

National Company Law Appellate Tribunal,
Chennai Bench
TA No. 178 of 2021
Company Appeal (AT) (Insolvency) No. 503 of 2020

(Arising out of order dated 10th October, 2019 passed by National Company Law Tribunal, Division Bench, Chennai in IBA/685/2019)

IN THE MATTER OF:

1. **Mr. Babumanoharan
Jai Kumar Christhurajan, R/O
No. 34, Ranganathan Avenue,
Uthandi, East Coast Road,
Chennai 600119.**

...Appellant

Versus

1. **Indian Bank, Represented through its Deputy
General Manager, Thousand Lights Branch,
611 Anna Salai, Kannammai Building,
Chennai, T.N., 600006**
2. **M/s Jeppiaar Cements Pvt. Ltd.
Represented by its IRP Mr. Umesh Garg, Old
No. 11, New No. 19, Venkatraman Streed,
Srinivas Avenue, Bishop Garden Extension,
R.A. Puram, Chennai, T.N., 600028**
3. **Mr. Umesh Garg, Interim Resolution
Professional of M/s Jeppiaar Cements Pvt.
Ltd. Having his office at M/s Excel
Insolvency Professional Pvt. Ltd., 115 Devika
Tower, Nehru Place, New Delhi
110019**

...Respondents

Present:

- For Appellant:** **Mr. AniruddhaDeshmukh, Advocate**
 Mr. VikramVijayraghavan, Advocate
- For Respondents:** **Mr. Aiyar&Dolia, Advocate R1**
 Mr. RamaswamyMeyyappan, R2, R3
 Ms. Harshini Jothiraman.K.P,R2, R3

Mr. Pramodh Kumar, Advocates R2 & R3
Mr. Jayesh B Dolia, Advocate R3
Mr. Abhishek Anand, Advocate R2 & R3 &
For RP Mr. Umesh Garg, R3.

J U D G M E N T
(31.03.2022)

KANTHI NARAHARI, MEMBER (TECHNICAL)

Preamble:

The Present Appeal is filed against the order of the Adjudicating Authority (National Company Law Tribunal, Division Bench, Chennai) in IBA No. 685 of 2019 dated 10.10.2019 whereby the Adjudicating Authority allowed the Application of the first Respondent herein filed under Section 7 of the I & B Code, 2016 and appointed IRP to conduct the CIRP of the Second Respondent.

Brief Facts:

Appellant's Submissions:

2. The Learned Counsel for the Appellant submitted that the Appellant is the former Director of Respondent No.2 which is an unlisted Pvt. Ltd. Company. The 1st Respondent i.e. the Indian Bank initiated proceedings under Section 7 of the I & B Code, 2016 against the 2nd Respondent herein who is an Corporate Guarantor

of M/s Jeppiaar Power Corporation Ltd. for default in payment of term loan of Rs. 92.50 Crore by the Principal Borrower i.e. M/s Jeppiaar Power Corporation Ltd. Further, the term loan facility was reviewed and additional facility of Rs. 48.50 Crore was made available to the Principal Borrower/Debtor.

3. It is submitted that due to adverse business environment and mounting losses the Principal Debtor defaulted in repayment to the Respondent No. 1 Bank. Hence, the Respondent No.1 filed Application against the Principal Borrower under Section 7 of the I & B Code, 2016 in IBA No. 128 of 2019 and the Adjudicating Authority admitted the said Application on 04.03.2019. Thereafter, the 1st Respondent filed OA 182 of 2019 before the DRT- II Chennai against the Principal Borrower as well as the 2nd Respondent inter alia seeking a recovery certificate to the extent of Rs. 150.26 Crore jointly and severally.

4. It is submitted that after initiating proceedings against the Principal Borrower before the Adjudicating Authority (NCLT, Chennai) by filing Section 7 application, the 1st Respondent initiated

proceedings against the 2nd Respondent i.e. the Corporate Guarantor for showing the default amount of Rs. 147,89,38,608/- which is the exact same sum that the 1st Respondent has claimed against the Principal Borrower.

5. In the light of the ratio of the Judgement of this Tribunal in 'Piramal Enterprises Ltd.' the application filed against the 2nd Respondent i.e. the Corporate Guarantor is not at all maintainable.

6. It is submitted that having initiated proceedings against the Principal Borrower and the Present Proceedings against the Corporate Guarantor are void ab-initio and the same cannot be allowed to "double-dip" in respect of the same amount.

7. It is submitted that the Adjudicating Authority failed to note that there is a distinction between the initiation of the proceedings under the IBC against the Principal Borrower and the Corporate Guarantor and the continuation of the two independent proceedings against the Corporate Guarantor and Principal Borrower and erred in observing that the Hon'ble Supreme Court has stayed the order of this Tribunal in Piramal Enterprises Ltd.

8. The Ld. Counsel for the Appellant relied upon the Judgments in the matter of (1) “*Dr. Vishnu Kumar Agarwal vs. Piramal Enterprises Ltd.*” in CA (AT) (Ins) No. 346 of 2018 dated 08.01.2019. (2) “*M/s SEW Infrastructure Ltd. vs M/s Mahendra Investment Advisors Pvt. Ltd.*”(3) “*Shabad Khan vs. M/s Nisus Finance and Investment Manager & Ors.*” in CA (AT) (Ins) No. 82 of 2020. (4) “*Sagufa Ahmad & Ors. vs Upper Assam Plywood Products Pvt. Ltd.*” (SC) in Civil Appeal Nos. 3007-3008 of 2020 dated 18.09.2020. (5) “*Laxmi Pat Surana vs. Union Bank of India*” Civil Appeal No. 2734 of 2020 (SC) dated 26.03.2021”.

1st Respondent’s Submissions:

9. The Learned Counsel appearing for this Respondent submitted that the present Appeal is not maintainable for the reason that the Appellant has not filed the Appeal within the time prescribed under law and filed beyond the period of limitation and therefore the appeal is liable to be dismissed on this ground itself.

10. It is submitted that the Adjudicating Authority admitted the Application filed by them under Section 7 in IBA No. 685 of 2019 on

10.10.2019 and appointed an IRP to conduct CIRP against the 2nd Respondent. The Appellant was aware of the order being passed by the Adjudicating Authority on 10.10.2019 by participating in the 2nd CoC meeting held on 10.12.2019 wherein he has affixed signatures in the attendance sheet for having participated in the meeting thus, the Appellant is having the knowledge of admitting the application on 10.10.2019 however, the Appellant applied the certified copy of the order and obtained it on 27.02.2020 which is an afterthought and cannot be entertained.

11. It is submitted that the Appellant has not given any valid reasons for delay and under Section 61 of the IBC the Appellate Authority can condone the delay of 15 days and not beyond the said period.

12. It is admitted by the Appellant itself that he is a Former Director of the 2nd Respondent and the 2nd Respondent, offered its Corporate Guarantee loan availed by the Principal Borrower/Debtor. The Ld. Counsel submitted that the Appellant relied upon two Judgments of this Tribunal in the case of "*Piramal*

Enterprises Ltd.” and *“Sew Infrastructure Ltd.”* is concerned the said Judgments are Per-incuriam. Even Section 31 of IBC does not prohibit or bar the Financial Creditor to proceed against the Corporate Debtor and Corporate Guarantor simultaneously. In fact Section 5(8) of IBC defines Financial Debt and sub clause (i) of Section 5(8) clearly states that the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause. Thus, for any amount borrowed against payment of interest, if guarantee is given the Financial Creditor has right to proceed against the Corporate Debtor or Corporate Guarantor irrespective of the fact that proceedings against the Corporate Debtor are over as long as Financial Creditor has not got maximisation of its money value.

13. It is submitted that the 2nd Amendment of 2018 to the IBC an explanation has been introduced under Section 14 to state that moratorium shall not be applicable to a guarantor of Corporate Debtor and there are several orders of various courts/tribunals to hold that order of moratorium under Section 14 will be applicable

only to proceedings against the Corporate Debtor not against guarantor. In this regard a reliance is placed “*SBI vs BS Rajendra Kumar*” Company Appeal (AT) (I) 87-91 of 2018 and “*ICICI Bank Ltd. vs Vista Steel Pvt. Ltd.*”

14. It is submitted that in the case of Piramal the issue concerning regarding whether a separate applications are maintainable against two Corporate guarantors for their debt and default.

15. It is submitted that as per Section 128 of Indian Contract Act, 1872 it is clearly establishes that the Liability of the surety is co-extensive with Principal Debtor, joint and several. It is submitted that there is no provision in the IBC restraining the Financial Creditor from initiating CIRP’s simultaneously against Principal Debtor and Guarantor or filing a claim in the CIRP’s against both Principal Borrower and Guarantor.

16. The Law laid down by the Hon’ble Supreme Court in the case of “*SBI vs. Ramakrishna & Anr.*” (2018) 17 SCC 394 which held that moratorium imposed upon proceedings against Corporate Debtor

under Section 14 is not extendable to the proceedings against the Guarantor of the Corporate Debtor.

17. In view of the reasons as stated above the Ld. Counsel prayed this Bench to dismiss the Appeal.

2nd and 3rd Respondent's Submissions:

18. The Ld. Counsel appearing for these Respondents submitted that the Present Appeal is time barred and liable to be dismissed at the very threshold by this Tribunal. The order was delivered on 10.10.2019 and the certified copies of the same were made available to all the parties involved at that time by the Registry of NCLT, Chennai Bench. It is submitted that these Respondents have received the copies of the order immediately after the date of pronouncement. Therefore, the Appeal is barred by limitation for the reason that the Appellant has not shown any genuine and bona fide reasons for filing the Appeal beyond the time the period prescribed for filing the appeal. In this regard the Ld. Counsel relied upon the Judgment of this Tribunal in Company Appeal (AT) (Ins) No. 268 of 2020 in the matter of "*office of the specified officer, SEZ*

vs. Mr. V. Venkatachalam, RP”. It is submitted that this Tribunal held that as a period of limitation will have to be reckoned from the date of knowledge of such order having been passed by the Adjudicating Authority. From the aforesaid judgment the date of knowledge was sufficient to state that the limitation period in motion. The Appellant participated at the meeting held on 22.10.2019 at the factory premises of the 2nd Respondent and subsequently at the CoC meeting convened on 18.12.2019 and the Appellant had complete knowledge of the status of the CIRP initiated against the 2nd Respondent.

19. The Adjudicating Authority rightly admitted the application under Section 7 filed by the 1st Respondent and initiated CIRP against the 2nd Respondent who is a Corporate Guarantor and the 1st Respondent has every right to invoke against the Corporate Guarantor since the Corporate Guarantor is co-extensive of Principal Debtor/Borrower. However, the Ld. Counsel for the Appellant relied upon the Judgment of this Tribunal passed in “Re-

Piramal” is concerned, the same is pending before the Hon’ble Supreme Court, and ordered status-quo to be maintained.

20. It is submitted that accordingly the Ld. Counsel for the Appellant wrongfully considered in “Re-Piramal” Judgment as referred to, be one in personam and not in rem as it rightfully dictates. However, the matter still remains to be pondered upon and decided by the Apex court and thus reliance on the issues raised before the Apex court would be considered premature and a faulty understanding of the applicability of the judgment passed by this Tribunal.

21. It is submitted that the contract of guarantee as envisaged by the Indian Contract Act, 1872 and the agreement of guarantee dated 07.10.2016 itself provides that the guarantor in this case the 2nd Respondent shall be jointly and severally liable to pay the 1st Respondent, the debt owed by the Principal Borrower. The Liability of the 2nd Respondent shall be co-extensive to that of the Principal Borrower. The 1st Respondent was always at liberty to proceed with

either jointly or severally against both, the Principal Borrower or the Corporate Guarantor.

22. It is submitted that the provisions contained in Sections 5(8)(i), 14 and 31 are to be read harmoniously with each other and thereby further the objective of the code enabling the maximisation of value in a time bound manner. The Ld. Counsel also relied upon the Judgment of the Hon'ble Supreme Court in "*State Bank of India vs. Ramakrishna & Anr. (2018) 17 SCC 394*" held that the moratorium imposed on the Corporate Debtor would not extend to the proceedings against the Corporate Guarantor. This was further substantiated by an amendment to the I & B Code thereafter.

23. In view of the reasons as stated above the Ld. Counsel prayed this Bench to dismiss the Appeal as it devoid of any merit.

24. The Respondents 1, 2 & 3 relied upon the Judgment of this Tribunal on the point of limitation in the matter of "*Office of the specified officer, Special Economic Zone vs. Mr. V. Venkatachalam*". On the point of simultaneous initiation of CIRP against the Principal Borrower and Corporate Guarantor, the Ld. Counsel for

the Respondents relied upon the following judgments viz, the Hon'ble Supreme Court in (1) "*Laxmi Pat Surana vs. Union bank of India*" in Civil Appeal No. 2734 of 2020 dated 26.03.2021, (2) "*State Bank of India vs. Ethena Energy*" in CA (AT) (Ins) No. 633 of 2020 dated 24.11.2020, (3) "*Edelweiss Asset Reconstruction Company vs. Gwalior Bypass Projects in CA(AT) (Ins) No. 1186 of 2019* dated 08.03.2021, (4) "*State Bank of India vs. Animesh Mukhopadhyay in CA (AT) (Ins) No. 186 of 2021* dated 08.03.2021, (5) "*Lalit Kumar Jain vs. Union of India & Ors.*" transferred case (Civil No. 245 of 2020) dated 21.05.2021.

Analysis/Appraisal:

25. Heard the Ld. Counsel appeared for the respective parties perused the pleadings, documents and citations relied upon by them. After analysing the pleadings the moot points for consideration is:

- (i) Whether the Appeal is filed within the time as prescribed under Law?

(ii) Whether simultaneous proceedings can be initiated against the Principal Borrower/Debtor and Corporate Guarantor?

26. Now we deal with the Limitation aspect:

The Respondent's raised strong objection that the Appeal filed by the Appellant is beyond the period of limitation as prescribed under Section 61 of the I & B Code, 2016 hence the appeal needs to be dismissed in limine. According to Sub-Section 1 of Section 61 of the I & B Code, 2016 any person aggrieved by the order of the Adjudicating Authority may prefer an appeal to the National Company Law Appellate Tribunal. Sub- Section 2 of Section 61 of I & B Code, 2016 every appeal under Sub-Section 1 shall be filed within 30 days before the National Company Law Appellate Tribunal. However, a proviso to Sub-section (2), empowers the NCLAT to allow an Appeal to be filed after the expiry of the said period of 30 days, if it is satisfied that there was sufficient cause for not filing the Appeal but such period shall not exceed 15 days.

27. From the above provision of law the Appeal shall be filed against the order of the Adjudicating Authority within a period of 30 days mandatorily. The Appellant in the Appeal stated that the certified copy of the order dated 10.10.2019 was made available to the Appellant only on 27.02.2020. It is also stated that the certified copy of the order was sent to the Erstwhile Registered Office of the Respondent No.2 which had been vacated, consequently the impugned order was returned and went back to the Registry of the Adjudicating Authority. It is stated that the Respondent No.2 was not represented by legal Counsel before the Adjudicating Authority as on the date of hearing on merits of the case. However, in the order dated 10.10.2019 one Mr. S. Shanmuga Surya's name reflects in the preamble of the order reflecting that as if the said Mr. S. Shanmuga Surya appeared for the Corporate Debtor i.e. the 2nd Respondent herein. The said person is only a Director of the Corporate Debtor and not a Advocate.

28. The Ld. Counsel for the Respondent's contend that the order was delivered on 10.10.2019 and the period of time for filing of

Appeal as per Section 61 is only a 30 days which can be extendable by a period of 15 days provided sufficient cause is shown. Having taken note of the facts with regard to the limitation aspect it is an admitted fact that the order was delivered on 10.10.2019 and it is a fact that the Corporate Debtor was represented by one Mr. S. Shanmuga Surya on behalf of the Corporate Debtor. The Respondents vehemently contend that the order was pronounced on 26.09.2020 in open court amongst others, in the presence of Suspended Director of the 2nd Respondent i.e. Mr. S. Shanmuga Surya and the said order was Delivered on 10.10.2019. It is also stated that the certified copies of the same were made available to all the parties involved at the time by the Registry of the NCLT. It is stated that the Appellant was aware of the order of CIRP and participated in the 2nd meeting of CoC held on 18.12.2019 which is evident from the attendance sheet. Even if the date of his knowledge is taken as 18.12.2019, the Appellant intentionally failed to procure a certified copy of the impugned order at the earliest. Therefore, the Respondents contend that the for the purpose of filing of the Appeal

under Section 61, the period of limitation should be calculated from 18.12.2019 and not on the date of receipt of the order by the Appellant on 27.02.2020.

29. This Tribunal perused the attendance sheet of the 2nd meeting of CoC of the 2nd Respondent held on 18.12.2019 at 11.00 AM. From the attendance sheet it is evident that one Mr. S. Shanmuga Surya affixed his signature on the attendance sheet and mentioned the time in as 11.00 AM and time out as 2.00 PM. The said fact emerges that the Director of the Corporate Debtor is aware of the order of the Adjudicating Authority dated 10.10.2019. Even the 1st CoC meeting held on 11.11.2019, Mr. S. Shanmuga Surya attended the said meeting and affixed his signature. Therefore, there is no denial with regard to the attendance of the Director of the Corporate Debtor and having complete knowledge of the impugned order. Therefore, this Tribunal taking into consideration the knowledge i.e. from 18.12.2019, the Appeal should have been preferred within a period of 30 days and the outer limit of 15 days further total a period of 45 days from the date of knowledge and the said 45 days

expires on 01.02.2020 whereas the present Appeal is filed on 18.03.2020 i.e. after 45 days from the date of knowledge, which is beyond the period of limitation. It is to state that this Tribunal does not have the power to condone the delay beyond the period of 45 days including the outer limit and if sufficient cause is shown by the Appellant. In the present Appeal the Appellant has not shown any sufficient cause for delay in filing the instant Appeal. Therefore, this Tribunal dismisses the Appeal on the ground that the Appeal is filed beyond the period of limitation as provided under the Law. This finding is supported by Judgment of this Tribunal in “*Office of the Specified Officer Special Economic Zone, Warora, District Chandrapur, Maharashtra vs. Mr. V. Venkatachalam Resolution Professional of Sai Wardha Power Generation Ltd.*” wherein it is held at paragraph 7:

“7. It is also manifestly clear that the outer limit of 45 days cannot be transgressed to enable an appellant to maintain an appeal under this provision. If the Appeal have been preferred beyond statutory period of 30 days and extended period of 15 days i.e. total 45 days, this Appellate Tribunal will have no jurisdiction to entertain such Appeal.”

Accordingly, the issue is answered against the Appellant. However, this tribunal intend to decide the Appeal on merits in the next issue.

30. Now we advert to issue no. (ii):

The Adjudicating Authority admitted the application filed by the 1st Respondent herein against the 2nd Respondent i.e. M/s Jeppiaar Cements Pvt. Ltd. claiming a sum of Rs. 147,89,38,608.49/- outstanding as on 21.12.2018. The Corporate Debtor against whom CIRP Proceedings were initiated is a Corporate Guarantor of the Principal Borrower/Debtor. The main grievance of the Appellant is that the 1st Respondent already initiated proceedings under Section 7 of the I & B Code against the Principal Borrower and the said proceedings are continuing and initiation of proceedings against the 2nd Respondent who is a Corporate Guarantor is against the Judgment of this Tribunal in 're-Piramal' and contended that the Financial Creditor cannot initiate proceedings under Section 7 simultaneously against the Principal Borrower and Corporate Guarantor. This Tribunal made

note of the impugned order. Since, the Appellant strongly relies upon the Judgment of this tribunal in Piramal, this tribunal intend to refer to the said judgment passed in “*Company Appeal (AT) (Ins) No. 346 of 2018 in “Dr. Vishnu Kumar Agarwal vs. M/s. Piramal Enterprises Ltd.” dated 08.01.2019*” whereby this tribunal held in paragraph 32 which is extracted here at:

“32. There is no bar in the ‘I & B Code’ for filing simultaneously two applications under Section 7 against the ‘Principal Borrower’ as well as the ‘Corporate Guarantor(s)’ or against both the ‘Guarantors’. However, once for same set of claim application under Section 7 filed by the ‘Financial Creditor’ is admitted against one of the ‘Corporate Debtor’ (Principal Borrower’ or ‘Corporate Guarantor(s)'), second application by the same ‘Financial Creditor’ for same set of claim and default cannot be admitted against the other ‘Corporate Debtor’ (the ‘Corporate Guarantor(s)’ or the ‘Principal Borrower’). Further, though there is a provision to file joint application under Section 7 by the ‘Financial Creditors’, no application can be filed by the ‘Financial Creditor’ against two or more ‘Corporate Debtors’ on the ground of joint liability (‘Principal Borrower’ and one ‘Corporate Guarantor’, or ‘Principal Borrower’ or two ‘Corporate Guarantor’s or one ‘Corporate Guarantor’ and other ‘Corporate Guarantor’), till it is shown that the ‘Corporate Debtors’ combinedly are joint venture company”.

31. On the other hand the Ld. Counsel for the Respondents contend that the said judgment of this Tribunal in Piramal, assailed before the Hon'ble Supreme Court and the Hon'ble Supreme Court ordered to maintain status quo to be maintained by the parties as it exists on that day by an order dated 01.02.2019. Therefore, the Appellant cannot rely upon the said judgment. Before addressing the issue this Tribunal intends to refer to certain provisions of I & B Code, 2016 in connection with this issue.

Chapter I of Part-II of the Act deals with Insolvency Resolution and Liquidation for Corporate Persons. Section 5 there of deal with definitions and Sub-Section 5 of Section 5 defines (Corporate Applicant). However, by way of Act 26 of 2018, Sub-Section 5 A has been inserted with effect from 06.06.2018. The Sub-Section 5 A i.e. Corporate Guarantor “means a Corporate Person who is the surety in a contract of Guarantee to a Corporate Debtor”. Whilst, the ‘Corporate Guarantor’ who is the surety in a contract of guarantee to a Corporate debtor is amenable to the proceedings to be initiated by the Creditor.

In this regard, it is apt to note that Sub-Section 8 of Section 5 defines 'Financial Debt' means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes (i) the amount of any liability in respect of any of the guarantee or/ indemnity for any of the items refer to in sub-clauses (a)to(h) of this clauses. From the definition of Financial Debt the guarantee also can be considered as a part of Financial Debt.

Section 60 of I & B Code, 2016:

Section 60 deals with Adjudicating Authority for Corporate Persons. Sub-Section (1) read as “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”. Sub-Section (2) read as “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 , as the case may be, of such Corporate Debtor) shall be filed before such National Company Law Tribunal”.

The above amendment made by incorporating the word Corporate Guarantor or Personal Guarantor by substituting Act, 26 of 2018 w.e.f. 06.06.2018. Therefore, it is significant to note that as per the said Sub-section (2) of Section 60 the jurisdiction for initiation of CIRP Proceedings is the same Adjudicating Authority where a CIRP or liquidation proceedings of a Corporate Debtor is pending i.e. NCLT having the territorial jurisdiction. From the above provision it is clear that there is no bar initiation of CIRP proceedings against Corporate Guarantor or Personal Guarantor as the case may be even though a CIRP or liquidation proceedings of the same Corporate Debtor is pending.

Section 14 of the Code deals with moratorium. Sub-section (1) thereof empowers the Adjudicating Authority who shall by order declare moratorium for prohibiting all of the following on the Insolvency Commencement date namely; Clauses (a) to (d) of Sub-section (1) and Sub-section (4). However, as per Sub-section (2) and (2A) certain things shall not be interrupted and to be continued. From the said provision, it is evident that there is no prohibition under the above moratorium with regard to either Personal Guarantor or Corporate Guarantor. Therefore, the Corporate Guarantor is out of the clutches of moratorium when initiated against the Principal Borrower to whom the Corporate Guarantor extended its surety to the liability of the creditor.

The Hon'ble Supreme Court in "*Laxmi Pat Surana vs. Union Bank of India & Anr.*" in Civil Appeal 2734 of 2020 dated 26.03.2021 held that the right or cause of action would ensure to the lender (Financial Creditor) to proceed against the Principal Borrower as well as the Guarantor in equal measure in case they commit default

in repayment of the amount of debt acting jointly and severally and held at paragraph 19 as under:

“19. Indubitably, a right or cause of action would ensure to the lender (Financial Creditor) to proceed against the principal borrower, as well as the guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default borrower fails to discharge his obligation in respect of amount of debt. For, the obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as predicated in Section 128 of the Contract Act. As a consequence of such default the status of the guarantor metamorphoses into a debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) of the Code. For, as aforesaid, expression “default” has also been defined in Section 3(12) of the Code to mean non-payment of debt when whole or any part or instalment of the amount of debt has become due or payable and is not paid by the debtor or the corporate debtor, as the case may be.

Also, the Hon’ble Supreme Court dealt with the provision of Clause (i) of Section 5 (8) of the Code and held as under:

“it is so provided in sub clause (i) of Section 5 (8) of the Code to take within its ambit a liability in relation to a guarantee offered by the Corporate Person as a result of the default committed by the Principal Borrower”.

32. Further, the Hon'ble Supreme Court in the above Judgment held that there is no reason to limit the width of Section 7 of the Code despite law permitting initiation of CIRP against the Corporate Debtor, if and when default is committed by the Principal Borrower. The liability and obligation of the guarantor to pay the outstanding dues would get triggered coextensively.

33. Section 128 of the Indian Contract Act, 1872 which deal with Surety's liability- means - The liability of the surety is co-extensive with that of the Principal Debtor, unless it is otherwise provided by the Contract.

34. Further, the Hon'ble Supreme Court in above judgment at paragraph 23 held as under:

“23. To get over this position, much reliance was placed on Section 5(5A) of the Code, which defines the expression “Corporate Guarantor” to mean a corporate person, who is the surety in a contract of guarantee to a corporate debtor. This definition has been inserted by way of an amendment, which has come into force on 06.06.2018. This provision, as rightly urged by the respondents, is essentially in the context of a corporate debtor against whom CIRP is to be initiated in terms of the amended Section 60 of the Code, which amendment is introduced by the same Amendment Act of 2018. This change was to empower NCLT to deal with the

insolvency resolution or liquidation processes of the corporate debtor and its corporate guarantor in the same Tribunal pertaining to same transaction, which has territorial jurisdiction over the place where the registered office of the corporate debtor is located. That does not mean that proceedings under Section 7 of the code cannot be initiated against a corporate person in respect of guarantee to the loan amount secured by person not being a corporate person, in case of default in payment of such a debt”.

35. The Hon’ble Supreme Court further held that “In law, the status of the guarantor, who is a Corporate Person metamorphosis into Corporate Debtor the moment Principal Borrower (regardless of not being a Corporate Person) commits default in payment of debt which have become due and payable”. Thus, action under Section 7 of the Code could be legitimately invoked against a Corporate Guarantor being a Corporate Debtor. The definition of Corporate Guarantor in Section 5(5A) of the Code needs to be so understood.

36. Thus, from the above judgment of the Hon’ble Supreme Court and the provisions of law with regard to the Corporate Guarantor it is unequivocal that the CIRP can be initiated by the Creditor against the Principal Borrower and the Corporate Guarantor simultaneously and there is no bar.

37. This Tribunal in “*State Bank of India vs. Ethena Energy Ventures Pvt. Ltd.*” in CA (AT) (Ins) No. 633 of 2020 dated 24.11.2020 after deliberating the judgment of this Tribunal in “*Vishnu Kumar Agarwal vs. Piramal Enterprises*” and the judgment of the Hon’ble Supreme Court in “*Innoventive Industries and V. Ramakrishnan*” is of the view that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as guarantor.

38. Further, this Tribunal in the matter of “*Edelweiss Asset Reconstruction Company vs. Gwalior Bypass projects Ltd.*” in CA (AT) (Ins) 1186 of 2019 dated 08.03.2021 after discussing the various judgments held that, there is no bar for the Financial Creditor to proceed against the Principal Borrower as well as Corporate Guarantor either in CIRP’s or file claims in both the CIRP’s.

39. Further, this Tribunal in the matter of “*State Bank of India vs. Animesh Mukhopadhyay RP*” in CA (AT) (Ins) No. 186 of 2021 dated 08.03.2021 taking into consideration the judgment passed in “*Ethena Energy and Edelweiss Asset Reconstruction Company Ltd.*” (*supra*), by concurring the judgments passed in Ethena Energy and

Edelweiss held that, there is no bar for the Financial Creditor to proceed against the Principal Borrower as well as Corporate Guarantor either in CIRP's or file claims in both the CIRP's.

40. Findings/Conclusion:

In view of the decisions of this Tribunal and the ratio of the Hon'ble Supreme Court and the fact that the judgment passed in 'Piramal' is pending before the Hon'ble Supreme Court, the simultaneous proceedings by the Creditor against the Principal Borrower and the Corporate Guarantor being surety having coextensive liability, can be initiated simultaneously. In view of the reasons/analysis as discussed above the Appeal sans any merit.

41. Resultantly, the Appeal is dismissed. No costs. Interim orders if any stand vacated. All Applications stand closed.

**[Justice M. Venugopal]
Member (Judicial)**

**[Kanthi Narahari]
Member (Technical)**

sr