

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) Insolvency No. 351 of 2021**

(Arising out of Order dated 15<sup>th</sup> April, 2021 passed by National Company Law Tribunal, Court-V, New Delhi, in IB-804/ND/2020).

**IN THE MATTER OF:**

**Rajnish Gupta**

Erstwhile Director, DMC Infrastructure Pvt. Ltd.

S/o Sh. Jai Bhgawan Gupta

R/o House No. 3, New Rohtak Road,

Karol Bagh, New Delhi-110005

Email: [rajnishgupta1975@yahoo.com](mailto:rajnishgupta1975@yahoo.com)

**....Appellant**

**Vs.**

**Union Bank of India**

(Corporation Bank merged with Union Bank of India  
w.e.f. 01.04.2020)

Asset Recovery Branch, 26/28-D,

Connaught Place, New Delhi – 110001

(Working at M-35, 1<sup>st</sup> Floor,

Connaught Place, New Delhi – 110001)

Email: [arbdelhi@unionbankofindia.com](mailto:arbdelhi@unionbankofindia.com)

&

**DMC Infrastructure Pvt. Ltd.**

**Through IRP, Mr. Ashok Kumar Dewan**

At: ARCK Resolution Professional LLP, 409, 4<sup>th</sup> Floor

Ansul Bhawan, 16 KG Marg, Connaught Place,

New Delhi – 110001

Email: [insolvency@arck.in](mailto:insolvency@arck.in) , [akdewan1001@gmail.com](mailto:akdewan1001@gmail.com)

**...Respondents**

**For Appellant:** Mr. Mohit Chaudhary, Mr. Kunal Sachdeva and Mr. Paras Mithal, Advocates

**For Respondent:** Ms. Ekta Chaudhury, Advocate for R-1  
Mr. Prateek Kushwaha, Advocate for R-2  
Mr. Abhishek Anand for R-2/IRP.

**J U D G E M E N T**

**Per: Ms. Shreesha Merla (T):**

1. Challenge in this Company Appeal (AT) Ins. No. 351 of 2021 is to the Impugned Order dated 15.04.2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Court-V, New Delhi) in IB-804/ND/2020. By the Impugned Order, the Adjudicating Authority has

admitted the Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'The Code') and observed as follows:

*“10. In the present matter, CD has signed deeds of guarantee in favour of FC for the CD facilities sanctioned to the two principal borrowers. In terms of the aforementioned provisions of the Code, FC is clearly a financial creditor to the CD having legally recoverable financial debt.*

*11. At this stage, we reproduce below the provisions of Section 7(5) of the Code:*

*“where the Adjudicating Authority is satisfied that--*

*(a) a default has occurred and the application under sub-section (2) is complete, and there are no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or*

*(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application.”*

*12. If it is established that default has occurred and no disciplinary proceeding is pending against the IRP and application is complete, the Adjudicating Authority (AA) has no option but to admit the application; if any of the conditions is lacking, the application is liable to be rejected.*

*13. From the facts, it is seen that the applicant falls within the definition of Financial Creditor. The material placed on record further confirms that FC had disbursed loan facilities to the principal borrowers in respect of which guarantees were issued by the CD. The principal borrowers had committed default in repayment of the outstanding financial debt. The FC*

has placed on record the guarantee agreement (tripartite agreement) executed by CD in favour of FC.

14. We are satisfied that the present application is complete in all respects and the FC is entitled to claim outstanding financial debts from the CD and that there has been default in payment of the financial debt. Consent of the IRP is enclosed with Petition. The defaulted amount is more than Rs. 1,00,000, being the minimum threshold limit fixed by the Code. Under such circumstances, this Adjudicating Authority is inclined to admit this petition and initiate CIRP against the respondent. Accordingly, **this petition is admitted.**”

## **2. Submissions of Appellant:**

- The Impugned Order dated 15.04.2021 has been passed *ex-parte* without issuing due notice and providing an opportunity to the ‘Corporate Debtor’ to be heard. He submitted that the email ID on which the service was done is the personal email ID of the ‘Director’ Mr. Bansal and there are *inter se* disputes between the Directors on account of which the said ‘Director’ had failed to inform others of the email.
- [anandjainca@rediffmail.com](mailto:anandjainca@rediffmail.com) is not the registered email ID of the Company as evident in the Company Master Data (CMD) the Appellant was never informed about the proceedings and was diligently appearing in the legal proceedings before DRT and the Delhi High Court. It is submitted that the Appellant came to know about the Petition only when the IRP contacted the Appellant telephonically. Even in the WhatsApp Screen Short provided by the Respondent, the Phone Number of the Respondent is not revealed.
- It is submitted that the Respondent/Lender being a mortgagee/Indirect Secured Creditor is not a Financial Creditor. Learned Counsel placed

reliance on the Judgment of the Hon'ble Supreme Court in '**Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited**' (2020 8 SCC 401) and drew our attention to Paragraph in which it is held as follows:

*"It was held that "financial creditor' is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress..... Role of a person having only security interest over the assets of the corporate debtor could easily be contrasted with the role of a financial creditor because the former shall have only the interest of realising the value of its security while the latter would,.....would also....be interested in rejuvenation, revival and growth of the corporate debtor.....it is clear that if..... a person having only security interest over the assets of the corporate debtor is also included as a financial creditor.....the growth and revival of the corporate debtor may be the casualty. ....Indisputably, the debts in question are in the form of third-party security said to have been given by the corporate debtor JIL so as to secure the loans/advances/facilities obtained by JAL from the respondent-lenders. Such a 'debt' is not a 'financial debt' within the meaning of Section 5(8) of the Code; and hence, the respondent-lenders, the mortgagees, are not the 'financial creditors' of the corporate debtor JIL."*

- Though 'Guarantee Agreements' were executed, other documents such as the 'Memorandum of Deposit of Title Deeds' and 'Letter of Continuity' dated 27.06.2013 evidencing creation of equitable mortgage need to be considered to understand the true nature of the transaction.
- The Title Deeds of the property of the Corporate Debtor were deposited with the Respondent in order to secure the repayment of the amounts

due to the Respondent from '*M/s. Roshni Jewellers Pvt. Ltd.*' & '*M/s. J.B. Gold Pvt. Ltd.*' and hence the Lender falls in the category of 'Indirect Secured Creditor' in whose security interest has been created by way of mortgage of asset of the Corporate Debtor.

- It is vehemently contended by the Learned Counsel for the Appellant that Respondent had initiated CIRP against '*M/s J. B. Gold Pvt. Ltd.*' in CP(IB) No. 1386(PB)/2019 and '*M/s. Roshni Jewellers Pvt. Ltd.*' in CP(IB) N. 1370 (PB)/2019. The Adjudicating Authority has allowed the Section 12A Applications filed by the Respondent herein and disposed of the matters as withdrawn. However, in this round of litigation, the same was not brought to the notice of the Adjudicating Authority.
- The Respondent approached this 'Tribunal' with the intention of recovery of dues and has absolutely no interest in reorganising or restructuring of the 'Corporate Debtor'. Hence, the Respondent cannot be termed as a 'Financial Creditor' within the meaning of Section 5(7) of the Code.
- The Lender initially proceeded against SARFAESI Act, 2002 by issuing Notice under Section 13(2) of the Act and is now initiating CIRP against a 'Non-Operational Creditor' whose sole 'Asset' is held in the possession of the Respondent. As the Petitions against the main 'Principal Borrowers' have been withdrawn, this Petition against the 'Guarantor' is not maintainable.
- The Learned Counsel drew our attention to the Guarantee Agreement and submitted that it was beyond the look back period as the mortgage was done in 2013. Under Section 13(4) of the SARFAESI Act, 2002,

possession was already taken by the Bank so the Bank cannot now abandon it.

- Relying on Section 141 of the Contract Act, 1872 without taking into consideration the scope of IBC is not justified.
- Learned Counsel for the Appellant relied on Order 23 Rule 1 (4) of the CPC in support of his submission that when the Plaintiff withdraws any suit, the Plaintiff shall be precluded from instituting any fresh suit in respect of the same subject matter and that the Impugned Order is *sub silentio* on this aspect.

### **3. Submissions of Respondents:**

- Learned Counsel for the Respondent submitted that 'Service' made was by way of an email which is the registered Email of the Company on the Company Master Data. An email was also sent to the Email ID of the Appellant herein who is also a Director of the Company.
- It is submitted that the Registry served notice vide an email dated 23.09.2020 on [anandjainca@rediffmail.com](mailto:anandjainca@rediffmail.com) and on [inderjeetbansal1969@yahoo.com](mailto:inderjeetbansal1969@yahoo.com) which ID is reflected in the MCA record. A WhatsApp message was also served to Mr. Rajnish Gupta who is the Appellant herein. The Respondent served a copy of the Section 7 Application informing the Appellant of the pending litigation vide an email dated 08.10.2020 and hence it cannot be said that the 'Appellant' was not served in accordance with the law.
- Learned Counsel vehemently contended that the Respondent Bank is a 'Secured Financial Creditor' as is evident from the loan and security

documents executed by the Principal Borrowers *M/s. Roshni Jewellers Pvt. Ltd. & M/s. J. B. Gold Pvt. Ltd.*

- It is also not denied that the Petitions under Section 7 of the Code filed against the aforementioned Two Principal Borrowers were withdrawn.
- Learned Counsel vehemently argued that the said Petitions were withdrawn only because the Companies were ‘non-operational’ and there existed no assets and any continuation of CIRP would only lead to additional liabilities in terms of costs incurred.
- The Judgment of ‘*Anuj Jain*’ (*supra*) is not applicable to the facts of this case as liability of the ‘Guarantor’ is co-extensive, with that of the ‘Principal Borrower’. The ‘Principal Borrower’ acknowledged its liability by agreeing to a ‘One Time Settlement dated 01.09.2020’, which was rejected by the Bank vide a letter dated 06.10.2020.
- There exists a ‘Guarantee Agreement’ whereby the ‘Promisor’ becomes a surety as referred to in Sections 126, 127 and 128 of the Contract Act, 1872.
- Mr. Abhishek Anand and Mr. Prateek Kushwaha appearing for the Resolution Professional (RP) stated that he is only a proforma party and no relief has been prayed for against this Respondent.

**4. Assessment:**

- At the outset, this Tribunal addresses the issue whether the ‘Appellant’ was legally served as mandated in the eyes of Law.

**5.** As regarding the service of notice, the ‘Adjudicating Authority’ had observed as hereunder:

*“7. It is pertinent to mention here that notice of the petition was issued on CD by all modes vide order*

*dated 15.09.2020. Affidavit of service dated 08.10.2020 showing service of petition along with next date of hearing, is on record. It is seen that notice through Bench was also sent to CD vide email dated 23.09.2020 (pg 3 of affidavit of service). Despite service, none appeared on behalf of the CD. Therefore, CD was proceeded ex-parte vide order dated 05.11.2020 and 26.11.2020.”*

**6.** The contention of the Learned Counsel for the Appellant that the service was effected to the personal Email ID of the Director Mr. Indrajit Bansal and on account of *inter se* disputes between the parties, the said email was never informed to the other Directors, is untenable, in the light of the view of the fact that the material on record shows that an email was also sent to Mr. Rajnish Gupta together with the Copy of the Petition by WhatsApp and it is the same Mr. Rajnish Gupta who is the ‘Appellant’ herein. Further, a perusal of the Company Master Data shows that the Respondent had served on the registered Email ID appearing on the Company Master Data and hence, we are of the considered view that the service by Email on the registered Email ID and also on the Email ID of the Appellant herein is held sufficient in the eyes of law.

Hence, this Tribunal does not find any illegality in the observations of the Ld. Adjudicating Authority in setting the ‘Appellant’ *Ex-parte* on account of non-appearance on 09.10.2020, 05.11.2020 and on 26.11.2020 on which date it was set *Ex-parte*.

**7.** Adverting to the contention of the Learned Counsel for the Appellant that the amount claimed to be ‘due and payable’ cannot partake the character of a ‘Financial Creditor’ within the meaning of Section 5(8) of the Code, as the ratio of ‘Anuj Jain’ (*supra*) is squarely applicable to the facts of this case. In



the afore-noted decision in '*Anuj Jain (Supra)*', Jaypee Infratech Limited ('JIL') had mortgaged properties as collateral securities for the loans and advances made by the Bankers to Jaiprakash Associates Limited ('JAL'), the Holding Company of 'JIL'. The Resolution Professional (RP) rejected the claim of the lenders of 'JAL' as 'Financial Creditors' of 'JIL', which decision was challenged. The Adjudicating Authority agreed with the Resolution Professional. This Tribunal allowed the Appeal. The Hon'ble Supreme Court has set aside the Order of this 'Tribunal' observing that the debts in question are in the form of third party security, given by 'JIL' so as to secure the loans obtained by 'JAL' from the said lenders and hence cannot be covered under the expression 'Financial Debt' as defined under the Code.

**8.** In the instant case, on 25.06.2013, the Respondent/Lender had sanctioned to the 'Principal Borrower' '*M/s. Roshni Jewellers Pvt. Ltd.*' an aggregate sum of Rs. 9 Crores towards overdraft facility and another amount of Rs. 9 Crores to the 'Principal Borrower' '*M/s. J.B. Gold Pvt. Ltd.*'. The Appellant herein '*M/s. DMC Infrastructure Pvt. Ltd.*' had executed the 'Guarantee Agreement' dated 27.06.2013 to secure the facilities sanctioned by the Respondent/Lender. For better understanding of the case, the relevant portion of one such 'Guarantee Agreement' dated 27.06.2013 entered into between '*M/s. Roshni Jewellers Pvt. Ltd.*'/Borrower and '*M/s. DMC Infrastructure Pvt. Ltd.*'/Guarantor is reproduced as hereunder:

“.....

*WHEREAS the Bank has accordingly sanctioned to the Borrower an aggregate sum of Rs 9,00,00,000/- (Rupees Nine Crores only) who has agreed to repay the same together with interest as stipulated in the loan documents executed by the Borrower or at such other rate that the Bank may determine to charge from time to time, from the date of*

*granting the credit facilities till its repayment which total liability shall be payable on demand made by the Bank upon the guarantor.*

*NOW THIS AGREEMENT WITNESSETH that the Guarantor both hereby agree to indemnify the Bank against all loss and to pay and satisfy the Bank on demand “the general balance” due from the Borrower, and the expression “general balance” shall be deemed to include all and every sum and sums of money which are now or shall at any time be owing to the Bank in all of its offices on any account whatsoever whether from the “Borrower” solely or from the Borrower jointly with any other or others in partnership or otherwise whether as principal or surety, or otherwise and whether such liabilities have matured or not and whether they are absolute or contingent including all liabilities in respect of advances, letters of credit, Bank Guarantees, Cheques, Hundies, Bills, Notes, Drafts and other negotiable instruments drawn, accepted endorsed or guaranteed by the Borrower and in respect of interest at the rate agreed upon with monthly/quarterly/half yearly/annual rests, commission and bank charges and in respect of all costs, charges and expenses with the Bank may incur in paying any rent, rates, taxes, duties, calls, instalments, legal and other professional charges or other outgoings whether for the insurance, repair, maintenance, management, realisation or otherwise in respect of any property movable or immovable or any chattles or actionable claims or scrip securities or title deeds pledged, mortgaged or assigned or ...with the Bank as security for the due payment and discharge of the Borrower liability to the Bank.*

.....

*The Guarantor hereby consents to the Bank making any variance that the Bank may think fit in the terms of the Bank’s contract with the Borrower to the Bank’s determining, enlarging or varying any credit to the Borrower, to the Bank making any composition with the Borrower or promising to give the Borrower time or not to sue him and the Bank’s parting with any security the Bank may hold for the guaranteed debt. The Guarantor also agrees that the Guarantor shall not be discharged from his liability by the Bank’s releasing the Borrower or by any act*

or omission of the Bank the legal consequences of which may be to discharge the Borrower or by any act which would but for this present provision, be inconsistent with the guarantor's rights as surety or by the Bank's omission to do any act which, but for the present provisions the Bank's duty to the Guarantor would have required the Bank to do. 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 sections 133, 134, 135, 139 and 141 of the Indian Contract Act, 1872 or any other provisions of law for the time being in force."

*(Emphasis Supplied)*

As per the aforementioned terms and agreements, the 'Guarantor' agrees that as between the 'Bank' and the 'Guarantor', the 'Guarantor' is a 'Principal Debtor' jointly with the 'Borrower' and accordingly the 'Guarantor' was not entitled to any of the rights conferred as surety under Sections 133, 134, 135, 139 and 141 of the Indian Contract Act, 1872. Section 128 of the Indian Contract Act, 1872 reads as follows:

*"128. Surety's liability.—The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. —The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.*

9. The Hon'ble Supreme Court in '**Central Bank of India Vs. C.L. Vimla and Others with M.A. Krishnamurthy Vs. C.L. Vimla and Ors.**' (2015) 7 SCC 337 discussed elaborately the liability of the 'Guarantor' under Section 128 of the Indian Contract Act, 1872 and has observed as hereunder:

*"13. We are of the opinion that the questions that need to be decided by us are regarding the liability of the guarantor under [Section 128](#) of the Indian Contract Act,*

1872. The legislature has succinctly stated that the liability of the guarantor is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. This Court has decided on this question, time and again, in line with the intent of the legislature. In Ram Kishun and Ors. v. State of U.P. and Ors., (2012) 11 SCC 511, this Court has held that

“in view of the provisions of Section 128 of the Contract Act, the liability of the guarantor/ surety is co-extensive with that of the debtor.”

The only exception to the nature of the liability of the guarantor is provided in the Section itself, which is only if it stated explicitly to be otherwise in the Contract.

14. In the case of Ram Kishun (*supra*), this Court has also stated that it is the prerogative of the Creditor alone whether he would move against the principal debtor first or the surety, to realize the loan amount. This Court observed:

“10.....Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as to how he should make the recovery and pursue his remedies against the principal debtor at his instance”.

Thus, we are of the view that in the present case the guarantor cannot escape from her liability as a guarantor for the debt taken by the principal debtor. In the loan agreement, which is the contract before us, there is no clause which shows that the liability of the guarantor is not co-extensive with the principal debtor. Therefore Section 128 of the Indian Contract Act will apply here without any exception.”

10. This ‘Appellate Tribunal’ in **Mr. Sabbas Winifred Joseph Vs. IDBI Bank Limited & Anr., Company Appeal (AT) Ins. No. 411 of 2021** had expressively discussed Section 126 of the Indian Contract Act, 1872 and the liability of the ‘Principal Borrower’ and ‘Guarantor’ and observed as under:

### **“INDIAN CONTRACT ACT, 1872**

80. Be it noted, that Section 126 of the Indian Contract Act, 1872 deals with ‘Contract of ‘Guarantee’, ‘surety’, ‘Principal Debtor and Creditor’. Section 127 of the Act pertains to ‘Consideration for Guarantee’. Section 128 of the Act pertains to ‘Surety’s liability’. Section 129 of the Act refers to ‘Continuing Guarantee’. Section 135 of the Act is concerned with ‘Discharge of Surety when Creditor compounds with, gives time to, or agrees not to sue, principal debtor’. Section 140 of the Act provides for the ‘Rights of Surety on Payment or Performance’. Section 146 of the Indian Contract Act, 1872 deals with ‘Co-Sureties’ liable to contribute equally.

### **SUING SURETY**

81. It is to be pointed out that a ‘Creditor’ can sue the ‘surety’ directly without suing the ‘Principal Debtor’. In reality, ‘surety’ provides ‘Guarantee’ only when requested by the ‘Principal Debtor’ in a ‘Contract Of Guarantee’. In Law, in a ‘Contract of Guarantee’ there is an existing liability for ‘Debt’ and ‘Surety’ guarantees the performance of such liability.

### **SURETY’S RIGHT**

82. A ‘Surety’ is eligible to proceed against the ‘Principal Debtor’ on payment of ‘Debt’, in case ‘Principal Debtor’ fails to pay the same. A ‘Creditor’ can sue their surety directly without proceeding against the Principal Debtor. As per Law, the ‘surety’ does not have the right to dictate terms to the creditor as to how he should make the recovery and pursue its remedy against the ‘Principal Debtor’ at his instance.

### **FINANCIAL DEBT AND DEFAULT UNDER IBC.**

83. It is to be pointed out that a ‘Financial Debt’ includes Debt owed to the Creditor by both the ‘Principal’ and the ‘Guarantor’. Failure by the ‘Guarantor’ to pay the ‘Financial Creditor’ when the ‘Principal Debt’ amount is demanded will amount to a ‘Default’ as per Section 3(12) of the Code. A Financial Creditor who has a ‘Guarantee’ on the debt due can initiate proceedings under Section 7 of the I&B Code,

2016 against the 'Guarantor' for failure to repay the amount borrowed by the 'Principal Borrower'.

.....

### **111. No absolvment of surety**

Even if a discharge, a Principal Debtor gets by operation of law in Bankruptcy or in Liquidation proceeds in respect of a Company, the same does not absolve the surety of its liability in the considered of this 'Tribunal'.

### **HON'BLE SUPREME COURT DECISION**

112. In the Judgement of Hon'ble Supreme Court dated 26.03.2021 in Laxmipat Surana V. Union of India (vide Civil Appeal No.2734 of 2020) wherein at paragraph 12 and 13 it is observed as under:-

12. "The Finance Creditor has refused the plea regarding maintainability of the application against the Corporate Debtor. According to the Financial Creditor, the liability of the Principal Borrower and of the Guarantor is coextensive or coterminous, as predicated in Section 128 of the Indian Contract Act, 1872. This legal position is well-established by now (see- Bank of Bihar Ltd Vs. Dr Damodar Prasad & Anr). Section 7 of the Code enables the financial creditor to initiate CIRP against the principal borrower if it is a corporate person, including against the corporate person being a guarantor in respect of loans obtained by an entity not being a corporate person. The Financial Creditor besides placing reliance on Section 7, would also rely on definition of expressions "corporate debtor" in Section 3(8), "debt" in Section 3(11), and financial creditor in Section 5(7) and "financial debt" in Section 5(8) of the Code. It is urged that upon conjoint reading of these provisions, it is crystal clear that a "financial debt" includes the amount of any liability in respect of any guarantee or indemnity for any money borrowed against interest. Resultantly, the money borrowed against interest. Resultantly the money borrowed by sole

*proprietorship of the appellant against payment of interest for which the Corporate Debtor stood guarantee or indemnity, was also a “financial debt” of the Corporate Debtor and for that reason, the Financial Creditor- Respondent No. could proceed under Section 7 of the Code. It is further urged that the definition of “corporate guarantor” introduced by way of amendment of 2018 is to define a corporate guarantor in relation to a corporate debtor against whom any CIRP is to be initiated, in reference to Section 60 of the Code. The objection regarding maintainability of the application against a corporate guarantor, if, therefore, devoid of merit and needs to be rejected.*

*13.....The Code is a special enactment for resolution of a financial debt and it is in larger public interest that financial debts are recovered and the debts of corporate person are restructured to revive the failing corporate entity.*

*19.Indubitably a right or cause of action would enure to the lender (financial creditor) to proceed against the principal borrow, 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 committed by the guarantor itself, if and when the principal 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 debit, 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. For, as aforesaid, express “default” has also been defined in Section 3(12) of the Code to mean nonpayment of debt when whose 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.”

(Emphasis Supplied)

### **CIRP INITIATION**

113. A ‘Financial Creditor’ is entitled to initiate ‘CIRP’ against a ‘Guarantor’ or ‘Surety’ although the Creditor holds enough security over the assets. A Surety has no right to dictate terms to the ‘Creditor’ as to how he ought to make a ‘recovery’ and pursue his remedies against the ‘Principal Debtor’ at his instance.

### **APPELLATE TRIBUNAL DECISION:**

114. In the judgment of this ‘Tribunal’ in ‘Ferro Alloys Corporation Ltd V. Rural Electrification Corporation Ltd. (vide Comp. App. (AT)(Ins) 921/2017, it is held that the ‘Insolvency’ proceedings against the ‘Corporate Debtor’ may be undertaken without initiating prior proceedings gains the ‘Principal Debtor’ under I & B Code. In fact, requiring/asking the ‘Financial Creditor’/‘Operational Creditor’ to postpone in availing its remedy against the ‘Corporate Debtor’ will undoubtedly defeat the purpose of obtaining ‘Guarantee’ as that would result in restricting the rights of a ‘Creditor’.

115. The ‘Financial Creditor’ has the option of commencing the ‘Insolvency’ proceeding against the ‘Corporate Grantor’ only without even resorting to any legal proceeding against the ‘Corporate Debtor’.”

(Emphasis Supplied)

**11.** The ‘Guarantee Agreement’ executed between the parties is clear with respect to the liability of the Appellant herein that the Guarantor/Appellant is the Principal Debtor jointly with the Borrower. Under Section 128 of the Indian Contract Act, 1872, the liability of ‘Surety’ towards a ‘Creditor’ is coextensive with that of the ‘Principal Debtor’. When a default is committed,



the 'Principal Borrower' and the surety are jointly and severely liable to the creditor, and the creditor has a right to recover his dues from either of them or from both of them simultaneously. The 'Burden of proof' is on the Appellant to establish that, the Contract of Guarantee provided anything to diminish the liability of the Petitioner under the Contract of the Guarantee excepting the liability of the Petitioner being coextensive as that of the Company. The material on record has failed to establish that the Contract of the Guarantee contains any such stipulation contrary to the liability of the Petitioner being coextensive with that of the Company. Therefore, we hold that 'Guarantee Agreement' does not stipulate any condition to the contrary and the Respondent/Lender can demand the payment from the Guarantor who is now essaying the rule of the Principal Debtor, as seen from the terms of the Agreement and hence is liable to pay the outstanding amount 'due and payable'.

**12.** Dealing with the contention of the Learned Counsel for the Appellant that as the CIRP proceedings against the 'Principal Borrowers' in CP(IB) No. 1386 (PB)/2019 was withdrawn under Section 12A of the Code (vide Order dated 22.10.2019), the Respondent/Lender is precluded from instituting any fresh suit in respect of the same subject matter and doing so would be in contravention of Order 23 Rule 1(4) of the Civil Procedure Code. It is a well settled preposition in Law that the creditor is not bound to exhaust his/its remedy against the 'Principal Borrower' before invoking the 'Guarantor' or suing the 'Guarantor' for payment of outstanding sum(s), (unless otherwise agreed to in the Guarantee Deed). A 'suit' can be maintained against the 'Guarantor' for payment of outstanding sums in connection with the Loan

extended to the 'Borrower' even if the 'Borrower' itself has not been sued by the Lender. This Tribunal is of the considered opinion that the 'Lender' has an independent access to the 'Guarantor' issued by the 'Principal Borrowers'. Therefore, this Tribunal holds that withdrawal of Section 7 Petition filed under the IBC Code, 2016 against the 'Principal Borrower' is not a fetter in initiating 'CIRP' against the 'Guarantor' in accordance with Law.

**13.** This Tribunal finds force in the contention of the Learned Counsel for the Respondent that the withdrawal of the proceedings was brought to the notice of the 'Adjudicating Authority' as the Order copies are part of the record before the Learned Adjudicating Authority.

**14.** It is also the case of the Respondent/Lender that the Section 7 Applications under IBC against the Principal Borrowers were withdrawn only on account of the fact that there was not a single Asset in the name of the Corporate Debtor and continuing the 'CIRP' would only amount additional costs. It is not in dispute that the 'Principal Borrower' had committed default in repayment of the outstanding 'Financial Debt' and the 'Tripartite Guarantee Agreement' executed by the Appellant/Corporate Debtor in favour of the Respondent evidences the liability of the Appellant herein to pay the amounts 'due and payable'.

**15.** The Appellant further created 'Security Interest' on the asset of the Corporate Debtor namely, "EMG/First charge on the permanent Cinema Structure (Knows as Filmistan Cinema) on Free hold plot of Land Measuring 2115 sq. yds. Bearing Municipal no 8356, situated at Model Basti, Bara Hindu Rao, Delhi – 110007". A Perusal of the Sanction Letters to the Principal Borrowers establishes that the credit facilities was executed towards meeting

working capital requirements and it cannot be said that Respondent/Lender has only a 'security interest' towards the Corporate Debtor. At the cost of repetition, the Appellant herein stood as a 'Guarantor' and stepped into the shoes of the 'Principal Debtor' and viewed from any angle it cannot be construed that Lender has only a 'security interest' over the assets of the Corporate Debtor. Hence, this Tribunal is of the earnest view that facts in the attendant differ from the facts and circumstances stated in '*Anuj Jain*' (*supra*).

**16.** For all the foregoing reasons, this Tribunal comes to an irresistible and inescapable conclusion that the Appellant being the 'Corporate Guarantor' of the two 'Principal Borrowers' viz. '*M/s. Roshni Jewellers Pvt. Ltd.*' and '*M/s. J.B. Gold Pvt. Ltd.*', is liable to pay the amounts in question. Accordingly, this Tribunal holds that mere withdrawal of the 'CIRP' against the 'Principal Borrower' will not be a bar for the Respondent/Lender in initiating fresh 'CIRP' against the 'Guarantor' who is the Appellant herein.

**17.** Viewed in the above perspective, this Tribunal is not inclined to interfere with the well-reasoned Order of the 'Adjudicating Authority' and hence the Appeal is dismissed. No order as to costs.

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

**[Ms. Shreesha Merla]**  
**Member (Technical)**

**New Delhi**  
**22<sup>nd</sup> February, 2022**  
*Basant B.*