 1969 SC 297

[30] *State Bank of India v Indexport Registered and Ors.* AIR 1992 SC 1740; *Jagannath Ganeshram Agarwala v Shivnarayan Bhagirath* AIR 1940 Bom 247

Authority dealing with the CIRP or liquidation process of the corporate debtor. Therefore, as the Code does require proceedings against a corporate debtor and its guarantors to be simultaneously heard by the same Adjudicating Authority, the Committee was of the view that the Code in fact, envisages initiation of concurrent proceedings against both a corporate debtor and its sureties. **Given this, the Committee recommended that a creditor should not be prevented from proceeding against both the corporate debtor and its sureties under the Code.**

7.5. However, the Committee noted that the Appellate Authority has, in certain cases, taken a view contrary to its decision taken in the *Piramal Enterprises Ltd.*[31] case. For example, in *Edelweiss Asset Reconstruction Company Limited v Sachet Infrastructure Pvt. Ltd. & Ors.*,[32] the Appellate Authority has permitted simultaneous initiation of CIRP against the principal borrower and its corporate guarantors. Further, the Appellate Authority has also admitted a petition to review its aforesaid judgement in the *Piramal Enterprises Ltd.* case.[33] **Given this, the Committee decided that no legal changes may be required at the moment, and this issue may be left to judicial determination.**

7.6. It was also represented before the Committee that in certain cases creditors extend loans to a debtor solely by relying on the contract of guarantee provided by a third-party surety, and without considering the commercial viability of the debtor and its ability to repay the debt. The Committee deprecated this practice, and agreed that creditors should necessarily carry out adequate due diligence regarding the debtor's financial position and should not extend a loan solely by relying on a contract of guarantee without assessing the financial and technical feasibility of the respective project.

Filing of Claims by a Creditor in Proceedings of the Principal Borrower & the Guarantor

7.7. The Committee further discussed whether, in cases where CIRP has already been initiated against the principal borrower and the surety, a creditor should be allowed to file claims (with respect to the same set of debts) in the CIRP of both the corporate debtors. The Appellate Authority, in *Dr. Vishnu Kumar Agarwal v*

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[31] *Dr. Vishnu Kumar Agarwal v M/s. Piramal Enterprises Ltd.*, Company Appeal (AT) (Insolvency) No. 346/2018, NCLAT. Decision date - 8 January 2019

[32] Company Appeal (AT) (Insolvency) No. 377/2019, NCLAT. Decision date - 20 September 2019

[33] *TUF Metallurgical Pvt. Ltd. v Wadhwa Glass Processors Pvt. Ltd.*, Company Appeal (AT) (Insolvency) No. 611/2019, NCLAT. Decision date - 31 May 2019

M/s. Piramal Enterprises Ltd.,[34] had opined that "*for same set of debt, claim cannot be filed by same 'Financial Creditor' in two separate 'Corporate Insolvency Resolution Processes'*".

7.8. However, as discussed above, the principal borrower and the surety being jointly and severally liable to the creditor is a key feature of a contract of guarantee. Therefore, the very object of a contract of guarantee would be prejudiced if the creditor is prohibited from filing claims in the CIRP of both the principal borrower and the surety.[35] Even in the First ILC Report, this Committee, while discussing the scope of moratorium under Section 14 *vis-à-vis* the assets of a surety of the corporate debtor, had observed that the "*characteristic of such contracts i.e. of having remedy against both the surety and the corporate debtor, without the obligation to exhaust the remedy against one of the parties before proceeding against the other, is of utmost important for the creditor and is the hallmark of a guarantee contract, and the availability of such remedy is in most cases the basis on which the loan may have been extended.*"[36] If a creditor is denied the contractual right to proceed simultaneously against the corporate debtor and the surety, the ability of the creditor to recover its debt may be seriously impaired.

7.9. **As the right to simultaneous remedy is central to a contract of guarantee, the Committee suggested that in cases where both the principal borrower and the surety are undergoing CIRP, the creditor should be permitted to file claims in the CIRP of both of them. Since, as the Code does not prevent this, the Committee recommended that no amendments were necessary in this regard.**

7.10. It was brought to the Committee that this right may be misused by a creditor to unjustly enrich herself by recovering an amount greater that what is owed to her. However, the right to simultaneous remedy under a contract of guarantee does not entitle a creditor to recover more than what is due to her, and **the Committee agreed that upon recovery of any portion of the claims of a creditor in one of the proceedings, there should be a corresponding revision of the claim amount recoverable by that creditor from the other proceedings.**

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[34] ibid

[35] *Bank of Bihar Ltd v Damodar Prasad & Another* AIR 1969 SC 297

[36] Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2018) para 5.9, <www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf> accessed 26 November 2019

15. The learned Counsel for the Appellant is relying on the above observations of the ILC to argue that the Creditor cannot be restrained from initiating CIRP against both the Principal Borrower as well as the surety and also maintaining the same. The learned Counsel submitted that when remedy is available against both, Application can be maintained against both and only at the stage of disbursement, adjustment may have to be made.

16. We find substance in the arguments being made by the learned Counsel for Appellant which are in tune with the Report of ILC. The ILC in para – 7.5 rightly referred to subsequent Judgement of **"Edelweiss Asset Reconstruction Company Ltd**. **v. Sachet Infrastructure Ltd. and Ors."** dated 20th September, 2019 which permitted simultaneously initiation of CIRPs against Principal Borrower and its Corporate Guarantors. In that matter Judgment in the matter of Pirmal was relied on but the larger Bench mooted the idea of group Corporate Insolvency Resolution Process in para – 34 of the Judgement. The ILC thus rightly observed that provisions are there in the form of Section 60(2) and (3) and no amendment or legal changes were required at the moment. We are also of the view that simultaneously remedy is central to a contract of guarantee and where Principal Borrower and surety are undergoing CIRP, the Creditor should be able to file claims in CIRP of both of them. The IBC does not prevent this. We are unable to agree with the arguments of Learned Counsel for Respondent that when for same debt

claim is made in CIRP against Borrower, in the CIRP against Guarantor the amount must be said to be not due or not payable in law. Under the Contract of Guarantee, it is only when the Creditor would receive amount, the question of no more due or adjustment would arise. It would be a matter of adjustment when the Creditor receives debt due from the Borrower/Guarantor in the respective CIRP that the same should be taken note of and adjusted in the other CIRP. This can be conveniently done, more so when IRP/RP in both the CIRP is same. Insolvency and Bankruptcy Board of India may have to lay down regulations to guide IRP/RPs in this regard.

17. The Hon'ble Supreme Court in the matter of **V. Ramakrishnan** dealt with Section 60(2) and (3) of IBC in Paragraphs – 24 and 25 of the Judgement, Hon'ble Supreme Court observed as under:-

> "24. The scheme of Sections 60(2) and (3) is thus clear – the moment there is a proceeding against the corporate debtor pending under the 2016 Code, any bankruptcy proceeding against the individual personal guarantor will, if already initiated before the proceeding against the corporate debtor, be transferred to the National Company Law Tribunal or, if initiated after such proceedings had been commenced against the corporate debtor, be filed only in the National Company Law Tribunal. However, the Tribunal is to decide such proceedings only in accordance with the Presidency-Towns Insolvency Act, 1909 or the Provincial Insolvency Act, 1920, as the case may be. It is clear that sub-section (4), which states that the Tribunal shall be vested with all the powers of the Debt Recovery Tribunal, as contemplated under Part III of this Code, for the purposes of sub-section (2), would not take effect, as

> the Debt Recovery Tribunal has not yet been empowered to hear bankruptcy proceedings against individuals under Section 179 of the Code, as the said Section has not yet been brought into force. Also, we have seen that Section 249, dealing with the consequential amendment of the Recovery of Debts Act to empower Debt Recovery Tribunals to try such proceedings, has also not been brought into force. It is thus clear that Section 2(e), which was brought into force on 23.11.2017 would, when it refers to the application of the Code to a personal guarantor of a corporate debtor, apply only for the limited purpose contained in Section 60(2) and (3), as stated hereinabove. This is what is meant by strengthening the Corporate Insolvency Resolution Process in the Statement of Objects of the Amendment Act, 2018.
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> 25. Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. 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. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him."

18. We have already mentioned that when Hon'ble Supreme Court was dealing with Section 60(2), it was in the context of bankruptcy of

Personal Guarantor and the Act 26 of 2018 was yet not published. The above para – 24 of the Judgement in the matter of Ramakrishnan can be conveniently read keeping in view the substituted provisions as per Act 26 of 2018. In place of Personal Guarantor, one can read "Corporate Guarantor" and with suitable changes, scheme of Section 60(2) and (3) can be appreciated from that angle also. The issue involved in the matter of "Ramakrishnan" was whether Section 14 of IBC will provide for a moratorium for the limited period mentioned in the Code, on admission of an insolvency petition would the same apply to Personal Guarantor of a Corporate Debtor. The issue was answered in negative by the Hon'ble Supreme Court. The Hon'ble Supreme Court in such context made observations as above in Paragraphs – 24 and 25 of the Judgement.

19. It is clear that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as Guarantor. The law as laid down by the Hon'ble High Courts for the respective jurisdictions, and law as laid down by the Hon'ble Supreme Court for the whole country is binding. In the matter of Piramal, the Bench of this Appellate Tribunal "interpreted" the law. Ordinarily, we would respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner it was interpreted in the matter of Piramal. For such reasons, we are unable to uphold the Judgement as passed by the Adjudicating Authority.

20. It is not shown that the application was otherwise incomplete. We thus, proceed to pass the following Order:-

ORDER

The Appeal is allowed. Impugned Order passed by the Adjudicating Authority dated 4th March, 2020 is quashed and set aside. CP(IB)No. 466/7/HDB/2019 filed by the Appellant before Adjudicating Authority is restored to the file of the Adjudicating Authority. The Adjudicating Authority is directed to admit the Application CP(IB)No.466/7/HDB/2019 and pass further necessary Orders as per provisions of IBC. The Adjudicating Authority is requested to appoint the same IRP/RP as has been appointed in CP(IB)616/7/HDB/2018 in the CIRP proceeding against M/s. Athena Chattisgarh Power Ltd. (Principal Borrower). The IRP/RP will act in accordance with law keeping observations in this Judgment in view.

No Orders as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[V.P. Singh]
rs Member (Technical)