**IN THE NATIONAL COMPANY LAW TRIBUNAL**
**NEW DELHI**
**BENCH-VI**

**IB-410/(ND)/2020**

Section: Under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

**In the matter of:**

**CANARA BANK**
*(Erstwhile SYNDICATE BANK)*

Head office at:
112, J.C. ROAD
BENGALURU, KARNATAKA - 560001

Concerned Branch office at:
**Specialized Asset Recovery Management Branch**
CIRCLE OFFICE BUILDING, VIPIN KHAND
GOMTI NAGAR, Lucknow – 226 010
Email: cb5248@canarabank.com

...Applicant/Financial Creditor

**Versus**

**M/s CLARION TOWNSHIPS PVT. LTD. (Under CIRP)**
Through its Resolution Professional
Mr. Mukesh Gupta
Registered office at:
Flat No. 2, F-50, B Madhu Vihar
I.P. Extension, Mandawali, Delhi – 110 092
Email: camukeship@rediffmail.com; cirp.clarion@gmail.com

...Respondent/ Corporate Debtor No. 1

**M/s LINAKS MICROELECTRONICS LTD.**

Registered office at:
12.6KM, Barabanki Road, Chinat
Lucknow, Uttar Pradesh – 227 105
Email: linakspcb@yahoo.com

...Respondent/ Corporate Debtor No. 2

**Coram:**
**SH. P.S.N. PRASAD, Hon'ble Member (Judicial)**
**SH. RAHUL BHATNAGAR, Hon'ble Member (Technical)**

**Counsel for Applicant**: Mr. Abhishek Naik, Advocate
**Counsel for Respondent**: Adv. Abhishek Anand & Adv. Kunal Godhwani for Resolution Professional of Corporate Debtor No. 1, Adv. Dhruv Mathur & Adv. Pranav Agarwal for Corporate Debtor No. 2.

**ORDER**

**Per P.S.N. PRASAD, MEMBER (JUDICIAL)**

**Date: 22.04.2022**

1. This is an application filed by 'M/s Syndicate Bank', through its Authorized Person Mr. Jitendra Singh Badesra, to initiate Corporate Insolvency Resolution Process ("CIRP") against 'M/s Clarion Townships Pvt. Ltd.' and 'M/s Linaks Microelectronics

Ltd.', under Section 7 of the Insolvency and Bankruptcy Code 2016 ("the Code") for the alleged default on the part of the Corporate Debtor ("CD") No. 1, in settling an amount of Rs. 25,69,65,915/- (Rupees Twenty-five crores sixty-nine lakhs sixty-five thousand nine hundred and fifteen only) comprising Rs. 25,57,98,566/- for Term Loan *(principal amount as on 31.12.2019 of Rs. 16,50,00,000/- and Interest thereon of Rs. 9,07,98,566/-)* and Rs. 11,67,349/- for Current account *(principal amount as on 31.12.2019 of Rs. 10,50,696/- and Interest thereon of Rs. 1,16,653/-)*, payable to the Financial Creditor ("FC"). The details of transactions leading to the filing of this application as averred by the FC are as follows:

a. The FC submitted that the CD No. 2 being the owner of the land i.e. Khasra No. 189 at Village – Semra, Pargana Thesil, Dist: Lucknow (UP), ("Project Land") wanted to develop a residential complex on Project Land. For that purpose, CD No.2 entered into a Development Agreement dated 06.04.2012 (modified vide supplementary agreement dated 22.07.2014) with the CD No.1 to develop the residential

complex namely "ROHTAS PLATINA" (Housing Project) on the Project Land. Subsequently, the CD No. 1 approached the FC seeking loan for the purpose of developing the Housing Project on the Project Land owned by the CD No. 2.

b. FC vide sanction letter dated 29.08.2014 sanctioned a term loan of Rs. 30,00,00,000/- (Rupees Thirty Crores only) in favour of CD No. 1. As per the sanction letter, CD No.1 had to repay the loan within 60 months (including 24 months moratorium period) in 12 quarterly installments of Rs. 2,50,00,000/- each. Against the sanctioned loan, CD No. 2 stood as corporate guarantor, guaranteeing repayment of the loan amount with interest in case CD No. 1 defaults in the repayment. That the loan was disbursed to the CD No. 1 in various tranches starting from 30.09.2014 and in toto Rs. 19,00,00,000 was disbursed to the CD No. 1 by the FC as and when required. The CD No. 1 did not make any repayment towards the loan even after the moratorium period. Consequently, the account of the CD No. 1 was

declared as Non-Performing Asset (NPA) by FC on 30.06.2017.

c. That to enforce the security held, the FC filed an Application No. 1289/2019 before the Debt Recovery Tribunal, Lucknow on 02.09.2019 against CD No. 1, its guarantors and CD No. 2 as corporate guarantor. FC also issued notices dated 26.08.2019 to both the CDs demanding payment of the financial debt by 11.09.2019 falling which the FC will be constrained to initiate proceedings against the CDs under the Insolvency and Bankruptcy Code, 2016.

d. That the CDs did not make any repayment of the financial debt. As on 31.12.2019, the CD No. 1 owed a financial debt of Rs. 25,69,65,915/- (Rupees Twenty-five Crores sixty-nine lakhs sixty-five thousand nine hundred and fifteen only). Therefore, the FC has prayed that the present application under Section 7 of Insolvency and Bankruptcy Code, 2016 be admitted and Corporate Insolvency Resolution Process be started against both the CDs.

2. That the CD No. 1 filed its written submission on 13.01.2022 through the Resolution Professional of CD No. 1 in which the following contentions were made:

i. That the CD No. 1 being Clarion Townships Pvt. Ltd. is undergoing Corporate Insolvency Resolution Process (CIRP) vide Order dated 03.05.2021 passed by this Adjudicating Authority in C.P. (IB) No. 638(ND) of 2020 in the matter "M/s Manjula Tripathi & Ors. v. M/s Clarion Townships Pvt. Ltd".

ii. That the CD No. 2, in utter disregard to the Development Agreement dated 06.04.2012, vide an email dated December 06, 2021, written to the Resolution Professional of CD No. 1 represented that the construction on the project land cannot take place through the Resolution Applicant of the CD No.1, even incase a resolution is achieved for CD No.1, which clearly showed the malafide intentions of CD No. 2 to stall the resolution process of CD No.1, which has many allottees to whom the units were allotted. This was also in contravention to their own claim which they had

submitted to the resolution professional of the CD No.1, which though was rejected by the resolution professional.

iii. That the CIRP be initiated against CD No.2 which is critical for the completion of the Project as the land belongs to CD No.2 and therefore, the units can also be handed over to the allottees if the project is completed by CD No.1 (undergoing CIRP).

3. That the CD No. 2 filed its written submission on 17.01.2022 in which the following contentions were made:

i. That the present petition is not jointly maintainable against the answering CD No. 2 as the present case is neither a case of group insolvency nor is a joint venture between the parties. There is no provision under the IBC, 2016 wherein a joint application can be filed against two corporate debtors unless they are shown to be joint venture. *[Bijay Kumar Agrawal v. SBI and Ors. MANU/NL/0032/2020 [Para 22]; Shabad Khan v. Nisus Finance and Investment*

*Manager & Ors. MANU/NL/0251/2020 [Para 9]; Vishnu Kumar Agarwal vs Piramal Enterprises MANU/NL/0003/2019 (Para 32).]*. Further, since the CIRP has already been initiated against the CD No.1 in Company Petition No. IB- 638/ND/2020, the FC cannot be permitted to file the present application to initiate CIRP proceedings against the Corporate Guarantor/ CD No.2.

ii. That the agreement dated 06.04.2012 entered into between the CD No. 1 and the CD No. 2 specifically records that the project is not a joint venture between the parties *(Clause 27 of the agreement dated 06.04.2012).*

> *.....27. "That the first party and the Developer / Second Party have entered into this Agreement on principal to principal basis only and nothing contained herein shall be deemed or construed as constituting a partnership between them or a joint venture between them nor shall the Developer/ Second party and the First Party in association of persons."*

*That a perusal of Clauses 4(a), 4(b), 8(b), 8(c), 8(f), 10(b), 19(b), 25, 26, 27 and 28 of the agreement dated 06.04.2012, clearly indicates that there was no common control, sharing*

*of profits and losses and community of interest in the project between the Corporate Debtor No.1 and the answering CD No. 2 and thus the project cannot be said to be a joint venture.*

iii. That the CD No.1 and the CD No.2 are neither associate companies, nor the CD No.2 is a subsidiary or a holding company of the CD No.1. CD No.2, who is the land owner in the present case had only entered into an agreement for development of the land and is an independent corporate entity having no nexus with the CD No.1. Thus, considering the following tests as laid down by the NCLT Mumbai Bench in its judgment dated 08.08.2019 in State Bank of India Vs Videocon Industries Ltd (CP No. 02/2018) (Para 79(d)(i)) and Para 80) for group insolvency, which has also been relied upon by the NCLAT in Jitender Arora RP of Premia Projects Ltd. Vs Tek Chand & Ors MANU/NL/0501/2021 (Paras 29-31), the CD No. 2 and CD No.1 are not group entities and present petition is liable to be dismissed.

a) Common control
b) Common directors
c) Common assets
d) Common liabilities, etc.

That in this regard the report of the Working Group on Group Insolvency, dated 23.09.2019 also proposes in its recommendations that group insolvency should be made applicable to a corporate group that is defined to include holding, subsidiary and associate companies.

iv. That the Division Bench of the NCLAT in the case "State Bank of India v. Athena Energy Ventures Pvt. Ltd" Company Appeal (AT) (Ins) No. 633 of 2020 permitting simultaneous initiation of CIRP against the Corporate Debtor and the Corporate Guarantor did not notice the law laid down by the aforesaid larger Full Benches of the NCLAT Bijay Kumar Agrawal v. SBI and Ors. MANU/NL/0032/2020 and Shabad Khan v. Nisus Finance and Investment manager & Ors. MANU/NL/0251/2020 which till date is good law. Further the law laid down by the NCLAT in the case of Athena Energy Ventures Pvt. Ltd is not applicable for the reason that it was rendered in the context of the corporate debtors who were in the nature of a joint venture company. Furthermore, the judgement of the NCLAT in Athena Energy

is not good law for the reason that if it ought to have differed with the view taken in Piramal's case, it should have referred the issue for determination by a larger Bench of the NCLAT.

v. That a genuine dispute exists with respect to the claim of the FC due to the fraud and collusion that has taken place between the FC and the officials of the CD No.1 leading to variance in terms of the sanction dated 29.08.2014. The adjudication of the dispute, is not only pending before various forums but investigation has revealed prima facie culpability and collusion of the Applicant Bank. An FIR has been filed against the FC as well as the CD No.1 for defrauding the CD No.2 and in which chargesheet has also been filed and investigation is continuing against the officials of the FC. That chargesheet dated 05.01.2022 has been filed against the promoters/directors of the CD No.1 wherein, the statement of Shri Rajesh Singh (Bank manager of the FC at the relevant point in time), has revealed prima facie culpability and collusion of the FC while disbursing

the loan amount to the CD No.1 (chargesheet dated 05.01.2022 alongwith the statement of Shri Rajesh Singh filed with additional reply dated 15.01.2022 filed by the CD No.2). That a regular suit has been filed by the CD No.2 before the Civil Judge (Senior Division), Lucknow being RSA No. 1930/2019 against the FC as well as the CD No.1 for declaring the guarantee extended by the CD No.2 as void. That the present petition ought not to be admitted until the dispute that is raised by the Applicant is decided which can only be done by the competent court, having jurisdiction to adjudicate such disputes. The NCLT cannot assume jurisdiction of civil courts or criminal courts while adjudicating such complex questions of fact.

vi. That the guarantee of the CD No.2 stands vitiated due to the variance in the terms of the sanction on account of the fraud and collusion that has taken place between the FC and the CD No.1. That the Applicant bank, without any monitoring disbursed numerous installments of loan, through accounts other than the Escrow Account, even

though all receipts relating to the project including that of customers had to be routed through the Escrow Account in terms of the sanction. The FC continued to disburse the loan to the CD No.1 to the tune of Rs. 19 crores, even though the FC had to maintain a Debt Equity Ratio of 2:1 at every stage of release of the loan, in terms of the sanction. The FC disbursed Rs.19,00,00,000/- (Nineteen Crores Only) out of the total sanctioned amount of Rs.30,00,00,000/- (Thirty Crores Only), i.e. 63.33% of the loan amount to the CD No. 1, even though works of approximately 8.33% were found to be constructed on the site from the loan amount that was disbursed by the FC to the CD No. 1. Report of the labour department determining cess, found the developmental work on the site to be merely worth Rs. 4,75,000/-. Further, the FC continued to release the loan amount without monitoring the progress of the project, even though the release of the term loan had to be based on satisfactory physical and financial progress of the project duly evaluated by an empanelled valuer and evaluated by a Chartered Accountant on a quarterly basis

so that the loan amount released would be in proportion to the progress of the project. That the loan amount sanctioned by the FC which could have been utilized by the CD No.1 only for the purposes of the construction of the project, was misutilised and siphoned off by the CD No.1.

vii. That the guarantee extended by the CD No.2 was strictly subject to the terms of the sanction and such obligations were cast upon the FC as its duty which it required to fulfill towards the CD No.2 as surety and any variance in such terms and conditions between the FC and the CD No.2 would release the guarantee extended by the answering Respondent on account of such variance. Section 133 of the Contract Act, 1872 is relevant in this context and is reproduced hereunder:

> *.....133. "Discharge of surety by variance in terms of contract – Any Variance, made without the surety's consent, in the terms of the contract between the principal[debtor] and the creditor, discharges the surety as to transactions subsequent to the variance."*

Further the reliance placed by the FC upon the guarantee dated 27.09.2014 given by the CD No. 2 and the argument that it waived its rights under section 133,134,135,139,141 of the Contract Act, 1872 is completely misconceived since it is settled law that the statutory rights of the surety under section 133 of the Contract Act cannot be waived by it in advance by executing the guarantee agreement. [State Bank of India Vs Machine Well Industries & Ors. MANU/DE/0022/1980. (Paras 31 and 32)]

viii. The FC from the very inception had an intent to defraud the CD No.2 since it allowed the Personal Guarantors of the CD No.1 namely Shri Akhilesh & Shri Jamuna Prasad Rawat (sureties) to part with the properties that were mortgaged to it, against the loan sanctioned.

ix. That the FC has deliberately and maliciously concealed above mentioned material facts, in order to gain an unjust and undue advantage over the CD No. 2 and has played fraud upon this Tribunal. That it is the duty of the FC to

disclose all material particulars while making its case and having failed to do so, the FC is not entitled to any relief whatsoever.

x. That thus there is no debt "due and payable" in fact or in law by the CD No. 2 to establish a "default" towards the claim set by the FC, thus this petition be dismissed by this Tribunal.

4. The FC made following contentions in its written submission dated 13.01.2022:

i. It was emphatically submitted that Ld. Adjudicating Authority while adjudicating an insolvency application under Section 7 of the Code only has to satisfy itself as to whether the concerned application fulfils the criteria stipulated under 7(5)(a) of the Code viz. a default has occurred; application is complete; and no disciplinary proceedings pending against proposed IRP. As such, no other reasons/grounds are required for considering an insolvency application under Section 7 of the code.

ii. It is submitted that the captioned Application has to be admitted against the CD No. 2, as a matter of consequence, as the CD No. 1 had specifically admitted committing default in payment of financial debt owned towards the FC, and CD No. 2, being the corporate guarantor is co-extensively liable for default committed by the CD No. 1 and consequently, is liable for payment of financial debt owned towards the FC. Pertinently, CD No. 2 has also defaulted in re-payment of the financial debt owned towards the FC.

iii. That the CD No. 2 has averred that an FIR No. 762/2019 dated 05.08.2019 has been filled against Pankaj Rastogi, Paresh Rastogi and 'unknown' officers of the bank for acting in collusion. It is submitted that mere filling of FIR against 'unknown' officials of the FC does not render the guarantee agreement executed in favor of the FC by CD No. 2 otiose nor the liability of CD No. 2 towards Creditor is extinguished in any manner whatsoever. Further, the investigation has not been completed and allegations of fraud and collusions against the Financial Creditor and its

'unknown' officials are yet to be proven before an appropriate court of law. Thus, the allegations of fraud and allegation against the FC are mere speculative and a moonshine argument taken by CD No. 2 to somehow escape from the legal liability of paying the FC.

iv. That the CD No. 2 has averred of filing a Civil Suit being RSA No. 1930/2019 before court of Civil Judge (Senior Division), Mohanlalganj, Lucknow for declaration of the guarantee agreement as void and injunct the FC from recovering any amount from it. It is submitted that the said civil suit has been filed as mere afterthought i.e., after receipt of notice dated 26.08.2019 sent by the FC to CD No. 2 seeking payment of financial debt or to face legal action under the Code on failure to make payment. Further, till date no order of injunction against the Financial Creditor has been passed by the Ld. Civil Judge, hence the guarantee agreement dated 27.09.2014 still stand valid and the CD No. 2 is co-extensively liable to pay the financial debt owned towards the FC. The said

action is nothing but a poor and miserable attempt on part of the CD No. 2 to desperately escape the legal liability its owned towards the FC. Furthermore, filing of civil suit against FC is of no consequence for adjudication of an insolvency application under Section 7 of the Code. The law in this regard has been well settled by Hon'ble NCLAT in the matter of Vinaya Exports & Anr. vs. Colorhome Developers Pvt. Ltd. [Company Appeal (AT)(Ins.) No.06/2019].

v. That the CD No. 2's averment that it stands discharged from liability in term of Section 139 of the Indian Contract Act, 1872 on unproven and unsubstantiated grounds of variance in disbursal loan amount by the Financial Creditor cannot be accepted in view of specific waiver of its right while executing the guarantee agreement. The CD No. 2 now cannot be allowed to retract from the promise made under the Guarantee Agreement dated 27.09.2014 when the guarantee is invoked by the FC by exercising its statutory right under the Code.

vi. That CD No. 2 at Para 8 of the Guarantee Agreement dated 27.09.2014 (Pg. 7 of the Additional Compliance Affidavit dated 09.03.2021) had agreed to be treated as 'Principal Debtor' jointly with CD No. 1 and is disentitled or waived all its rights conferred in the capacity of 'surety' under Indian Contract Act, 1872. Extract of Para 8 of the Guarantee Agreement is reproduced herein below: -

> ...*"8. Though as between the Borrower, and the Guarantor, the Guarantor is the surety only, the Guarantor agrees that as between the Bank and the Guarantor, the guarantor is the principal debtor jointly with the Borrower and accordingly, the Guarantor, shall not be entitled to any of the rights conferred as surety by section 133, 134, 135, 139 and 141 or any other relevant provisions of the Indian Contract Act, 1872.*

Further that at Para 3 of the Guarantee Agreement dated 27.09.2014 (Pg. 6 of the Additional Compliance Affidavit dated 09.03.2021), CD No. 2 has conceded that the guarantee shall be continuing guarantee for payment of the ultimate balance due to the FC, irrespective of the said financial accommodation is varied or changed.

Hence, in view of the abovementioned facts and circumstances, the CD No. 2's arguments that it is discharged from the guarantee agreement in terms of Section 139 of the Indian Contract Act, 1972 is highly misplaced and untenable in the eyes of the law and outrightly liable to be rejected by this Adjudicating Authority.

vii. That the Hon'ble NCLAT in the matter of Mrs. Mamatha vs. AMB Infrabuild Pvt. Ltd. & Ors. [Company Appeal (AT)(Ins.) No. 155 of 2018], while holding that joint application is maintainable against two corporate debtors, held that:

*"14. If two corporate debtors collaborate and form an independent corporate entity for entity for developing the land and allotting the premises to its allottee, the application under Section 7 will be maintainable against both of them jointly and not individually against one or other.*

*15. In such case, both the 'Developer' and the "Land Owner', if they are corporate should be jointly treated to be one for the purpose of initiation of 'Corporate Insolvency Resolution Process' against them.*

viii. That Hon'ble NCLAT in another matter i.e., Edelweiss Asset Reconstruction Company Ltd. vs. Gwalior Bypass Projects Ltd. [Company Appeal (AT) (Ins.) No. 1186/2019] held that there is no bar in the Code to proceed against the Principal Debtor as well as the Corporate Guarantor at the same time. The bench referred to the findings in **"State Bank of India Vs. Athena Energy Ventures Pvt. Ltd."** – Company Appeal (AT) (Ins) No. 633 of 2020 dated 24th November 2020 and found that the appeal is required to be allowed:

> *8. ..... We do not find that there is bar of the Financial Creditor to proceed against the Principal Borrower as well as the Corporate Guarantor at the same time, either in CIRPs or file claims in both CIRPs."*

ix. In view of the aforesaid submissions, it is imperative that the captioned Application be admitted by the Ld. Adjudicating Authority and direct the commencement of CIRP of CD No. 2, Linaks Microelectronics Ltd.

5. We have gone through the documents filed by all the parties and have heard the arguments advanced by the counsels. The FC has claimed the default on part of the CD No. 1 for the

Loan amount of Rs. 25,69,65,915/- (Rupees Twenty-five crores sixty-nine lakhs sixty-five thousand nine hundred and fifteen only) comprising of Rs. 25,57,98,566/- for Term Loan (principal amount as on 31.12.2019 of Rs. 16,50,00,000/- and Interest thereon of Rs. 9,07,98,566/-) and Rs. 11,67,349/- for Current account (principal amount as on 31.12.2019 of Rs. 10,50,696/- and Interest thereon of Rs. 1,16,653/-).

6. That the matter was listed for seeking clarification on 30.03.2022 and the Learned counsel for the Financial Creditor has admitted about the merger of Syndicate Bank with Canara Bank with effect from 01.04.2020 and prayed for opportunity to make necessary application for amending the memo of parties accompanied by supporting documents. He was also directed to serve an advance copy to the Respondents vide daily order dated 30.03.2022.

7. Subsequently, the amended memo of parties accompanied by a true copy of gazette notification dated 04.03.2020 of

amalgamation of Syndicate Bank with Canara Bank (with effect from 01.04.2020) were taken on record. The Counsel for Financial Creditor confirmed that the e-mails and amended memo of parties were served on the respondents and they have duly received the same. Further, the Counsel for the Financial creditor has invited the attention of this Adjudicating Authority to Clause 4(8) and 4(9) of the Scheme. We are satisfied that the application is in order now.

8. That during the hearing of this Application, the CD No. 1 was placed in the rigors of CIRP vide Order dated 03.05.2021 of this Adjudicating Authority passed in the matter of "Ms. Manjula Tripathi & Ors. vs. M/s Clarion Township Pvt. Ltd. [CP(IB) No. 638(ND)/2020]". Since then, the CD No. 1 has been represented through the Resolution Professional, Sh. Mukesh Gupta.

9. The documents submitted and the submissions made by the FC and the CDs clearly substantiate the FC's claim that the CD No.1 has defaulted on repayment of loan amount. That the

CD No. 2 being a Corporate Guarantor of CD No.1 is liable to repay the loan to FC. A Guarantee Agreement dated 27.09.2014 (Pg. 4-9 of Additional Affidavit dated 09.03.2021 [e-filling no. 0710102/01247/2020/6 dated 09.03.2021]) was executed in favor of the FC.

10. That the arguments of CD No. 2 regarding validity of the guarantee, be it as it may, do not have a significant bearing on the matter. Further, the outcome of allegations of fraud against FC have not been substantiated by any material evidence.

11. That the CD No.2 had contended that the FC had an intent to defraud as it also allowed the Personal Guarantors of the CD No.1 to part with the properties mortgaged to it. This matter does not seem to be of much relevance for consideration by this Adjudicating Authority in an application under section 7 of the IBC, 2016.

12. That it is relevant to mention the decision of Hon'ble Supreme Court of India in the matter of Innoventive Industries Limited

Vs. ICICI Bank & Anr. Civil Appeal No. 8337-8338 of 2017 wherein it was stated that Section 7 application must be admitted if the default of a debt has occurred and the application is complete with respect to the requirements of the Code.

> *28..... It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", **which may also include a disputed claim**, is not due. A debt may not be due if it is not payable in law or in fact. **The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete**, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.*

13. That that CD No.2 has opposed this application filed by FC by relying on the judgement of the NCLAT in the case of "Vishnu Kumar Agarwal vs. Piramal Enterprise Ltd." – CA (AT) (Ins.) No. 346 & 347 of 2018 dated 8th January, 2019 where

it was held that once the petition under Section 7 of IBC is filed against Principal Debtor/Co-Guarantor and CIRP has been initiated, the FC cannot file another Application on the very same set of claim. That it is relevant to mention a later decision of NCLAT in the matter of **"State Bank of India Vs. Athena Energy Ventures Pvt. Ltd."** – Company Appeal (AT) (Ins) No. 633 of 2020 dated 24th November 2020 wherein the earlier decision of Piramal was analysed.

> *12....Considering the issues which were before this Tribunal when matter of Piramal was decided, it is clear that the Issue No.2 was relating to question whether CIRP can be initiated against two Corporate Guarantors simultaneously for same set of debt and default. The issue was not whether Application can be filed against the Principal Borrower as well as the Corporate Guarantor. The observations made in para – 32 of the Judgement that* ***second application for same set of claim and default cannot be admitted against the Corporate Guarantor or Principal Borrower was not an issue in the matter of Piramal.***
>
> *13....Apart from this, the observations in the* ***Judgement in the matter of Piramal do not appear to have noticed Sub-Sections 2 and 3 of Section 60 of IBC.*** *It would be appropriate to reproduce Section 60(1) to (3) which reads as under:-*

***"60. Adjudicating Authority for corporate persons.–***

*(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or [liquidation or bankruptcy of a corporate guarantor or personal guarantor of such corporate debtor] shall be filed before such National Company Law Tribunal.*

*(3) An insolvency resolution process or [liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor] pending in any Court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor."*

*If the above provisions of Section 60(2) and (3) are kept in view, it can be said that IBC has no aversion to simultaneously proceeding against the Corporate Debtor and Corporate Guarantor.* ***If two Applications can be filed, for the same amount against Principal Borrower and Guarantor keeping in view the above provisions, the Applications can also be maintained.*** *It is for such reason that Sub-Section (3) of Section 60 provides that if insolvency resolution process or liquidation or bankruptcy proceedings of a Corporate Guarantor or Personal Guarantor as the case may be of the Corporate Debtor is pending in any Court or Tribunal, it shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or*

*liquidation proceeding of such Corporate Debtor. Apparently and for obvious reasons, the law requires that both the proceedings should be before same Adjudicating Authority.*

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

*the Creditor receives debt due from the Borrower/Guarantor in the respective CIRP that the same should be taken note of and adjusted in the other CIRP.*

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

*24....The scheme of Sections 60(2) and (3) is thus clear – the moment there is a proceeding against the corporate debtor pending under the 2016 Code, any bankruptcy proceeding against the individual personal guarantor will, if already initiated before the proceeding against the corporate debtor, be transferred to the National Company Law Tribunal or, if initiated after such proceedings had been commenced against the corporate debtor, be filed only in the National Company Law Tribunal.*

When Hon'ble Supreme Court was dealing with Section 60(2), it was in the context of bankruptcy of Personal Guarantor and the Act 26 of 2018 was yet not published. The above para – 24 of the Judgement in the matter of Ramakrishnan can be conveniently read keeping in view the substituted provisions as per Act 26 of 2018. In place of Personal Guarantor, one can

read "Corporate Guarantor" and with suitable changes, scheme of Section 60(2) and (3) can be appreciated from that angle also.

15. Thus, from above mentioned judgements, it is clear that in the present matter, CIRP can be proceeded against the Guarantor. The material placed on record clearly shows that CD had availed the credit facility and has committed default in repayment of the outstanding loan amount to FC. We are satisfied that the present application is complete in all respects and the FC is entitled to claim its outstanding financial debt from the corporate guarantor.

16. It is thus seen that the requirement of sub-section 5 (a) of Section 7 of the code stands satisfied as default has occurred, the present application filed under Section 7 is complete. In light of the above discussion, after giving careful consideration to the entire matter, and after hearing the arguments of the parties and upon appreciation of the documents placed on record to substantiate the claim, this

Tribunal **admits** this petition and initiates CIRP on the CD No. 2 i.e., Linaks Microelectronics Ltd with immediate effect.

17. Referring to what has been observed by Insolvency Law Committee in its Report of February, 2020 (Part 7 of the Report):

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

Keeping in view the above recommendation of ILC, The Interim Resolution Professional/ Resolution Professional of CD No. 2 is directed to closely coordinate with the Interim Resolution Professional/ Resolution Professional of CD No.1 to remain updated about any recovery of the claim of FC from CD No.1 and to accordingly revise the claim amount of FC in CD No.2

to ensure that the FC should not recover an amount (collectively from both CDs) which is more than what is due to him. FC is also directed to inform the IRP/RP in case of any recovery from any of the CDs and ensure that its total recovery from both CDs is limited to its total debt/claim.

18. Sub-section (3) (b) of Section 7 mandates the financial creditor to furnish the name of an Interim Resolution Professional. In compliance thereof the FC has proposed the name of Mr. Bhoopesh Gupta, for appointment as Interim Resolution Professional having registration number IBBI / IPA-001 / IP-P-01468/ 2018-19 / 12271, Address at: 645A/533B, Janki Vihar Colony, Sector-I, Prabhat Chauraha, Jankipuram, Lucknow, Uttar Pradesh -226031; email - id cabhoopesh@rediffmail.com. Mr. Bhoopesh Gupta has agreed to accept the appointment as the interim resolution professional and has signed a communication in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Accordingly, it is seen that the requirement of Section 7 (3) (b) of the Code has been satisfied.

19. It is thus seen that the *requirement of sub-section 5 (a) of Section 7 of the code* stands satisfied as default has occurred, the present application filed under Section 7 is complete, and as no disciplinary proceeding against the proposed IRP is pending.

20. Section 16(1) and Section 16 (2) of the Code mandate that the Insolvency Professional proposed by the Financial Creditor shall be appointed as the Interim Resolution Professional (IRP) by the Adjudicating Authority (Tribunal) if no disciplinary proceedings are pending against him. Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, require the proposed Interim Resolution Professional to make a declaration in Form 2 confirming his eligibility to be appointed as a Resolution Professional as well as a declaration confirming that no disciplinary proceedings are pending against him in the Insolvency and Bankruptcy Board or elsewhere. The proposed

Interim Resolution Professional Mr. Bhoopesh Gupta has submitted the declaration in Form 2 dated 27.01.2020. The proposed Interim Resolution Professional Mr. Bhoopesh Gupta has also submitted an "Authorisation for Assignment" dated 30/12/2019 issued by Insolvency Professional Agency.

21. It is pertinent to mention here that the Code requires the adjudicating authority to only ascertain and record satisfaction in a summary adjudication as to the occurrence of default before admitting the application. The material on record clearly goes to show that respondent had availed the credit facilities and has committed default in repayment of the outstanding loan amount.

22. We are satisfied that the present application is complete in all respects and the applicant financial creditor is entitled to claim its outstanding financial debt from the corporate debtor and that there has been default in payment of the financial debt.

23. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is admitted. Mr. Bhoopesh Gupta having registration number IBBI / IPA-001 / IP-P-01468/ 2018-19 / 12271 is appointed as an Interim Resolution Professional.

24. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (three days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

25. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

> *"(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*

*(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*

*(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*

*(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

26. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

27. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any preferential/ undervalued/ tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional shall make appropriate application to this Adjudicating Authority (Tribunal) with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by

Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

28. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.

**(RAHUL BHATNAGAR)**
**MEMBER (TECHNICAL)**

**(P.S.N. PRASAD)**
**MEMBER (JUDICIAL)**