NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT)(INS) NO.1012 OF 2024

(Arising out of judgement and order dated 03.04.2024 passed by the Ld. Adjudicating Authority, Kolkata Bench in IA(IB)/1372(KB)/2023 in CP(IB)No.82(KB) of 2019)

In the matter of:

IFCI Ltd,
Through its Authorized Signatory
Having Registered Office
at IFCI Tower, 61, Nehru Place,
New Delhi 110019. **Appellant**

Vs

Ashok Kumar Sarawgi,
Resolution Professional
for Kohinoor Steel Pvt Ltd
18 Rabindra Sarani, Poddar Court,
Gate 3, 5th floor, Room No.4,
Kolkata 700001. **Respondent**

For Appellant : Mr Vivek Kohli, Sr Advocate with Ms Nimita Kaul, Ms Shivambika Singh, Advocates.

For Respondent : Ms Muskan Sabharwal, Mr Shaunak Mitra, Advocates.

JUDGEMENT
(Hybrid Mode)

[Per: Ajai Das Mehrotra, Member (Technical)]

This appeal is against the impugned order dated 03.04.2024 passed by the Ld. Adjudicating Authority, Kolkata Bench in IA(IB)/1372(KB)/2023 in CP(IB) No. 82 (KB) of 2019.

2. It is submitted that the appellant had granted a loan to M/s Kohinoor Power Pvt. Ltd. (hereinafter referred to as the "**KPPL**" or as the "Principal Borrower"), in which corporate guarantee was given by M/s Kohinoor Steel Pvt. Ltd. (hereinafter referred to as the "**KSPL**" or as the "Corporate Guarantor"). KPPL was admitted into Corporate Insolvency Resolution Process (hereinafter referred to as the "**CIRP**") on 03.08.2018. The appellant had filed its claim as a Financial Creditor with the Resolution Professional of KPPL.

2.1 It is submitted that the appellant had provided financial assistance to KPPL by way of subscription to Compulsorily Convertible Debentures (**CCDs**) of Rs. 50 crores. The loan was disbursed in two instalments of Rs. 25 crores each on 10.01.2012 and another on 21.05.2013. The said financial assistance was secured by a corporate guarantee issued by KSPL in favour of the appellant vide irrevocable deed of corporate guarantee dated 16.12.2011. The deed *intera alia* stipulated that the labiality of the guarantor KSPL shall not be affected by winding up of the borrower, i.e. KPPL. The corporate guarantor KSPL also entered into a deed of hypothecation dated 22.02.2016 in favour of the appellant and hypothecated/pledged its immovable assets in favour of the appellant.

2.2 It is submitted that due to failure on the part of the main borrower KPPL to repay the loan, KPPL was classified as a Non-Performing Asset ("NPA") on 30.06.2017.

2.3 It is submitted that the appellant had filed its claim as a financial creditor in the CIRP of KPPL and the claim was admitted also. However, KPPL

went into liquidation and appellant's claim remained undischarged, except to the extent of Rs. 28.74 lakhs only.

2.4 On 13.08.2018, the corporate guarantee issued by KSPL was invoked by the appellant. Subsequently, KSPL was admitted into CIRP by the Ld. Adjudicating Authority vide its order dated 20.11.2019 in CP(IB) No. 82 (KB)/2019. The Form A calling for claim was published on 25.11.2019 and the appellant filed its claim Form dated 11.12.2019 for Rs. 171,75,49,875.60/- with the Resolution Professional of KSPL.

2.5 The claim filed by the appellant was rejected by the Resolution Professional on 18.02.2020 stating that the appellant cannot file two claims against two different Corporate Debtors for the same debt and as the claim of the appellant has been admitted into in the CIRP of KPPL, the principal borrower, the same claim cannot be admitted in the CIRP of the corporate guarantor, namely, KSPL. The Resolution Professional relied upon the order of this Tribunal in the case of *Vishnu Kumar Agarwal v. Piramal Enterprises Ltd., (2019) SCC Online NCLAT 81.*

2.6 The appellant again requested the Resolution professional on 22.01.2021 for admission of its claim in view of the change of legal position referring to the decision of this Tribunal in the case of *State Bank of India vs Athena Energy Ventures Private Limited in Company Appeal (AT) Insolvency No. 633 of 2020.* On 30.01.2021, the Resolution Professional again rejected the claim of the appellant stating that both the judgments(Piramal and Athena) of the NCLAT were passed by the Bench of equal strength. On 22.02.2021, the appellant again wrote to the Resolution Professional for

reconsideration citing decision of *SBI vs Ramakrishnan & Anr., (2018) 17 SCC 394,* that the CIRP can proceed against the principal borrower as well as the guarantor simultaneously and also on the ground that in case of two views *(judgment in the case of Athena and Piramal)* on the same issue, the later judgment will prevail. On 26.03.2021, the Resolution Professional again rejected the appellant's claim.

2.7 The Hon'ble Supreme Court in the case of *Lalit Kumar Jain vs Union of India, (2021) 9 SCC 321 pronounced on May 21st, 2020* held as under in paragraph 125 of the said judgment:

> *"122. It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this Court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In Maharashtra SEB30 the liability of the guarantor (in a case where liability of the principal debtor was discharged under the Insolvency law or the Company law), was considered. a It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realise the same from the guarantor in view of the language of Section 128 of the Contract Act, 1872 as there is no discharge under Section 134 of that Act. This Court observed as follows:*
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> *(SCC pp. 362-63, para 7)*
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> > *"7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may*

have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Contract Act, 1872, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under Section 134 of the Contract Act, 1872 by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a 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 (see Jagannath Ganeshram Agarwale v. Shivnarayan Bhagirath; see also Fitzgeorge, In re)."

……

125. In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this Court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process i.e., by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract."

(Emphasis supplied)

2.8 Subsequent to the above cited judgment of the Hon'ble Supreme Court stating that contract of guarantee is an independent contract and the liquidation proceedings in the case of principal borrower does not absolve the guarantor, the appellant informed the Resolution Professional about the said judgment vide its email dated 20.02.2023. On 16.03.2023 Resolution Professional again refused to admit the claim stating that the CIRP is on the

verge of completion. On 20.06.2023, the appellant again wrote to the Resolution Professional to admit its claim. Thereafter, on 25.07.2023, IA(IB)/1372(KB)/2023 was filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 by the appellant before the Ld. Adjudicating Authority. Through the impugned order dated 03.04.2024, the Ld. Adjudicating Authority dismissed the said IA with following observations:

> *"9. We have considered the rival contentions, perused the records.*
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> *10.* ***We would note that probably Liquidator of Kohinoor Power Private Limited have already admitted the same claim of the Applicant in the aforementioned case. Further, we would note that revised plans have been submitted on 26.05.2023, voting lines was open for approval of the Resolution Plan till 30.01.2024 and therefore, at this advanced stage of CIRP the claim of the Applicant cannot be entertained.*** *The CIRP being a time bound process.*
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> *11. We would also note the decisions in Company Appeal 1340 of 2022 in the matter of Deputy Commissioner, UTGST, Daman Vs. Rajeev Dhingra, Hon'ble NCLAT has noted the following decisions:*
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> > *i. In Harish Polymer Product Vs. George Samuel & Anr. In CA (AT) (Ins.) No. 420 of 2021, it has been held that:*
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> > > *"….if at belated stage when the Resolution Applicants are already before the Committee of Creditors with their Resolution Plan(s) if new claims keep popping up and are entertained, the CIRP would be jeopardized and Resolution Process may become more difficult. Keeping in view the object of the I&B Code which is Resolution of the Corporate Debtor in time bound manner to maximize value, if such requests of applicants like Appellant are accepted the purpose of 'I&B Code' would be defeated."*

ii. In M/s. Innovative industries Ltd. Vs. ICICI Bank (2018) 1 SCC 407 and Arcelor Mittal India Private Limited VS, Satish Kumar Gupta (2029) 2 SCC 1, Hon'ble Apex, Court emphasized on the legislative fiat of timeliness in the conduct of CIRP and that the model timelines provided in Regulation 40A of the CIRP Regulations needs to be adhered to by all the parties as closely as possible.

12. In view of above and as per the available records, the claim of the Applicant being rejected on 18.12.2020 itself, at this belated stage, after 3 years, it cannot be entertained to frustrate the timely conclusion of the CIRP.

13. Accordingly, IA (IB)/1372(KB)/2023 is rejected."

3. The Learned Sr. Counsel for the appellant relied upon the judgment of this Tribunal in the case of *State Bank of India vs Athena Energy Ventures Private Limited in Company Appeal (AT) Insolvency No. 633 of 2020* and of the Hon'ble Supreme Court in the case of *(a) Lalit Kumar Jain vs Union of India, (2021) 9 SCC 321 pronounced on May 21st, 2020 and (b) Greater NOIDA Industrial Development Authority v. Prabhjit Singh Soni & Anr. reported in (2024) 6 SCC 767* and stated that its lawful claim, duly backed by necessary proof has been wrongly rejected by the IRP/RP.

4. It is the submission of the Learned Counsel for the Respondent that the application/claim of the appellant was rejected as the same was barred by law of limitation. It is submitted that Regulation 12 of the CIRP Regulations, 2016 provides that the creditors shall submit their claim with proof on or before the last date mentioned in the public announcement. Regulation 12(2) of the CIRP Regulations provides that if a creditor fails to submit its claim with proof within time stipulated in the public announcement, it may submit

its claim with proof to the IRP/RP on or before 90 days of the insolvency commencement date. It is submitted that prior to this amendment, Regulation 12(2) provided that "A creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the interim resolution professional or the resolution professional, as the case may be, till the approval of a resolution plan by the committee."

5. It is submitted that keeping in mind the time-bound process of CIRP under the Code, the claim is required to be filed within 90 days of insolvency commencement date. The appellant had initially lodged its claim on 11.12.2019, which was after the last date for submission of claims as per the public announcement, though it was filed within 90 days period specified in Regulation 12. It was submitted that after rejection of its claim by the Resolution Professional on 18.02.2020, the appellant did not file any appeal before the Ld. Adjudicating Authority regarding the said rejection. It was only on 27.07.2023 when the said IA was filed before the Ld. Adjudicating Authority, it was rejected by the Ld. Adjudicating Authority as per by law of limitation.

6. It was submitted that considering the time bound CIRP process, the appellant's claim cannot be admitted at this stage. It was submitted that revised plan was submitted on 26.05.2023, where by the negotiation stage was completed, and at the time of filing of the said application voting line was opened till 31.01.2024 for approval of the resolution plan. The resolution plan is presently pending for approval before the Ld. Adjudicating Authority.

7. Heard and perused the documents.

8. The appellant had filed its claim for the first time on 11.12.2019 along with proof of claim for an amount of Rs.171,75,49,875.60/-, which was within the time allowed under Regulation 12 of IBBI (CIRP) Regulations, 2016 the said claim was rejected by the Resolution Professional following the judgment in the case of *Vishnu Kumar Agarwal (supra),* on the grounds that claim for the same debt cannot be made in the CIRP of both the principal borrower and the corporate guarantor. There were several email correspondences between the Resolution Professional and the Appellant. The appellant informed the Resolution Professional the Hon'ble NCLAT has subsequently, in the case of *State Bank of India vs Athena Energy Ventures Private Limited in Company Appeal (AT) Insolvency No. 633 of 2020* held that claim can be filed in the CIRP of both the Corporate Debtor and the guarantor. This time, the Resolution Professional rejected the claim of the appellant stating that both the judgments of the NCLAT were passed by the Bench of equal strength and the appellant was asked to seek a clarification from the NCLAT. It is noteworthy that the Hon'ble Supreme Court in the case of *Lalit Kumar Jain vs Union of India, (2021) 9 SCC 321, (supra)* has held that the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process i.e., by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract. The judgment of the Hon'ble Supreme Court has settled the law on this issue.

9. In the impugned order, the Ld. NCLT has rejected the IA filed by the appellant/applicant on the grounds that the CIRP is in advance stage and the

claim of the applicant cannot be entertained, CIRP being time bound process. The Ld. NCLT held that the claim of the applicant was rejected on 18.12.2020 itself, and at this belated stage after three years it cannot be entertained as it would affect the timely conclusion of the CIRP.

10. The Hon'ble Supreme Court in the case of *Greater NOIDA Industrial Development Authority v. Prabhjit Singh Soni & Anr. reported in (2024) 6 SCC 767* has held as under:

> *"The resolution plan did not meet the requirements of Section 30(2) IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016.*
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> ***54.*** *In our view the resolution plan did not meet the requirements of Section 30(2) IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016 for the following reasons:*
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> ***54.1.*** *The resolution plan disclosed that the appellant did not submit its claim, when the unrebutted case of the appellant had been that it had submitted its claim with proof on 30-1-2020 for a sum of Rs 43,40,31,951. No doubt, the record indicates that the appellant was advised to submit its claim in Form B (meant for operational creditor) in place of Form C (meant of financial creditor). But, assuming the appellant did not heed the advice, once the claim was submitted with proof, it could not have been overlooked merely because it was in a different form. As already discussed above, in our view the form in which a claim is to be submitted is directory. What is necessary is that the claim must have support from proof. Here, the resolution plan fails not only in acknowledging the claim made but also in mentioning the correct figure of the amount due and payable. According to the resolution plan, the amount outstanding was Rs 13,47,40,819 whereas, according to the appellant, the amount due and for which claim was made was Rs 43,40,31,951. This omission or error, as the case may be, in our view, materially affected the resolution plan as it was a vital information on which there ought to have been application of mind. Withholding the information adversely affected the interest of the appellant because, firstly, it affected its right of being served a*

notice of the meeting of the CoC, available under Section 24(3)(c) IBC to an operational creditor with aggregate dues of not less than ten per cent of the debt and, secondly, in the proposed plan, outlay for the appellant got reduced, being a percentage of the dues payable. In our view, for the reasons above, the resolution plan stood vitiated. However, neither NCLT nor NCLAT addressed itself on the aforesaid aspects which render their orders vulnerable and amenable to judicial review.

54.2. *The resolution plan did not specifically place the appellant in the category of a secured creditor even though, by virtue of Section 13-A of the 1976 Act, in respect of the amount payable to it, a charge was created on the assets of the CD. As per Regulation 37 of the CIRP Regulations, 2016, a resolution plan must provide for the measures, as may be necessary,for insolvency resolution of the CD for maximisation of value of its assets, including, but not limited to, satisfaction or modification of any security interest. Further, as per Explanation 1, distribution under clause (b) of subsection (2) of Section 30 must be fair and equitable to each class of creditors. Non-placement of the appellant in the class of secured creditors did affect its interest. However, neither NCLT nor NCLAT noticed this anomaly in the plan,which vitiates their order.*

54.3. *Under Regulation 38(3) of the CIRP Regulations, 2016, a resolution plan must, inter alia, demonstrate that:*

(a) it is feasible and viable; and

(b) it has provisions for approvals required and the timeline for the same.

In the instant case, the plan conceived utilisation of land owned by the appellant. Ordinarily, feasibility and viability of a plan are economic decisions best left to the commercial wisdom of the CoC. However, where the plan envisages use of land not owned by the CD but by a third party, such as the appellant, which is a statutory body, bound by its own rules and regulations having statutory flavour, there has to be a closer examination of the plan's feasibility. Here, on the part of the CD there were defaults in payment of instalments which, allegedly, resulted in raising of demand and issuance of pre-cancellation notice. In these circumstances, whether the resolution plan envisages necessary approvals of the statutory authority is an important aspect on which feasibility of

the plan depends. Unfortunately, the order of approval does not envisage such approvals. But neither NCLT nor NCLAT dealt with those aspects.

Relief

***55**. As we have found that neither NCLT nor NCLAT while deciding the application/ appeal of the appellant took note of the fact that:*

(a) the appellant had not been served notice of the meeting of the CoC;

(b) the entire proceedings up to the stage of approval of the resolution plan were ex parte to the appellant;

(c) the appellant had submitted its claim, and was a secured creditor by operation of law, yet the resolution plan projected the appellant as one who did not submit its claim; and

(d) the resolution plan did not meet all the parameters laid down in subsection (2) of Section 30 IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016.

We are of the considered view that the appeals of the appellant are entitled to be allowed and are accordingly allowed. The impugned order dated 24-11-20221 is set aside. The order dated 4-8-20203 passed by NCLT approving the resolution plan is set aside. The resolution plan shall be sent back to the CoC for re-submission after satisfying the parameters set out by the Code as exposited above. There shall be no order as to costs."

(Emphasis supplied)

In the aforesaid judgment the Hon'ble Supreme Court has set aside the approved resolution plan for failure to include the claim of the creditor, and also for other reasons.

11. Section 18 of IBC, 2016 specifies duties of Interim Resolution Professional ("IRP"). IRP has to receive and collate all the claims submitted by the creditors as per provisions of Section 18(1)(b) of IBC, 2016. As per the

provisions of Section 25(2)(e), the duty of Resolution Professional ("RP"), who succeeds IRP, includes maintenance of an updated list of claims. It is expected that the Resolution Professional exhibits diligence, fairness and neutrality in collating and verifying the claims.

12. We have noted that in the present case the claim, along with proof, was submitted by the appellant before the Resolution Professional within time of 90 days allowed under the Regulation 12. It was only due to legal interpretation that the claim was not admitted by the Resolution Professional. The Hon'ble Supreme Court has already settled the issue in the case of *Lalit Kumar Jain case, (supra) on 21.05.2021.* Admittedly, there was delay on part of the appellant in bringing this judgment to notice of the Resolution Professional. However, the Resolution Professional being a technical expert was also duty bound to implement the law of the land. As we have noted earlier, it is the duty of the IRP/RP to receive, collate and verify the claims as per law. In our view, there was no delay on the part of the appellant in submitting its claim, along with proof, in the CIRP of the Corporate Debtor. The omission or error on part of the Resolution Professional in admitting the claim materially affects the resolution plan. However, the resolution plan is yet to be approved by Ld. NCLT. In the facts and circumstances of the case, we have no hesitation to hold that the Ld. NCLT erred in rejecting the IA No. 1372/KB/2023 regarding claim of the appellant. The impugned order is set aside for the aforesaid reasons. The Resolution Professional is directed to verify and entertain the claim of the appellant as per law. Accordingly, the

instant appeal is allowed. No order as to costs. Pending application(s), if any, are also closed.

[Justice Yogesh Khanna]
Member (Judicial)

[Mr. Ajai Das Mehrotra]
Member (Technical)

Place: New Delhi
Dated: 22.09.2025
Ram N.