

Detailed Discussion followed by Q&A

Webinar organized by BVSS IBC Group

Provisions of IBC relating to Personal Guarantors to Corporate Debtors

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ALA Legal

Issues covered

- Background
- Issue I: Impact of admission of Corporate Insolvency Resolution Process of the Corporate Debtor on Personal Guarantor's proceedings
- Issue II: Where these proceedings will lie?
- Issue III: Insolvency under IBC or Old Acts?
- Issue IV: Once Resolution Plan approved under Section 31, can the liability still be recovered from guarantor?
- Issue V: If instead of Resolution Plan being approved under Section 31, the insolvency application results into liquidation, and whether liability can be recovered from surety?

Issues covered (Contd..)

- Issue VI: Vires of the provisions of Personal Guarantor
- Issue VII: After approval u/s 31, whether personal guarantor can take money from Creditor?

Personal Guarantor

- Section 5(22) of the Code defines “personal guarantor” to mean an individual who is the surety in a contract of guarantee to a corporate debtor.
- Contracts of guarantee covered under Chapter VIII of the Contract Act, 1872 – “*Contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default.*” [S. 126]
- The rights and obligations of the guarantor (surety) are determined by the detailed provisions contained said chapter VIII of the Contract Act.

Guarantor's liability under Contract Act

- Guarantor's liability arise because of the contract of guarantee
- Under Section 128 of the Contract Act, liability of surety is **co-terminus** with that of the principal debtor.
- It is so **onerous**, that if there is dispute between Principal Debtor and creditor, then also surety will have to pay the debts.
- In the case of *Ram Krishan v. State of UP AIR 2012 SC 2288*, it was held that creditor has a right to obtain a decree against the surety and the principal debtor. **Surety has no right to restrain execution of the decree against him** until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/ guarantor to see whether the principal debtor has paid or not.

- **Background**

Background

- Vide Notification dated 15.11.2019, the **provisions pertaining to personal guarantors to Corporate Debtors** were notified [w.e.f. 1.12.2019]:

Section 2(e)	Application of IBC to personal guarantors to corporate debtors
Section 78 (except with regard to fresh start process) and Section 79	Application of Part III (Insolvency Resolution and Bankruptcy for individuals and Partnership), and Definitions
Sections 94 to 187 (both inclusive)	Chapter-III (Insolvency Resolution Process), Chapter IV (Bankruptcy order for individuals and Partnership firms), Chapter-V (Administration and Distribution of The Estate of the Bankrupt),

Background (Contd..)

	Chapter-VI (Adjudicating Authority for individuals and Partnership firms) and Chapter-VII (Offences and Penalties)
Clause (g) to Clause (i) of sub-section (2) of Section 239	Power to make rules in respect of: Clause (g) to clause (i) of Section 239(2)
Clause (m) to clause (zc) of sub-section (2) of Section 239	Power to make rules in respect of: Clause (m) to clause (zc) of Section 239(2) including inter-alia form, manner and fee for making application for IRP by the debtor and the creditor under Section 94 and 95 respectively

Background (Contd..)

Clause (zn) to clause (zs) of sub-section (2) of Section 240;

Power to make regulations in respect of Clause (zn) to (zs) of Section 240(2) including inter alia the details and documents required to be submitted under Section 95(7)

Section 249

Section 249 which provides that the Recovery of Debts due to Banks and Financial Institutions Act, 1993 shall be amended in the manner specified in the Fifth Schedule, was notified

Insolvency Resolution of Corporate Persons v. Individual Insolvency and Bankruptcy

- In case of **corporate insolvency**:
 - the creditors assess the viability of the corporate debtor and
 - endeavour to rescue it through a resolution plan.
- **Corporate insolvency resolution process** ends up either with
 - an approval of a resolution plan rehabilitating the corporate debtor or
 - an order for commencement of its liquidation.

Contd..

- In case of individual insolvency,
 - The debtors and creditors negotiate a repayment plan,
 - Which is implemented under the supervision of a resolution professional.
- A bankruptcy process,
 - entails sale of the assets of the debtor,
 - arising on failure of either the insolvency resolution process or implementation of repayment plan.

Part-III of the Code

- Part III of the Code makes provisions for insolvency resolution and bankruptcy of individuals and partnership firms.
- For this purpose, it classifies individuals into three categories:
 - Personal guarantors to Corporate Debtors
 - Partnership firms and proprietorship firms, and
 - Other individuals
- As on date, only the provisions qua the Personal Guarantors to Corporate Debtors have been notified.

Application of Part-III

- Section 78 of the Code provides that this Part shall apply to
 - matters relating to fresh start,
 - insolvency and
 - bankruptcy
 - of individuals
 - and partnership firms,
 - where the amount of default is not less than one thousand rupees
- It is further provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than Rs. 1,00,000/-.

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- **I: Impact of admission of Corporate Insolvency Resolution Process of the Corporate Debtor on Personal Guarantor's proceedings**

*State Bank of India v. V. Ramakrishnan, Civil Appeal
3595 of 2018 dated 14.08.2018 (SC)*

- **Facts:**
- Corporate Debtor filed application under Section 10 on receipt of Possession Notice under Section 13(4) of SARFAESI.
- The Application was allowed.
- Interim application filed by Personal Guarantor.
- In the I.A., the **Guarantor took the plea that Section 14 of the Code would apply to personal Guarantor as well**, hence proceedings against personal guarantor and his property would have to be stayed. (Prior to Amendment)

Facts (Contd..)

- NCLT allowed the I.A. and stayed the proceedings against Guarantor in view of moratorium. Reliance was placed on Section 31 of the Code whereby a Resolution plan once made would bind the personal guarantor as well.
- On Appeal, the NCLAT dismissed the Appeal and upheld NCLT order.
- The State Bank of India filed Civil Appeal before the Supreme Court.

Judgment of Supreme Court

- Supreme Court considered and expressed its approval with the **Insolvency Law Committee Report dated 26.03.2018**, wherein it was stated as under:
 - It was recommended to insert by way of an explanation that all assets of guarantors to the corporate debtor shall be outside the scope of moratorium imposed under the Code.
 - The general principle of guarantee contracts is that the liability of the principal debtor and the surety is **co-extensive** and its joint and several.

Judgment of Supreme Court (Contd..)

- The Committee noted that this 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 utmost important for the creditor and is hallmark of a guarantee contract.
- The availability of such remedy is in most cases the basis on which the loan may have been extended.

Judgment of Supreme Court (Contd..)

- On **Section 31 of the Code**, the Court observed that this section only states that once a Resolution plan, as approved by COC, 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 Contract Act, any change made to the debt** owed by the corporate debtor, without the surety's consent, **would relieve the guarantor from payment.**

Judgment of Supreme Court (Contd..)

- Section 31(1) makes it clear that **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**.
- Further, **Sections 96 and 101, when contrasted with Section 14**, would show that Section 14 cannot possibly apply to a personal guarantor.
- **Part III contemplates a separate moratorium**, applicable separately in the case of personal guarantors against whom IRP may be initiated under Part III.

Judgment of Supreme Court (Contd..)

- The object of the Code is **not to allow such guarantors to escape from an independent and coextensive liability to pay off the entire outstanding debt**, which is why Section 14 is not applied to them.
- Parliament, when it enacted Section 14, **specifically did not provide for any moratorium along the lines of Section 22** of the Sick Industrial Companies (Special Provision) Act, 1985 (“SICA”) in Section 14 of the Code.
- *Note:* Section 22 of SICA provided that **creditors could not proceed against guarantors** as well after the Company had been declared sick under the Act, **without permission** from Board for Industrial and Financial Reconstruction.

Amendment Act No. 26 of 2018

- By virtue of Section 10 of the Act 26 of 2018, sub-section (3) of Section 14 was substituted.
- Section 14 provides for a moratorium or a stay on institution or continuation of proceeding, suits, etc. against the corporate debtor and its assets.
- Sub-section (3) (newly substituted) provides that the provisions of sub-section (1) shall not apply to-
 - Such transaction as may be notified by the Central Government in consultation with any financial regulator;
 - **A surety in a contract of guarantee to a corporate debtor.**

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- **II: Where these proceedings will lie?**

Adjudicating Authority for Personal Guarantors

- In case where CIRP against Corporate Debtor is pending, then Section 60 of the Code is applicable qua the personal guarantors.
- As per Section 60(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.

Legal Provisions (Contd..)

- Section 60(2) provides that:
 - Without prejudice to sub-section (1) and Notwithstanding anything to the contrary contained in the 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**, as the case may be,
 - of such corporate debtor, **shall be filed before such National Company Law Tribunal**

Legal Provisions (Contd..)

- The non obstante clause provided in sub-section (2) of Section 60 of the Code thus prevails over anything to the contrary contained in the Code.
- As per Section 60(3) of the Code,
 - An **insolvency resolution process** or
 - liquidation or
 - bankruptcy proceeding
 - **of a corporate guarantor or personal guarantor**, as the case maybe,
 - of the corporate debtor
 - **pending in any court or tribunal**

Legal Provisions (Contd..)

- **shall stand transferred** to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding
- of such corporate debtor
- Section 94 contained in Part-III of the Code, provides that a debtor who commits default may apply to the Adjudicating authority.

Legal Provisions (Contd..)

- Similarly, Section 95 of the Code provides that a creditor may apply to the Adjudicating Authority for initiating IRP under the Section.
- Adjudicating Authority is defined in Section 79(1) of Chapter-I of Part-III of the Code to mean the **Debt Recovery Tribunal** constituted under Section 3(1) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993

Legal Provisions (Contd..)

- Section 179 of the Code provides that **subject to provisions of Section 60**, the Adjudicating Authority, in relation to insolvency matters and individuals and firms shall be the DRT.
- In view of Section 60 of the Code,
 - where CIRP of a corporate debtor is pending before NCLT,
 - an application relating to insolvency resolution or liquidation or bankruptcy of a corporate guarantor or a personal guarantor
 - shall be filed before the NCLT and not the DRT.

Supreme Court decision

- In the case of V. Ramakrishnan (supra), the Hon'ble Supreme Court held as under:

*21. The scheme of Section 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...***

- **III: Insolvency under IBC or Old Acts?**

V. Ramakrishnan SC

- Supreme Court, in the case of V. Ramakrishnan (supra) held:
 - ..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...
- Thus, there shall be two periods that arise by virtue of Notification notifying provisions w.e.f. 01.12.2019:
 - One pre-Notification: where proceedings shall be carried out before the NCLT in accordance with the Presidency-Towns Insolvency Act, 1909 or the Provincial Insolvency Act, 1920

Contd..

- Another post- Notification: where provisions of IBC pertaining to personal guarantors shall be applicable
- At Para 19, the Hon’ble Court observed that so far as personal guarantors are concerned, Part III of the Code has not been brought in force, and neither has Section 243, which repeals the Presidency Towns Insolvency Act and the Provincial Insolvency Act (as on date of judgment, i.e. 14.07.2018). Hence, the individual personal Guarantors will continue to be proceeded against under the aforesaid two Insolvency Acts and not under the Code.

w.e.f. 01.12.2019

- However, pursuant to Notification dated 15.11.2019, provisions of Chapter III of Part III of the Code shall apply on Personal Guarantors.
- Further, Section 243 of the Code has not yet been brought into force because presently only provisions qua personal guarantors have been invoked and provisions qua other individuals and partnership firms/ sole proprietorship is yet to be enforced.
- But, Section 238 will apply. It provides that the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

- **Legal Provisions**

Application by Debtor

- This section has been notified only for personal guarantor
- Section 94 of the Code provides for Application by debtor to initiate insolvency resolution process.
- Section 94(1) provides that:
 - A Debtor who commits a default,
 - May apply, either personally or through a Resolution professional,
 - To the Adjudicating Authority for initiating the insolvency resolution process,
 - By submitting an application

Legal Provisions (Contd..)

- Section 94(2) provides that where debtor is a partner of a firm, such debtor shall not apply under this Chapter to the Adjudicating Authority in respect of the firm unless all majority of the partners of the firm file the application jointly.
- As per sub-section (3), an application under sub-section (1) shall be submitted only in respect of debts which are not excluded debts.
- As per sub-section (4), a debtor shall not be entitled to make an application under sub-section (1), if he is-
 - An undischarged bankrupt;
 - Undergoing a fresh start process;
 - Undergoing an insolvency resolution process; or

Legal Provisions (Contd..)

- Undergoing a bankruptcy process
- It is also provided that a debtor shall not be eligible to apply under sub-section (1) if an application under this Chapter has been admitted in respect of the debtor during the period of twelve months preceding the date of submission of the application under this Section.
- As per sub-section (6), the application referred to in sub-section (1) shall be in such form and manner and accompanied with such fee as may be prescribed.
- **Definitions**
- “Excluded debt” is defined in Section 79(15) to mean:

Legal Provisions (Contd..)

- a) Liability to pay fine imposed by a court or tribunal;
- b) Liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;
- c) Liability to pay maintenance to any person under any law for the time being in force;
- d) Liability in relation to a student loan; and
- e) Any other debt as may be prescribed;

Application by Creditor

- Section 95 of the Code provides as under:
 - A creditor
 - May apply either by himself, or jointly with other creditors, or through a resolution professional
 - To the Adjudicating Authority
 - For initiating an insolvency resolution process under this Section by submitting an application.

Legal Provisions (Contd..)

- Sub-section (4) of Section 95 provides that:
 - An application under sub-section (1) shall be accompanied with details and documents relating to-
 - Debts owed by the debtor to the creditor or creditors submitting the application for IRP as on the date of application
 - The failure by the debtor to pay the debt within a period of 14 days of the service of notice of demand; and

Legal Provisions (Contd..)

- Relevant evidence of such default or non-repayment of debt.
- Section 95(6) provides that the application referred to in sub-section (1) shall be in such form and manner and accompanied by such fee as may be prescribed.
- Further, the details and documents required to be submitted under sub-section (4) shall be such as may be specified.
- **Definitions:**
- The definition of “creditor”, “debt” and “default” is provided in Section 3 of the Code.

Interim Moratorium

- By virtue of specific provision contained in IBC, i.e. in Section 96 of the Code, when an application is filed under Section 94 or Section 95-
 - **An interim-moratorium shall commence on the date of the application**
 - **In relation to all the debts and**
 - **Shall cease to have effect on the date of admission of such application.**

Legal Provisions (Contd..)

- Further,
 - During the interim- moratorium period-
 - **Any legal action or proceeding pending** in respect of any debt shall be **deemed to have been stayed** and
 - **The creditors of the debtor shall not initiate any legal action or proceedings** in respect of any debt.
- Section 96(3) provides that the provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

Appointment of RP

- Section 97 of the Code provides for Appointment of resolution professional.
- Section 97(1) provides that-
 - If an application under Section 94 or 95 is filed through a RP,
 - The Adjudicating Authority shall direct the Board within 7 days of the date of Application
 - To confirm that there are no disciplinary proceedings pending against the RP.
- Thereafter the Board shall, within 7 days of receipt of directions under Sub-section (1), communicate to the Adjudicating Authority in writing either-

Legal Provisions (Contd..)

- Confirming the appointment of the RP; or
- Rejecting the appointment of the RP and nominating another resolution professional for the insolvency resolution process.
- Section 97(3) provides as under:
 - Where an application under Section 94 or 95 is filed
 - By the debtor or the creditor himself, as the case maybe
 - and not through the Resolution Professional,
 - the Adjudicating Authority shall direct the Board,

Appointment of RP (Contd..)

- Within 7 days of the filing of such Application,
- To nominate a resolution professional for the Insolvency Resolution process.
- As per Section 97(4), the Board shall nominate a RP within 10 days of receiving the direction issued by the Adjudicating Authority under sub-section (3)
- The Adjudicating Authority shall by order appoint the RP recommended under sub-section (2) or nominated by the Board under sub-section (4).

Appointment of RP (Contd..)

- The RP appointed by the Adjudicating Authority under subsection (5) shall be provided a copy of the application for IRP.

Submission of a report by Resolution Professional

- The Resolution Professional, as per Section 99(1), shall
 - Examine the application referred to in Section 94 or Section 95, as the case maybe,
 - Within 10 days of his appointment,
 - And submit a report to the Adjudicating Authority recommending for approval or rejection of the Application
- Where application is filed under Section 95, the RP may require the debtor to prove repayment of the debt claimed as unpaid by the creditor.
- The RP may seek further information or explanation for the purpose of examining application. (Section 99(4))

Legal Provisions (Contd..)

- The Resolution professional shall examine the application and ascertain that:
 - The Application satisfies the requirements set out in Sections 94 or 95;
 - The Applicant has provided information and given explanation sought by the Resolution professional under subsection (4)(Section 99(6))
- The Resolution Professional, after examination of the application, may recommend acceptance or rejection of the Application in his report and shall record reasons. (Section 99 (7) and (9))

Admission or rejection of Application

- Section 100 of the Code provides for Admission or rejection of application.
- Sub-Section (1) provides:
 - The Adjudicating Authority shall,
 - within fourteen days from the date of submission of the report under section 99
 - pass an order either admitting or rejecting the application referred to in section 94 or 95, as the case may be.

Legal Provisions (Contd..)

- Sub-section (2) provides:
 - Where the Adjudicating Authority
 - admits an application under sub-section (1), it may,
 - on the request of the resolution professional,
 - issue instructions for the purpose of conducting negotiations between the debtor and creditors and for arriving at a repayment plan.

Legal Provisions (Contd..)

- Sub-section (3) provides:
 - The Adjudicating Authority
 - shall provide a copy of the order passed under sub-section (1)
 - along with the report of the resolution professional and the application referred to in section 94 or 95, as the case may be,
 - to the creditors within seven days from the date of the said order.

Legal Provisions (Contd..)

- Sub-section 4 of Section 100 provides that:
 - If the application referred to in section 94 or 95, as the case may be,
 - is rejected by the Adjudicating Authority
 - on the basis of report submitted by the resolution professional that the application was made with the intention to defraud his creditors or the resolution professional,
 - the order under sub-section (1) shall record that the creditor is entitled to file for a bankruptcy order under Chapter IV.]

Moratorium

- Section 101 of the Code provides for moratorium. Sub-section (1) provides:
 - When the application is admitted under Section 100,
 - a moratorium shall commence in relation to all the debts and
 - shall cease to have effect at the end of the period of 180 days beginning
 - with the date of admission of the application
 - or on the date the Adjudicating Authority passes an order on the repayment plan under Section 114, whichever is earlier.

Legal Provisions (Contd..)

- During the moratorium period-
 - **Any pending legal action or proceeding** in respect of any debt **shall be deemed to have been stayed;**
 - **The creditors shall not initiate any legal action or legal proceedings** in respect of any debt; and
 - **The debtor shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights** or beneficial interest therein

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- **IV: Once Resolution Plan approved under Section 31, can the liability still be recovered from guarantor?**

Gouri Shankar Jain (Cal)

- Calcutta High Court in the case *of Gouri Shankar Jain v. PNB W.P. No. 10147 (W) of 2019 (SB)*.
- The Corporate Debtor in a proceeding under Section 7 of the Code may stand discharged of its liability to its creditors.
- Such **discharge** being had in the proceeding for bankruptcy and insolvency, the same **does not absolve the surety** of the liability. (Relying on Maharashtra State Electricity Board, SC).
- The sanctioned Resolution plan cannot be construed to be a variation of the terms of the Contract between the principal debtor and the creditor, without the consent of the surety, discharging the surety as to transaction subsequent to the variants or at all.

Contd..

- Further appellate status of Calcutta High Court decision in Gouri Shankar (supra) : No appeal

Kundanmal (P&H)

- Contrary view given by Punjab and Haryana High Court in the case of *Kundanmal Dabriwala*. Therein it was held that scheme sanctioned by Court under Sections 391 and 394 of the Companies Act, 1956 was binding on the creditors whether such creditors assented to it or not.
- The Court therein took note of Section 135 of the Contract Act, and held that, a contract between the creditor and the principal debtor by which the creditor compounds with the principal debtor, discharges the surety.

Contd..

- Section 135 interpretation done by Calcutta, but issue arises whether 134 and 135, and 128: how are they to be read?
- In other words, if there are circumstances other than 134 and 135, can 128 not independently trigger, example, in this case by Section 31 of IBC.
- Section 31 of the IBC not considered or interpreted by the Cal HC
- The clean slate theory is to be considered
 - Ultratech (Raj)
 - Electro Steel Steels Ltd. v. State of Jharkhand (JH HC)

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- **V: If instead of Resolution Plan being approved under Section 31, the insolvency application results into liquidation, and whether liability can be recovered from surety?**

Maharashtra State Electricity Board (SC)

- Reference is invited to the decision of Supreme Court in the case of Maharashtra State Electricity Board v. Official Liquidator (1982) 3 SCC 358
- Therein, it was held that discharge which the principal debtor may secure by operation of law in **bankruptcy or in liquidation** proceedings in the case of a company **does not absolve the surety of his liability.**

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- **Issue VI: Vires of the provisions of Personal Guarantor**

Provisions challenged before HC

- The Writ Petitions that were filed before several HC had challenged Notification dated 15.11.2019 and the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019.
- The Writ Petitioners also sought a declaration that Section 95, 96, 99, 100, 101 of the IBC are unconstitutional insofar as they apply to personal guarantors of Corporate Debtors.

Grounds of Challenge of provisions pertaining to Personal Guarantors before various High Courts

- We have placed reliance on two news reports written for Indian Express and Live Law.
- From **Indian Express**, report on “*Explained: Why is the issue of Personal Guarantors under IBC in SC?*” dated 02.11.2020:
 - As many as 19 promoters before different high courts, have challenged the new provision, claiming that it was always a management board that ran the company and, therefore, the promoters alone should not be held liable for the default on debt repayment.

Grounds of Challenge (Contd..)

- One of the major contention is that if insolvency tribunals start accepting the plea of banks on personal insolvency, **it could lead to the initiation of insolvency twice for the same debt.**
- From **Live Law**, article on “Resolution Process against Personal Guarantors- A violation of Principles of Guarantee?” dated 18.10.2020:
 - One of the main grounds of challenge to the constitutionality is that the initiation of insolvency proceedings against the personal guarantors **violates/ extinguishes rights of the guarantor under the Indian Contract Act, more importantly, the right of subrogation.**

State Bank of India v. Anil Ambani, in NCLT, Mumbai, MANU/NC/8854/2020 dated 20.08.2020

- **Facts:**
- Before NCLT, Mumbai, State Bank of India, the Financial Creditor, filed application seeking urgent hearing and necessary orders under Section 97(3) of the Code against Anil Ambani (Respondent).
- The Respondent had provided personal guarantee in favour of SBI in respect of credit facilities extended to Reliance Communications (“RCOM”) and Reliance Infratel Limited (“RITL”).
- The Respondent was the Chairman of Reliance ADA Group the umbrella organization under which RCOM and RITL functioned.

Facts (Contd..)

- NCLT had admitted Section 9 petitions against the aforesaid Companies, filed by Ericsson.
- In view of the default in payment of credit facilities by Corporate Debtor, the Bank invoked personal guarantee and issued an invocation notice on 31.01.2018 upon the Respondent.
- The Bank thereafter issued demand notice in Form B to the Respondent.
- On no response from the Respondent, the Bank filed application under Section 95 of the Code against the Respondent before the Tribunal.

Contentions of the Respondent

- The Respondent in their Counter, admitted the Credit facilities availed by RCOM and RITL and his personal guarantee under the Deed of Guarantee dated 23.09.2016.
- It was submitted that as per the understanding between the Financial Creditor and Personal Guarantor, the Corporate Guarantee provided by RCIL, RCOM and Reliance Telecom Ltd. in respect of RCOM Facility and provided by RCIL, RCOM and Reliance Telecom Ltd. in respect of RITL facility, would be invoked before invoking the Personal Guarantee.
- It was submitted that Resolution plan of UV Asset Reconstruction Co. Ltd. (“UVARC”) in the CIRP of RCOM was approved by the COC with 100% voting share and the Application for approval of Resolution plan is pending.

Contentions of the Respondent (Contd..)

- It was submitted that Resolution Plan of UVARC should be able to discharge the entire financial debt of RCOM to the Bank and other lenders.
- Under the circumstances, the Respondent's liability as Guarantor under Personal Guarantee would stand fully and completely discharged.
- Same would be the case with the Resolution plan in case of CIRP of RITL.
- It was also submitted that once application is filed, the interim moratorium has come into force till the disposal of the Company petitions. Therefore, all legal actions proceeded against the Respondent shall be deemed to have been stayed.

Contentions of the Respondent (Contd..)

- It was also submitted that the reliefs sought in the Applications cannot be granted pending final decision of the Company petitions.
- It was submitted that in certain cases, view has been taken by Tribunal that upon assignment of debts, the guarantees would cease to be enforceable by the assignor.
- The NCLAT has also, taken the view that once the Resolution process has been initiated against a corporate debtor then, for the same debt, a claim cannot be filed by the same financial creditor which would result in two separate insolvency resolution processes against the corporate debtor and against guarantor.

Contentions of the Respondent (Contd..)

- The reliance was placed on the case of Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd. (Company Appeal (AT) (Insolvency) No. 346 and 347 of 2018, decided on 08.01.2019 to submit that while the Resolution plan for the Corporate Debtors are pending consideration, it would be prudent not to proceed against the Personal Guarantor.

Tribunal's order in SBI v. Anil Ambani

- The Tribunal dealt with the contention of the Respondent that in view of pendency of Resolution plans, the Petition should not be proceeded with.
- In this regard, reliance was placed by the Bench on Section 60(2) of the Code, and held that when the law mandates that a particular proceeding can be initiated, it would be preposterous to think that after initiation of the proceedings the Authority, before whom it is filed, would not act upon such petition and would not do anything about it until some subsequent event happens.

Tribunal's order in SBI v. Anil Ambani (Contd..)

- In the case of Piramal Enterprises (supra), the Hon'ble NCLAT had no occasion to consider the effect of CIRP on a personal guarantor.
- Calcutta HC in *Gauri Shankar Jain v. Punjab National Bank and State Bank of India v. Ramakrishnan: (2019) SCC Online Calcutta 7288* has held that liability of a guarantor of a debt of a corporate debtor does not stand extinguished upon a Insolvency Resolution plan in respect of the Corporate debtor, being approved under the IBC.

Tribunal's order in SBI v. Anil Ambani (Contd..)

- The Calcutta High Court therein relied on SC judgment in *Maharashtra State Electricity Board v. Official Liquidator*, *MANU/SC/0024/1982; AIR 1982 SC 1497* wherein it was held:
 - a discharge which the Principal Debtor may secure by operation of law in bankruptcy or in liquidation does not absolve the surety of his liability.
- In the said Judgment of Supreme Court, the Court considered the interplay of **Sections 128 and 134 of the Contract Act** and held that the fact that company which is the principal debtor has gone into liquidation would have no effect on the liability of the guarantor.

Tribunal's order in SBI v. Anil Ambani (Contd..)

- The principle thus laid down applies on all fours to the case at hand.
- In view of the authoritative pronouncement, it was held that it is clear that notwithstanding pendency of the Resolution plans, the personal guarantor can be proceeded against under Section 60(2) read with Section 95 and 97(3) of the Code.
- During the pendency of a process of corporate insolvency resolution of the Corporate Debtors, an application against the Personal Guarantor shall have to be filed.
- The law doesn't envisage that the insolvency resolution of personal guarantor should follow only when the CIRP of Corporate Debtor has come to an end.

Tribunal's order in SBI v. Anil Ambani (Contd..)

- The present forum is not a recovery forum and has nothing to do with the satisfaction or otherwise of the debts of the corporate debtors.
- Having rejected the contentions of the Respondent, the Tribunal issued direction in terms of Section 97(3) of the Code.

Delhi High Court proceedings in the case of Anil Dhirajlal Ambani v. SBI W.P. (C) 5712/2020

- Anil Ambani pursuant to order of NCLT, Mumbai, filed Writ Petition before the Hon'ble Delhi High Court.
- The Court, vide order dated 27.08.2020 issued notice on the Petition, passing the following order:

....

*In the meantime, the proceedings would continue in relation to the Corporate Debtor and while dealing with those proceedings, the liability of the Petitioner may also be examined by the IRP. **However, the proceedings against the Petitioner under Part-III of the IBC shall remain stayed.***

Delhi High Court order (Contd...)

We restrain the Petitioner from transferring, alienating, encumbering or dealing with, or disposing of any of his assets, or his rights, or beneficial interest therein till the next date.

Delhi High Court order (Contd...)

- Order dated 12.10.2020 in batch matters including Anil Ambani, W.P. (C) 5712/2020:
- The Counsel for the Respondent, SBI in W.P(C) No. 5712/2020 brought attention of the Court to Section 96 of the IBC, which provides for an interim moratorium, when an application is filed under Section 94 or Section 95 of IBC.

Delhi High Court order (Contd...)

- The Court in light of the above provision, passed the following order:

It goes without saying that the said provision shall continue to have effect in all cases wherever an application under Section 94 or 95 has been filed.

-
- Issue VII: After approval u/s 31, whether personal guarantor can take money from Creditor?

Principle of Subrogation

- In this regard, reference is invited to Section 140 of the Contract Act.
- Section 140 provides for rights of surety on payment or performance.
 - Where a guarantee debt has become due,
 - or **default of the principal debtor** to perform a guaranteed duty has taken place,
 - **the surety,**
 - **upon payment or performance of all that he is liable for,**
 - **is invested with all the rights which the creditor had against the Principal Debtor.**

-
- Supreme Court order in Transfer Petition

Supreme Court allows Transfer Petition

- IBBI had filed Transfer Petition before Supreme Court seeking transfer of the writ petitions filed before High Courts to Supreme Court. (IBBI v. Lalit Kumar Jain and Ors. TP (C) No. 1034 of 2020)
- The Court observed that the writ petitions that are pending in HC pertaining to challenge to Notification dated 15.11.2019 and related issues have to be transferred. Basis of Judgment:
 - Transfer would avoid conflicting decisions by HC which are in seisin of the Writ Petitions.
 - The IBC is at a nascent stage

Supreme Court allows Transfer Petition (Contd..)

- Better that interpretation of provisions of the Code is taken up by Supreme Court to avoid confusion and to authoritatively settle the law
- Considering importance of issues raised
- which need finality of judicial determination at the earliest,
- it is just and proper that the Writ petitions are transferred from High Courts to Supreme Court.
- Accordingly, the Court directed transfer of the writ petitions to itself.

Supreme Court allows Transfer Petition (Contd..)

- Further, it was directed that no further writ petition involving challenge to the Notification dated 15.11.2019 and provisions brought into force pertaining to Personal Guarantors to Corporate Debtors shall be entertained by any High Court

THANK YOU

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