PERSONAL GUARANTOR'S FOOTING UNDER INSOLVENCY LAW: AN UPCOMING ERA OF CHANGE

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ABSTRACT

The Insolvency and Bankruptcy Code, 2016 has become the most significant change brought about by the Legislature in recent times. By vesting it with the status of a 'Code of law', the legislature has made-clear its intention to exhaustively cover a complete system of laws by a process of codification thereby making the present enactment a consolidating and amending law. The Code provides for a time-bound process whereby the entire rehabilitation process is to be completed in One Hundred and Eighty days excluding a maximum extension of Ninety days, subject to approval of the NCLT. Nevertheless, the Code gained immense fame among the general public owing to various controversies which prevailed over the status of a personal guarantor under the Code. Varying judicial interpretations and differential scenarios, which arose on a daily basis, spiked up the confusion and tension amongst Corporate Guarantors. The various NCLT Benches across the country found it difficult to address the issue even upon constituting Special Benches. Finally, the air was cleared out with the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 on June 2018. It is however, worthwhile to study about what caused this chaotic situation all over the country which forced the Parliament to promulgate an amendment legislation. This article attempts to study about the same in detail. The agenda of the paper can be achieved by going into the actual ambit of the phrase 'personal guarantor' and the footing of this guarantor under existing laws. Further, we move on to look into the stand taken by the Reserve Bank of India, in its capacity as the Central Regulatory Authority for Banks. Moving on, we comprehend the Code again, with emphasis on its unnotified provisions and what impact these provisions could possibly have on the legal framework. Finally, we delve into the substance of the article itself by discussing elaborately the controversy regarding the assets of a Personal Guarantor under the I&B Code.

INTRODUCTION

The study on a Personal Guarantor's footing in regard to insolvency proceedings requires a deep understanding of the newly enacted Insolvency and Bankruptcy Code, 2016 (herein referred to as "*the Code*") in relation with prior laws governing the same. In light of the changing insolvency scenario in India and the differential judicial interpretations of the same, it is safe to conclude that the Code is exhaustive on its own but needs to be applied wisely.

The Code defines *"personal guarantor"* to be an individual who is the surety in a contract of guarantee to a corporate debtor.[1] This must be read in accordance with the Indian Contact Act, 1872 which defines a "contract of guarantee" to be a contract to perform the promise, or discharge the liability, of a third person in case of his default. It further defines the person who gives the guarantee to be a "surety".[2] For a more detailed understanding of the same, it is mandatory to look into the historical development and other related provisions.

CORNERSTONE OF PERSONAL GUARANTORS UNDER PRIOR LAWS

i. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 *(SARFAESI Act, 2002)*

The first, and possibly the most closely related, enactment to be looked into in this regard is the SARFAESI Act, 2002. The applicability of such other laws to the insolvency proceedings has been mentioned in the "Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law".[3] The primary establishment that needs to be made is that the guarantor is in fact a "borrower" under the SARFAESI Act. This can be understood from a mere perusal of *Section 2(f)*[4] of the said Act. Therefore, when a default, as defined under

[1] Sec: 5(22) of the Insolvency and Bankruptcy Code, 2016.
[2] Sec: 126 of the Indian Contract Act, 1872.
[3] Resolution No. 59/40 of the UN General Assembly passed on December 2, 2004.
[4] *Sec: 2(f)*- "borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance'.

Section 2(j)[5] of the Act, is committed by a borrower a notice demanding repayment under *Section 13(2)*[6] of the SARFAESI Act.

The guarantor is further entitled to service of all the statutory notices even if he has not created any security interest. This is clearly provided in *Sub-Rule (4)* of *Rule 3* of Security Interest (Enforcement) Rules 2002.[7] Therefore, any proceedings initiated under the Act without serving statutory notices to guarantor are not permissible under the law and the same shall be declared void.

The Hon'ble Supreme Court in *Ahok Mahajan v. State of U.P &Ors*,[8] had held that action against guarantor cannot be taken until property of principal borrower is sold off. However, a differential view was taken by the Hon'ble A.P. High Court in the case of *Ahok Sharada v. Small Industries Development Bank of India*[9]whereby it was held that the SARFAESI Act did not contain any provision granting of priority or preference to guarantor's direction to secured creditor.

ii. Indian Contract Act 1872

Considering that the contract of Guarantee is governed by the Indian Contract Act 1872, it is appropriate to look into the same. The Act talks about the co-extensive liability[10] of the Principal Debtor and the Guarantor. This means that the Creditor has discretion to proceed against the guarantor or the Principal Debtor in case of an occurrence of default. The same has been pronounced by the Hon'ble Supreme Court in *Industrial Investment Bank v. Bishwanath Jhunjhuwala*,[11] to quote, *"The legal position as crystallized by a series of cases of this Court*

[5]*Sec: 2 (j)*- "default" means non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor.
[6]*Sec: 13*- Enforcement of security interest— (2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and -his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4).
[7]*Rule 3(4)*- Where there are more than one borrower, the demand notice shall be served on each borrower.
[8]*Ahok Mahajan v. State of U.P &Ors*2007(2) D.R.T.C.696 (SC).
[9]*Ahok Sharada v. Small Industries Development Bank of India*,2007 (2) D.R.T.C 707(AP).
[10] Sec: 128 of the Indian Contract Act, 1872.
[11]*Industrial Investment Bank v. BishwanathJhunjhuwala*,(2009) 9 SCC 478.

is clear that the liability of the guarantor and principle debtors are co-extensive and not in the alternative."

iii. Sick Industrial Companies (Special Provisions) Act, 1985[12]

In line with the above, the next enactment to be referred is the Sick Industrial Companies (Special Provisions) Act, 1985 (herein referred to as "*SICA*"). *Section 22*[13] of the said Act provides for understanding the proceedings against guarantor and principal borrower. The Hon'ble Supreme Court cleared the air in this regard in the case of *Kailash Nath Agarwal &Ors. v. Pradeshiya Industrial & Investment Corporation of UP Ltd. &Anr*.[14] The Apex Court had observed that:

"The object for enacting SICA and for introducing the 1994 Amendment was to facilitate the rehabilitation or the winding up of sick industrial companies. It is not the stated object of the Act to protect any other person or body. If the creditor enforces the guarantee in respect of the loan granted to the industrial company, we do not see how the provisions of the Act would be rendered nugatory or in any way affected. All that could happen would be that the guarantor would step into the shoes of the creditor vis-à-vis the company to the extent of the liability met."

At this juncture, it is appropriate to mention that under the Code, *Section 14* talks about the moratorium and it serves as a period of relief for the Debtor until the resolution plan is approved or liquidation order has been passed. The same is however, not the case under the SICA which largely distinguishes between the liability of principal borrower and the guarantor.

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[12]SICA has been repealed by way of Sick Industrial Companies (Special Provision) Repeal Act, 2003 (notified on November 25, 2016).

[13]*Sec: 22*- Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or whether an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advances granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or as the case may be, the Appellate Authority

[14](2003) 4 SCC 305; See also *KSL & Industries Ltd. v. Arihant Threads Ltd. &Ors*. (2015) 1 SCC 166.

RBI'S STANCE CONCERNING PERSONAL GUARANTORS

Over the past few months, the RBI and the Finance Ministry has time and again addressed the position of a personal guarantor under insolvency proceedings. The Banking Regulation (Amendment) Ordinance, 2017 **(**"Ordinance"**)** was promulgated by the President of India with a view to give extensive powers to Reserve Bank of India **(**"RBI"**)** to issue directions to banks for resolution of stressed assets. The Ordinance introduced two new sections to the Banking Regulation Act, *Section 35AA* and *Section 35AB* which enable RBI to direct banks to commence the Insolvency Resolution Process against the defaulting company under the Code. The RBI has also been granted the discretion to set up one or more advisory/supervisory committees to advise banks on resolution of stressed assets.[15]

In lieu of the powers vested on it, the RBI had passed a series of circulars, clarifications and notifications in regard to the personal guarantee delivered.[16] On a joint reading of the *'Master Circular on Guarantees and Co-acceptances'*[17] and *'Master Circular on Direct Investment by Residents in joint ventures or WOS'*[18] (collectively referred to as "FEMA Circulars") it can be understood that the RBI has allowed 'individual promoters' of Indian party to provide their personal guarantee within the total financial commitment of 400% of net worth of the Indian party (financial commitment *exceeding USD 1 (one) billion or its equivalent* would require prior approval of the RBI) in relation to the joint venture / WOS abroad, subject to the certain conditions.

The term '*promoter*' is not defined under the Foreign Exchange Management Act, 1999 ("FEMA") / FEMA Circulars**.** However, reference of the same may be taken from the definition of '*promoter*' as provided under other laws.

As per the Companies Act (CA) 2013, '*promoter*' *inter-alia* includes "*.....a person who (a) who has been named as such in a prospectus or is identified by the company in the annual*

[15]Extracted from Nishith Desai Associates, '*Stressed Assets - Rbi Granted Sweeping Powers'* (2017) (Accessed by 11:00 PM on April 04, 2018).
[16] Extracted from Seth Dua& Associates, *'Personal Guarantee(s) Under FEMA'*(Accessed by 09:30 AM on April 03, 2018).
[17] dated July 1, 2014
[18] dated July 1, 2014

return referred to in Section 92; or(ii) has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or (iii) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act....."

Further, in terms of the provisions of '*Master Circular on External Commercial Borrowings and Trade Credits*'[19] as issued by RBI, personal guarantee by individuals is also permitted to secure the ECBs availed by the Indian entity from recognized foreign lender.

Perhaps the most striking feature of a guarantor in the course of this research is the level of importance given to enforce one's guarantee. The RBI has taken a special interest in the same. In the amendment to the RBI '*Master Circular on Wilful Defaulters'*[20]it was observed that in cases where guarantees furnished by the companies within the Group on behalf of the wilfully defaulting units are not honoured when invoked by the banks /FIs, such Group companies should also be reckoned as wilful defaulters. The banking regulator, however, clarified that these norms would apply only prospectively and not on cases where guarantees were taken prior to the notification. Further, the said guarantors, who refuse to fulfil their obligations to banks despite having adequate resources, will also be treated as wilful defaulters.

The "*Committee to Recommend Data Format for Furnishing of Credit Information to Credit Information Companies"* had made several recommendations in its report to the Reserve Bank of India on January 2014.

More recently, the panel reviewing the Insolvency and Bankruptcy Code (IBC) has proposed that lenders to defaulting companies should be allowed to invoke personal guarantees, which in most cases are those of the promoters, even if the resolution process has been initiated, said people with knowledge of the matter.[21] This would prove very beneficial from the Bank's point of view, if and when implemented.

[19]Dated July 1, 2014.
[20] DatedSeptember 9, 2014- Amendment DBOD.No.CID. 41/20.16.003/2014-15
[21]Extracted from Economic Times, Sangita Mehta, '*IBC panel for allowing lenders to invoke personal guarantees'* (2018) (Accessed by 12:54 PM on May 01, 2018).

The RBI has always been clear about preferential grant of loans. However, what is noteworthy is that the involvement of the guarantors as well in this list of prohibited grants. The RBI '*Master Circular on Loans and Advances - Statutory and Other Restrictions'*[22]prohibits the Banks from entering into any commitment for granting any loans or advances to or on behalf of any of its directors, or any firm in which any of its directors is interested as partner, manager, employee or *guarantor* etc.

Interestingly, a parallel can be drawn to the RBI '*Master Circular - Guarantees and Co-acceptances'*[23]which gives more clarity in this regard. It says that certain facilities which, inter alia, include issue of guarantees, are not regarded as 'loan and advances' within the meaning of *Section 20* of the Banking Regulation Act, 1949. In this regard, it noted with particular reference to banks giving guarantees on behalf of their directors, that in the event of the principal debtor committing default in discharging his liability and the bank being called upon to honour its obligation under the guarantee, the relationship between the bank and the director could become one of creditor and debtor. Further, the directors were deemed to not evade the provisions of *Section 20* by borrowing from a third party against the guarantee given by the bank.

RBI '*Master Circular - Guarantees and Co-acceptances'*[24]whereby certain procedures were enunciated. It stated that the system of obtaining guarantees should not be used by the directors and other managerial personnel as a source of income from the company. It further directed the Banks to obtain an undertaking from the borrowing company as well as the guarantors that no consideration whether by way of commission, brokerage fees or any other form, would be paid by the former or received by the latter, directly or indirectly.

[22] Dated July 1, 2015- RBI/2015-16/95, DBR.No.Dir.BC.10/13.03.00/2015-16.
[23] Dated July 1, 2015- RBI/2015-16/76, DBR. No. Dir. BC.11/13.03.00/2015-16.
[24] Dated July 1, 2013- RBI/2013-14/66, DBOD. No.Dir.BC.12/13.03.00/2013-14.

THE UN-NOTIFIED PROVISIONS OF THE CODE AND ITS ANTICIPATED IMPACT

The Insolvency and Bankruptcy Code has a dedicated set of provisions for the governing of insolvency proceedings against personal guarantors. Chapter VI of the Code deals with the same. It declares the NCLT to have territorial jurisdiction over all matters pertaining to the adjudication of insolvency proceedings against a personal guarantor.[25] It further vests the Appellate jurisdiction on the NCLAT[26] and the Supreme Court is to have the final say in all matters.[27]

Just as the provisions of the Code pertaining to Corporate Debtor have transferred the jurisdiction of the High Court to the NCLT, the Chapter VI provisions strips the Civil Courts and other authorities of their power and vests it on the NCLT in matters pertaining to the Code.[28] The Tribunal is to be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of the Code.[29] However, it is pertinent to mention that the above said provisions have not been notified yet by the MCA. "This is a serious hindrance to the effective implementation of the Insolvency & Bankruptcy Code. The IBC provides for cases ralated to individual guarantors of a corporate to be heard at the NCLT, but since that section is not notified, only cases against the corporates are being heard at the NCLT," said KP Sreejith, managing partner, IndiaLaw LLP.[30] In the absence of notified *Section 60*, Creditor(s) shall have no remedy to proceed against personal guarantors of Corporate Debtor but to file a case with DRT.[31] Those cases in which winding-up petitions were not served as per *Rule 26* of the Companies (Court) Rules, 1959 (**"**CC Rules**"**) were transferable to NCLT while others were to be continue to be heard and adjudicated by the High Court itself.

[25] Sec: 60 of I&B Code.
[26] Sec: 61 of I&B Code.
[27] Sec: 62 of I&B Code.
[28] Sec: 63 of I&B Code.
[29] Sec: 60 (4) of I&B Code.
[30] Extracted from Financial Express '*Banks rue non-inclusion of guarantor norms under IBC'*(2018) (Accessed by 03:40PM on March 31,2018)
[31] Extracted from Vinod Kothari- Shreya Routh &Vallari Dubey '*Section 14 (1) v. Section 60(2) of the Code: Creditors cannot take action against personal guarantors while on-going CIRP of a Corporate Debtor*' (2017) (Accessed by 07:00 PM on March 30, 2018)

Such categorization created a situation of chaos within the legal regime until it was clarified by way of a notification[32] by inserting the third proviso to *Rule 5* of the Transfer Rules, 2016 which provided that if some of the winding-up petitions are admitted against a company before the High Court as on December 15, 2016, other connected petitions against the same company shall together be heard and adjudicated by the High Court.

The NCLT referred the varied opinions of the NCLAT in *Forech India Pvt Ltd. v. Edelweiss Assets Reconstruction Company*[33] and in *Unigreen Global Pvt Ltd v. PNB &Ors*.[34] Reference was also made to the decision of the Hon'ble Bombay High Court in *Jotun India Pvt Ltd v. PSL*[35] wherein it was held that once a petition has been admitted by the NCLT, it can declare moratorium in accordance with *Section 14* of the Code thereby restricting other Courts from entertaining winding-up petition against the same Corporate Debtor. This was held in view of the fact that the NCLT and the High Court being equivalent in law, the former can impose a moratorium on cases pending before the latter. The Hon'ble Bombay High Court had relied on the decision of the Hon'ble Supreme Court of India in *Innoventive Industries Limited v. ICICI Bank &Anr*.[36] and observed that the I&B Code has been enacted to set up the Insolvency and Bankruptcy resolution process in a strict time bound manner, powers which can only be exercised by the NCLT. In light of the above, the Court recognized that, under the Code, there is a paradigm shift from the erstwhile regime in as much as it displaces the management of the company, an IRP is appointed, and the committee of creditors is left to decide the fate of the company.

Relying upon the same, the NCLT conclusively decided that there is no bar on the NCLT to trigger insolvency resolution process under the Code even if a winding up petition is pending or admitted before the High Court, *unless* an official liquidator has been appointed and a winding up order is passed.

[32] dated June 29, 2017.
[33] Company Appeal (AT) (Insolvency) No. 202 of 2017
[34] Company Appeal (AT) (Insolvency) No. 81 of 2017
[35] [2018] 142 CLA 290 (Bom.)
[36] (2017) SCC Online 1025

The *JotunIndustries* decision has been humbly analyzed and criticized[37] on the ground that the learned single judge had over-ruled an earlier decision of another learned single judge of the Hon'ble Bombay High Court in *West Hill Reality* case[38]which is not permitted in common Law.

Thus, it can be anticipated that when the *pending* proceedings against the Guarantors are transferred from the respective forums to the NCLT, care would be taken to remove the ambiguity which was caused earlier by the transfer of proceedings against corporate entities. The legislature would be well-aware that petitions against the guarantors may have already been filed, admitted and pending before Company Courts under the existing legislations. Thus, those petitions in respect of which notice has been issued or which have been admitted would remain with the jurisdictional tribunal whereas all other petitions get transferred to the NCLT.

It is pertinent to mention at this stage that the Code was amended by the Government via notification of the Insolvency and Bankruptcy Code (Amendment) Act, 2017 retrospectively and it was being deemed to have come into force on the 23rd day of November, 2017. A new *Section 29A* has been inserted specifying persons not eligible to be resolution applicant. It mandates that certain classes of identified persons or any other person acting jointly with such person or the promoter or any person in management of such person is barred from submitting the resolution plan. Apart from a wilful defaulter[39], which also includes a personal guarantor as discussed above, the most striking inclusion is that of a person who has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under the Code.[40] Further, no connected person in this regard is allowed to submit a resolution plan.[41]

Promoters of stressed companies have also expressed interest in submitting resolution plan for their own companies. The IBBI had issued a notification amending the IBBI (Insolvency

[37] Extracted from Indiacorplaw.in- Dheeresh Kumar Dwivedi, '*Transferability of Winding-up Proceedings from High Court to NCLT*' (2018) (Accessed by 10:00 AM on April 30, 2018).
[38]2016 SCC OnLine Bom 10038.
[39]*Section* 29A (a)
[40]*Section* 29A (g)
[41]*Section*29A (j)

Resolution Process for Corporate Persons) Regulations, 2016[42], which provided for details of the applicant of the plan such as identity, conviction for any offence, identification as a wilful defaulter, details of promoter etc. to be incorporated in the plan.

Proviso to existing *Section30* (dealing with submission of resolution plan*)* has been inserted pursuant to which the committee of creditors shall not approve a resolution plan submitted before the Ordinance, if the resolution applicant is ineligible under *Section 29A* and if no other resolution plan is available, the resolution professional to invite fresh plan.[43]

With respect to inclusion of personal guarantors of corporate debtors, though the Allahabad High Court in a recent case[44] had the occasion to analyze and opine on the initiation of insolvency process against a personal guarantor under the Bankruptcy Code.[45]

MORATORIUM AND ASSET OF PERSONAL GUARANTORS: THE CONTROVERSY

The need to address the concern of the guarantors arises in lieu of the growing number of cases pending regarding the same. There are over 40,000 cases worth Rs 1.73 lakh crore pending before various courts and Debt Recovery Tribunals. In March 2014, the Gross non-performing assets (GNPAs) in banking system went up 4.4 per cent from 3.8 per cent of the total assets in the previous fiscal year.[46]

The judicial authorities of the land have over the period of time, passed a series of orders regarding the applicability of a moratorium over a Guarantor's assets when insolvency proceedings have been commenced against a Corporate Debtor. Several of these decisions or orders are contradictory to each other. This can be attributed to the ambiguity in the language used in the relevant provisions of the Code. More specifically, *Sections 10, 14* and *60* of the Code have been time and again, interpreted by the Courts and tribunals.

[42]Available at http://www.ibbi.gov.in/cirpregulation19.pdf, (Accessed by 09:00 AM on March 29, 2017)
[43]Extracted from Nishit Desai Associates '*Bankruptcy Code: Ghost of Retrospectivity Returns to Haunt'* (2017) (Accessed by 10:00 AM on April 3, 2018)
[44]*Sanjeev Shriya v. State Bank of India & others C*. No. 30285 of 2017.
[45]*Supra* note 113.
[46]Business Today, 'Banks to tag guarantor as wilful defaulter if obligation not met, says RBI'.

The more specific interpretation made thus, is the scope of the word "its" used in these provisions.[47]

The landmark judgment of *Sanjeev Shriyav. State Bank Of India &Ors*[48]provided for a certain level of confusion in this regard. In the said case, thepetition was filed by directors of the Corporate Debtor challenging a DRT's order. The DRT had permitted proceedings against the directors, while staying the proceeding against the Company (DRT Order). The Hon'ble Allahabad High Court held that the proceedings against a guarantor of a Corporate Debtor before a Debt Recovery Tribunal must be stayed in light of on-going proceedings against the Corporate Debtor before the National Company Law Tribunal.

The Court had opined that the proceedings were in a "fluid stage" and for the same course of action, two split proceedings i.e. before the DRT as well as the NCLT, should be avoided, if possible. Furthermore, it was held that sufficient safeguards have been provided under the Code; and the liability of the Company has not yet crystallized against either the principal debtor or the guarantors.

However, pronouncements by the NCLTs, NCLAT and the High Courts provide contradictory positions with regard to the scope of moratoriums under the Code.

In the case of *Alpha & Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company Of India Ltd. &Ors.*,[49] the personal properties of the promoters had been given as security to the banks. The question before the NCLT (Mumbai) was whether such properties that are not owned by the Corporate Debtor would come within the meaning of moratoriums under the Code. The NCLT used principles of statutory interpretation to hold that the term "its" under *Section 14 (1) (c)* of the Code refers to the property of the Corporate Debtor. Accordingly, the property not owned by the Corporate Debtor would not fall within the ambits of the moratorium under the Code.

[47]Part analysis extracted from Nishit Desai Associates *'Guarantors and the Moratorium under the Bankruptcy Code: An On-Going Battle*' (2017) (Accessed by 03.00 PM on March 21, 2018)
[48] Civil Writ Petition No. 30285 of 2017
[49] Company Appeal (AT) (Insolvency) No. 116 of 2017

Upholding the decision of the NCLT, the NCLAT held that the moratorium would not be applicable to any assets, movable or immoveable, that do not belong to the Corporate Debtor.

In the case of *Schweitzer Systemtek India Pvt. Ltd. v. Phoenix ARC Pvt. Ltd. &Ors.*,[50] the grievance of the appellant was whether personal property that was given as security to the creditor-banks would fall within the scope of the moratorium under the Code. The NCLAT referred to earlier judgments of the Tribunal and held that the moratorium under the Code is only applicable to the property of the Corporate Debtor. *(*For deciding the same, the Court relied upon the principle of *'ejusdem generis').*

The final leg of NCLAT case-wise analysis draws our attention towards the case of *State Bank of India v. V Ramakrishnan and Veesons Energy Ltd.* [51] is a direct contradiction of its own orders in the aforesaid two decisions. In this case, the Creditor had invoked his right under the SARFAESI Act and proceeded against the Guarantor who also happens to be the promoter of the Debtor. This right was continued to be exercised despite the admission of application against the Corporate Debtor and the order of Moratorium having been passed.

The NCLAT observed that a 'Financial Creditor' may proceed against the 'Personal Guarantor' of the 'Corporate Debtor', by filing an application relating to 'Bankruptcy' of the 'Personal Guarantor' before the same Adjudicating Authority. It further observed that though, Part III of the 'I&B Code' has not yet notified but the Adjudicating Authority is vested with all the powers of the Debt Recovery Tribunal (Adjudicating Authority under Part III) as contemplated under Part III of the 'I&B Code' for the purpose of sub section (2) as apparent from sub-section (4) of Section 60 of the 'I&B Code' It was thus concluded that the 'Moratorium' will not only be applicable to the property of the 'Corporate Debtor' but also on the 'Personal Guarantor'.

Several cases had arisen which were decided by the NCLTs in contrary to the *Sanjeev Shriya* case. Some of these are as follows:

In *Leo Duct Engineers and Consultants Ltd. (Corporate Applicant)*[52] the Corporate Debtor had been unable to liquidate their outstanding liabilities of about Rs. 32 Crores towards their

[50] Company Appeal (AT) (Insolvency) No. 129 of 2017
[51]Company Appeal (AT) (Insolvency) No. 213 of 2017
[52] Company Petition no. 1103/I&BP/NCLT/MAH/2017

financial creditors. Thereafter, they filed an application with the NCLT to initiate corporate insolvency resolution process under *Section 10* of the IBC. Admission of the application by the NCLT would necessarily result in initiation of moratorium under *Section 14* of the IBC. The moratorium would prevent the continuation or initiation of any proceedings against Leo Duct including but not limited to proceedings under the SARFAESI Act. The financial creditors of Leo Duct had already initiated proceedings under the SARFAESI Act which were considerably in the advanced stages of fructification. The secured assets of Leo Duct were due to be repossessed by the financial creditors on the day of filing of the application.

The NCLT (Mumbai) stated that under the SARFAESI Act, a bank could proceed against any security provided by either the promoter/guarantor or the corporate debtor. However, personal properties of the promoter/guarantor do not fall within the purview of the IBC. The resolution professional is concerned only with the assets of the corporate debtor or any immovable property in its name and yet a moratorium under *Section 14* automatically stalls all proceedings that involve the assets of the debtor as well as the personal property of the promoter/guarantor. Thus, a guarantor could use the moratorium under the IBC to scuttle SARFAESI Act proceedings and avoid being dispossessed of their personal immovable properties.

Noting this, the NCLT held that Leo Duct was merely using this application as a *dilatorytactic* to scuttle the proceedings under the SARFAESI Act. It was noted that admitting the application would have a serious impact on the financial creditors, who had already set the wheel in motion to recover their debts. Leo Duct was evidently trying to abuse the process of law, to which the NCLT could not be party. Accordingly, the application was dismissed.

In *Unigreen Global Private Limited (Corporate Applicant)*[53]the Corporate Debtor filed an application with the NCLT (Principal Bench) to initiate CIRP. The issue was whether the CIRP application could validly be admitted. The creditor-bank argued that Unigreen (directly and through its aides) had merely engineered several civil suits, and kept them pending, to sustain possession of the properties that were otherwise mortgaged and could be taken possession of

[53] Company Petition no.IB-39(PB)/2017.

by the creditor. Unigreen had also filed a suit under *Section 17* of the SARFAESI Act against the sale of the mortgaged properties.

The NCLT observed that admission of the CIRP application would induce a moratorium on all other legal actions. Consequently, the creditor-banks would unjustly be stayed from taking possession of the secured assets for a period of at least six months. The NCLT opined that this seemed to be the wrongful intention of Unigreen, and that the Tribunal would not support any such mala fide actions of corporate debtors. They accordingly dismissed the CIRP application and imposed a penalty of Rs.10,00,000/- on Unigreen and its directors under *Section 65* of the IBC.

In *Axis Bank Limited v. Edu Smart Services Limited*[54] (hereafter, "ESSL"), both the principal debtor and the guarantor were undergoing the CIRP under the Code and Axis Bank Limited, being a financial creditor of both the principal debtor and the guarantor, filed its claim with the resolution professional appointed under the Code for the principal debtor as well as the guarantor. However, the claim of Axis Bank was rejected by the resolution professional of the guarantor on the ground that the corporate guarantee was invoked by Axis Bank Limited during the moratorium under section 14 of the Code. The Hon'ble NCLT agreed with the decision of the resolution professional and upheld that the invocation of corporate guarantee during the moratorium period was bad in law. The Hon'ble NCLT also made an interesting observation at para 21 of the order and mentioned, "In equity also, the applicant-Axis Bank Ltd. would not suffer any prejudice as it has already claimed the amount of debt in CIRP of the principal borrower-Educomp Solutions Ltd. in a separate proceeding initiated by admission of.[55]

In conformity with the above, several High Court judgments find relevance in present day scenario, some of which are to be mentioned as follows:

In *Oshi Foods Limited and ors v. State Bank of India*[56] learned Single Judge of the High Court of Madhya Pradesh (Gwalior Bench) held that unless and until the liability of the company is

[54]C.P.No.(IB)-101(PB)/2017.
[55] Extracted from livewlaw.in '*Corporate insolvency resolution process under Insolvency and Bankruptcy Code and the dilemma surrounding Guarantee'* (2018) (Accessed by 02:30 PM on April 4, 2018)
[56]AIR 1997 (2) MPLJ 643.

determined, the guarantors cannot be held liable. The Hon'ble Court reiterated the importance of proceeding against the principal debtor before proceeding against the guarantor.

Further, the Hon'ble High Court of Calcutta while dealing with an issue relating to right of representation through legal counsel by the borrowers[57] before the committees identifying the wilful defaulters made an observation on differing views of various High Courts and Benches and pointed out the importance of common interpretation of legal provision. While dealing with interpretation on legal provisions in the said case, the Hon'ble High Court commented that:

"There can be no doubt that the mind-set and approaches of judges of the High Courts may vary but when it boils down to the question of interpretation of a legal provision and while agreeing that the interpretation of law must keep pace with contemporary needs and challenges, such law cannot be read, interpreted and understood in a manner that would militate against statutory inhibition".[58]

However, the Parliament promulgated the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 which came into effect on 6th June 2018. Subsequent to the same, the air regarding the personal guarantor's footing was cleared out. *Section 14 (3) (b)* was inserted which exempted the assets of the personal guarantor thereby paving way for a whole new set of litigations in front of other forums.

CONCLUSION

To conclude this, a quick reference can be made to the decision passed by the Hon'ble Bombay High Court in *Lacchman Joharimal v. BapuKhandu and Tukaram Khandoji* [*(*1869) 6 Bom HCR 241], whereby the Hon'ble Court held that "*the very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case, the creditor is a banking company. A guarantee is a collateral security usually taken by a banker.*

[57] *Dynametic Overseas Private Ltd &Anr v. State Bank of India &*Ors, W.P.No.3989 (W) of 2016.
[58] Id.

The security will become useless if his rights against the surety can be so easily cut down." (Emphasis supplied).

It is a well-established fact now that the Creditors are free to proceed against the Guarantors even before the completion of the CIRP period. Further, it is also safe to conclude that the co-extensive liability of the Debtor and the Guarantor is proven by no restrictions on the rights of the Creditor.

Irrespective of its ambiguities, the fact remains that the remedies under IBC are exhaustive in respect to its jurisdiction and under no circumstances can a 'Creditor' be deprived of his right to approach the NCLT seeking remedy. This means that even a proceeding initiated under the SARFAESI Act cannot be considered as a bar for the initiation of insolvency resolution process against the Corporate Debtor as held by the Hon'ble NCLAT in the case of *Speculum Plast Pvt. Ltd.*

Thus, the various developments in regard to the personal guarantor's footing under insolvency proceedings have proven to be largely significant and is advancing at a rate which is too fast to fully comprehend.