NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 736 of 2022

[Arising out of order dated 11.05.2022 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi in CP(IB) No. 108(PB)/2022]

IN THE MATTER OF:

Naresh Kumar Aggarwal
Shareholder of M/s Micro Stock Holdings Pvt. Ltd.
30-B, Road No.78, West Punjabi Bagh,
Punjabi Bagh, West Delhi,
Delhi - 110026 **...Appellant**

Versus

CFM Asset Reconstruction Pvt. Ltd.
A/3, 5th Floor, SafalProfitaire,
Near Prahlad Nagar Garden,
Ahmedabad – 380015 **...Respondent No.1**

Maya Gupta,
IRP of M/s Micro Stock Holdings Pvt. Ltd.
3685/7, Narang Colony, Tri Nagar,
New Delhi – 110 035 **...Respondent No.2**

Present:

For Appellant: **Mr. Alok Dhir, Ms. Varsha Banerjee and Ms. Udita Singh, Advocates.**

For Respondents: **Mr. Abhijeet Sinha, Mr. Arijit Mazumdar, Ms. Akanksha Kaushik, Ms. Heena Kochar, Mr. Saikat Sarkar, Advocates for R-1.**
Mr. Sandeep Bajaj, Ms. Vasudha Chadha, Advocates for RP/R-2

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 ("**IBC**" in short) by the Appellant arises out of the Order dated 11.05.2022 (hereinafter referred to as "**Impugned Order**") passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi) in CP (IB) No.108(PB)/2022. By the impugned order, the Adjudicating Authority has admitted the application under Section 7 of the IBC filed by CFM Asset Reconstruction Pvt. Ltd. – Respondent No.1 and initiated Corporate Insolvency Resolution Process ("**CIRP**" in short) of the Corporate Debtor- M/s Micro Stock Holdings Pvt. Ltd. Aggrieved by this impugned order, the present appeal has been filed by share- holder of the Corporate Debtor.

2. The brief facts to be noted for deciding this appeal are as follows:

- A consortium of banks including State Bank of India sanctioned multiple credit facilities to M/s Action Ispat and Power Private Ltd.- Principal Borrower from 2007-2012.
- Unable to repay debts, the principal borrower requested for debt restructuring following which a Master Restructuring Agreement ("**MRA**" in short) was executed between the principal borrower and lenders with SBI as the Lead Bank.
- In terms of the MRA, a Deed of Guarantee was executed on 30.09.2013 by the Corporate Debtor in favour of SBICAP Trustee Company Ltd. ("**SBICAP**" in short) which secured the loans availed by the Corporate Debtor.

- This was followed by a second Supplemental and Amendatory MRA on 12.06.2015 and thereafter the Corporate Debtor executed revival letter of acknowledgment on 16.07.2016.
- SBI entered into an Assignment Agreement with Respondent No.1-CFM Asset Reconstruction Pvt. Ltd., on 18.01.2021 assigning the debt owned by the Principal Borrower.
- After signing of Assignment Agreement, the charge registered on behalf of Corporate Debtor with MCA was modified on 16.04.2021 and registered in favour of Respondent No.1.
- SBI filed Section 7 application against the principal borrower on 13.08.2018 vide CP(IB) No.1096 of 2018 which was admitted on 23.03.2022.
- Section 7 application was filed by the Respondent No.1 vide CP(IB) 108/PB/2022 against the Corporate Debtor which was admitted on 11.05.2022. Aggrieved by this order, this appeal has been filed by the Appellant-Shareholder of the Corporate Debtor.

3. Making his submissions the Learned Counsel for the Appellant submitted that the Respondent No.1 did not properly serve notice on the Corporate Debtor. Though it had been directed by the Adjudicating Authority vide interim order dated 22.02.2022 to serve notice by email and by way of dasti, the affidavit of service filed by Respondent No.1 shows that service had been effected only by email and hence incomplete. The impugned order also failed to record its findings that the notice had not been properly issued to the Corporate Debtor by Respondent No.1. Furthermore, by proceeding to hear the matter ex-parte with

no reasons recorded in the impugned order by the Adjudicating Authority for having proceeded ex-parte, the principles of natural justice have been violated.

4. The Learned Counsel for the Appellant has also challenged the impugned order on the ground that the application filed by Respondent No.1 was not eligible for admission under Section 7 of IBC since it was made on the basis of an Assignment Deed dated 18.01.2021 which was not legally enforceable as it was an unregistered agreement.

5. Furthermore, as there was no privity of contract between the Corporate Debtor and Respondent No.1 the latter was not entitled to initiate Section 7 proceedings. It has also been contended that the Deed of Guarantee dated 30.09.2013 was executed by the Corporate Debtor in favour of SBICAP and thus can only be enforced by security trustee. Moreover, SBICAP was an entity which was distinct from the original lenders led by SBI.

6. Submission was also made that the Respondent No.1 had made a malafide attempt to file duplicate claims with respect to the same debt and for the same default. The Adjudicating Authority had already admitted the principal borrower into CIRP vide order dated 23.03.2022 in CP(IB)-1096/PB/2018. It was contended that for the same set of claim amount and default, two applications under Section 7 cannot be initiated simultaneously.

7. The Learned Counsel for the Respondent No.1 refuting the submissions made by the Appellant contended that there was no substance in their contention of breach of principles of natural justice since notice of the company petition had been duly served on the Corporate Debtor on their registered email ID and

affidavit of service to this effect had also been filed before the Adjudicating Authority. It was further submitted that the agreement executed by SBI being in accordance with the statutory scheme under Section 5 of the SARFAESI Act, there was no need for the Assignment Agreement to be registered. Moreover, Respondent No.1 having been registered as a Securitization and Asset Reconstruction Company under Section 3 of the SARFAESI Act, acquisition by Respondent No.1 was complete immediately upon execution of the Assignment Agreement. It was also submitted that provisions of Registration Act, 1908 applies only qua immovable property which is not the subject matter in the present case. It was further stated that SBI in the Assignment Agreement had absolutely assigned and transferred all of its rights in the credit facilities to the principal borrower along with all security interests and right to enforce such security interests to the Respondent No.1. Hence, Respondent No.1 had stepped into the shoes of the SBI and in terms of Section 5 of the SARFAESI Act, the guarantees executed by the Corporate Debtor in favour of SBICAP stood vested upon Respondent No.1. It was also pointed out that pursuant to the Assignment Agreement, the MCA had modified the charge of the Corporate Debtor in favour of Respondent No.1 which were earlier registered in favour of SBICAP.

8. It was also contended that the assertion made by the Appellant that CIRP cannot be initiated simultaneously against the principal borrower and the corporate guarantor is without any basis since the liability of the guarantor/surety is co-extensive with that of the principal borrower/principal debtor. The liability of the Corporate Debtor does not get extinguished because CIRP has been initiated against the principal borrower. The financial creditor is

fully entitled to initiate Section 7 proceedings both against the principal borrower and the corporate guarantor.

9. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

10. Before we go into the rival submissions made by the parties, it is relevant to point out at this stage that no contentions have been raised by either party regarding debt and default committed thereto. On perusing the impugned order, we find that the Adjudicating Authority has recorded that there exists financial debt and default and admitted Section 7 application. Debt and default on the part of the Corporate Debtor not having been contested, we do not find any error on the part of the Adjudicating Authority in admitting the Section 7 application.

11. We now come to the contention raised by the Appellant that Respondent No.1 had not served the notice of the company petition on the Corporate Debtor and that this led to an unsavoury situation of the case having been heard ex-parte against them. It is also the case of the Appellant that the service of notice was not proper since it was sent only by email and not by dasti which was in violation of the order of the Adjudicating Authority dated 22.02.2022. It is also submitted by the Appellant that the Adjudicating Authority without recording reasons for proceeding ex-parte decided the matter against the Corporate Debtor without giving them an opportunity for hearing thereby violating the principles of natural justice.

12. The above contention of the Appellant was strenuously opposed by Respondent No.1. It was submitted that the Corporate Debtor had been served an advance copy of the company petition on 03.02.2022 on their email address

'nkagroups2011@gmail.com' which is the registered email ID of the Corporate Debtor. Subsequently, the entire company petition was sent at the registered email ID of the Corporate Debtor on 28.02.2022. In the said email of 28.02.2022, it was also intimated to the Corporate Debtor that the Adjudicating Authority had on 22.02.2022 ordered that notice be issued to the Corporate Debtor for further consideration of the matter on 02.03.2022. Thereafter, an affidavit of service was filed before the Adjudicating Authority regarding service of notice upon the Corporate Debtor. Again on 01.03.2022, an email was sent to the Corporate Debtor wherein the copy of the order of the Adjudicating Authority dated 28.02.2022 was enclosed.

13. At this stage, it may be useful to note the relevant portion of the orders of the Adjudicating Authority dated 22.02.2022, inter alia, on modalities of issue of notice which is to the effect:

> *"Accordingly, notice to the Respondent/Corporate Debtor, be issued.*
> *This Notice to be sent by the Petitioner/Operational Creditor under NCLT Rules, Form-5.*
>
> 1. *By way of an email to the registered email of the Corporate Debtor available with the petitioner.*
> 2. *By way of an email to the CD email address registered with the MCA.*
> 3. *Service by way of Dasti within three days for today.*
> 4. ***Proof of Service in any one of the above form** filed by way of an affidavit before the next date of hearing.*
>
> *List the matter for further consideration on 02.03.2022."*
>
> ***(Emphasis supplied)***

14. It is clear from the above interim order of the Adjudicating Authority that there were no directions to the effect that the notice had to be served both by

email and by dasti. It has been held by the Adjudicating Authority in the above interim order that service of notice by any one mode would suffice the purpose and this has been complied to by Respondent No.1 having sent the notice at the registered email address of the Corporate Debtor. Besides the fact that this email ID of the Corporate Debtor was registered on the MCA website, there cannot arise any doubt on the authenticity of the email ID since the Appellant have themselves admitted that the same email ID was used by Respondent No.2 on 20.05.2022 while communicating to them the impugned order dated 11.05.2022 as is seen at page 202 of Appeal Paper Book. We also notice that the Adjudicating Authority had taken cognizance of the Affidavit of Service which had been filed by the Respondent No.1. From the totality of above cited circumstances, we have sufficient reason to believe that notice was properly served upon the Corporate Debtor at their valid email address on three separate occasions and an affidavit of service to this effect was also filed as placed on record at pages 25-29 of Reply Affidavit. However, after service of notice, if the Corporate Debtor did not appear before the Adjudicating Authority, the Respondent No.1 cannot be held responsible for not having sent proper notice. That being so, we are of the considered view that the Appellant cannot rightfully claim that they were deprived of reasonable opportunity of hearing due to non-service of notice. While it is axiomatic that principles of natural justice are not an empty formality, we cannot be unmindful of the fact that this cannot be resorted to by a litigant to cover up their own shortcoming and derail the judicial process.

15. Next, we come to the contention of the Appellant that the Respondent No.1 does not fall within the definition of "Financial Creditor" as envisaged under Section 5(7) of the IBC since the Assignment Agreement in question is an

unregistered document in terms of Section 17 of the Registration Act, 1908. It is noticed that the same contention qua the same Assignment Agreement was raised before this Appellate Tribunal in a connected matter in ***CA(AT)(Ins.) No.470 of 2023 in Naresh Kumar Aggarwal v. CFM Asset Reconstruction Pvt. Ltd. & Ors.*** wherein it has been held that since the Assignment Agreement was in accordance with Section 5 of the SARFAESI Act, the Asset Reconstruction Company has to be deemed to be a lender and is entitled to exercise all rights which are vested in the lender.

16. We have no doubts in our mind, therefore, that the ratio of this Tribunal in the ***Naresh Kumar Aggarwal judgment (supra)*** is squarely applicable which is to the effect:

> "6…Section 5 of the SARFAESI Act, 2002 provides as follows:
>
> *"**5. Acquisition of rights or interest in financial assets.** - (1) Notwithstanding anything contained in any agreement or any other law for the time being in force, any 1[asset reconstruction company] may acquire financial assets of any bank or financial institution—*
>
> *(a) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or*
>
> *(b) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.*
>
> *2[(1A) Any document executed by any bank or financial institution under sub-section (1) in favour of the asset reconstruction company acquiring financial assets for the purposes of asset reconstruction or securitisation shall be exempted from stamp duty in accordance with the provisions of section 8F of the Indian Stamp Act, 1899 (2 of 1899):*
>
> *Provided that the provisions of this sub-section shall not apply where the acquisition of the financial assets by the asset reconstruction company is for the purposes other than asset reconstruction or securitisation.]*

(2) If the bank or financial institution is a lender in relation to any financial assets acquired under sub-section (1) by the 1[asset reconstruction company], such 1[asset reconstruction company] shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.

2[(2A) If the bank or financial institution is holding any right, title or interest upon any tangible asset or intangible asset to secure payment of any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire the tangible asset or assignment or licence of intangible asset, such right, title or interest shall vest in the asset reconstruction company on acquisition of such assets under sub-section (1).]"

7. Section 5 Sub-section (1) begins with non-obstante clause with the words *"Notwithstanding anything contained in any agreement or any other law for the time being in force…".* Section 5 is an enabling provision to empower the Asset Reconstruction Company to acquire financial assets in the manner provided in Sub-section (1). The Assignment Agreement dated 18.01.2021 was in accordance with Section 5(1)(b) i.e. by entering agreement with State Bank of India. Sub-section (2) of Section 5 contains a deeming clause. Sub-section (2) provides that Asset Reconstruction Company on such acquisition be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company. When the legislature uses the deeming fiction it is always for purpose and object.

8. Hon'ble Supreme Court had occasion to consider provision of Section 43 of the Indian Contract Act, 1872 which contains the deeming provision and on fulfilling the ingredients as provided in the statute, legal fiction will come into play, irrespective whether the transaction was in fact intended or even anticipated to be so. We may refer to Para 22.2.1, 22.2.2 and 22.3 of the judgment of the Hon'ble Supreme Court in ***"Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Ltd. & Ors., (2020) 8 SCC 401"***, which is to the following effect:

"22.2.1. As regards construction of a deeming fiction, this Court pointed out the basic and settled principles in the following:

"88. In every case in which a deeming fiction is to be construed, the observations of Lord Asquith in a concurring judgment in East End Dwellings Co. Ltd. v. Finsbury Borough Council: 1952 AC 109 (HL) are cited. These observations read as follows: (AC pp. 132-133)

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.... The statute says that you must imagine a certain state of affairs. It does not say that, having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

These observations have been followed time out of number by the decisions of this Court. (See, for example, M. Venugopal v. Divisional Manager, LIC: (1994) 2 SCC 323 at page 329).

*** *** ***

94. Although a deeming provision is to deem what is not there in reality, thereby requiring the subject-matter to be treated as if it were real, yet several authorities and judgments show that a deeming fiction can also be used to put beyond doubt a particular construction that might otherwise be uncertain. Thus, Stroud's Judicial Dictionary of Words and Phrases (7th Edition, 2008), defines "deemed" as follows:

"Deemed"- as used in statutory definitions "to extend the denotation of the defined term to things it would not in ordinary parlance denote", is often a convenient device for reducing the verbiage or an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words "deem" and "deemed" when used in a statute thus simply state the effect or meaning which some matter or things has-the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an indisputable conclusion."

22.2.2. In Pioneer Urban, this Court further extracted extensively from the decision in Hindustan Cooperative Housing Building Society Limited v. Registrar, Cooperative Societies and Anr.: (2009) 14 SCC 302 on various features of the processes of construction of different deeming provisions in different contexts. Some of the relevant parts of such extraction (as occurring in paragraph 95 of Pioneer Urban) read as follows (in SCC at pp. 524):

" '… The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is

used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.'
(Per Lord Radcliffe in St. Aubyn v. Attorney General:1952 AC 15 (HL), AC p. 53)

14. 'Deemed', as used in statutory definitions [is meant]
'to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient devise for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words "deem" and "deemed" when used in a statute thus simply state the effect or meaning which some matter or thing has — the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an undisputable conclusion.'
(Per Windener, J. in Hunter Douglas Australia Pty. v. Perma Blinds: (1970) 44 Aust LJ R 257)

15. When a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences, but it is not that something else (per Cave, J., in R. v. Norfolk County Court: (1891) 60 LJ QB 379).

'When a statute gives a definition and then adds that certain things shall be "deemed" to be covered by the definition, it matters not whether without that addition the definition would have covered them or not.' (Per Lord President Cooper in Ferguson v. McMillan : 1954 SLT 109 (Scot))

16. Whether the word "deemed" when used in a statute established a conclusive or a rebuttable presumption depended upon the context (see St. Leon Village Consolidated School District v. Ronceray: (1960) 23 DLR (2d) 32 (Can)).
'…. I … regard its primary function as to bring in something which would otherwise be excluded.'
(Per Viscount Simonds in Barclays Bank Ltd. v. IRC: 1961 AC 509 at AC p. 523.)
' "Deems" means "is of opinion" or "considers" or "decides" and there is no implication of steps to be taken before the opinion is formed or the decision is taken.'
[See R. v. Brixton Prison (Governor), ex p Soblen: (1963) 2 QB 243 at QB p. 315.]'"

22.3. On a conspectus of the principles so enunciated, it is clear that although the word 'deemed' is employed for different purposes in

different contexts but one of its principal purpose, in essence, is to deem what may or may not be in reality, thereby requiring the subject-matter to be treated as if real. Applying the principles to the provision at hand i.e., Section 43 of the Code, it could reasonably be concluded that any transaction that answers to the descriptions contained in sub-sections (4) and (2) is presumed to be a preferential transaction at a relevant time, even though it may not be so in reality. In other words, since sub-sections (4) and (2) are deeming provisions, upon existence of the ingredients stated therein, the legal fiction would come into play; and such transaction entered into by a corporate debtor would be regarded as preferential transaction with the attendant consequences as per Section 44 of the Code, irrespective whether the transaction was in fact intended or even anticipated to be so."

9. Following the law laid down by the Hon'ble Supreme Court in the above case, when acquisition of assets by Asset Reconstruction Company is made as per Section 5(1), deeming provision contained in Sub-section (2) of Section 5 shall come into play and the Asset Reconstruction Company shall be deemed to be Lender for all purposes. As a Lender, the Respondent No.1 was fully entitled to exercise its right to initiate proceeding under Section 7."

17. It is pertinent to add here that two case citations, namely, ***Palm Products Pvt. Ltd. v. T.V.L. Narsimha Rao and Anr., 2021 SCC OnLine NCLAT 37*** and ***Citi Securities & Financial Services Pvt. Ltd. v. Sudip Bhatacharya*** referred to by the present Appellant in the present matter in support of their contention that assignment of financial debt has to be by registered document has also been considered in ***Naresh Kumar Aggarwal (supra)*** but both were held to be distinguishable in facts and therefore held inapplicable. We agree with the finding in ***Naresh Kumar Aggarwal (supra)*** that the ratio in ***Palm Products Pvt. Ltd. v. T.V.L. Narsimha Rao and Anr.*** is not applicable since in that case the applicant was a NBFC and not an Asset Reconstruction Company while the present is a case where an asset has been acquired by an Asset Reconstruction Company in conformity with the provisions of Section 5 of SARFAESI Act. We

also find that the ratio of ***Citi Securities & Financial Services Pvt. Ltd. v. Sudip Bhatacharya*** is not applicable since even in that case the applicant was not an Asset Reconstruction Company unlike in the present case.

18. We now come to the next contention of the Appellant that the Respondent No.1 could not have filed the application under Section 7 of IBC before the Adjudicating Authority because the guarantee was executed by the Corporate Debtor in favour of SBICAP. Coming to the facts of the present case, we note that the SBI vide the Assignment Agreement had assigned and transferred all its rights in the credit facilities extended to the principal borrower along with all underlying security interests to Respondent No.1. Hence, the Respondent No.1 having clearly stepped into the shoes of SBI and on having acquired the assets under the Assignment Agreement in the capacity of an Asset Reconstruction Company in the manner and procedure laid down by the SARFAESI Act, it had become the deemed lender and therefore entitled to exercise its right to initiate proceedings under Section 7 of IBC. It is also pertinent to note that pursuant to the Assignment Agreement, the MCA had modified the charge of the Corporate Debtor in favour of Respondent No.1 which were earlier registered in favour of SBICAP. Thus, the argument of the Appellant that application under Section 7 by Respondent No.1 was not maintainable cannot be accepted. SBI having assigned its debt to the Respondent No.1, the later was entitled to initiate proceedings under Section 7.

19. This brings us to the last limb of the argument raised by the Appellant that for the same set of claim, amount and default, two applications under Section 7 cannot be admitted simultaneously against both the principal borrower and the

corporate guarantor /corporate debtor. This issue has also been dealt at length by this Tribunal in the ***Naresh Kumar Aggarwal (supra)*** and held that the lender can proceed against the principal borrower as well as the corporate guarantor in equal measure by relying upon the judgment of Hon'ble Supreme Court in ***Laxmi Pat Surana v. Union of India & Anr., (2021) 8 SCC 481.*** The above finding of this Tribunal in ***Naresh Kumar Aggarwal (supra)*** is squarely applicable in the present facts of the case and the relevant portion of the above judgment is reproduced below:"

> "14. Now, we come to last submission of learned counsel for the Appellant that application under Section 7 having admitted against the Principal Borrower, it was not open for the Respondent No.1 to file application against the Corporate Guarantor since two simultaneous proceedings under Section 7 cannot be proceeded with. Learned counsel for the Appellant has placed reliance on judgment of this Tribunal in ***"2019 SCC OnLine NCLAT 542, Dr. Vishnu Kumar Agarwal vs. Piramal Enterprises Ltd."***, where in Para 32 following observations have been made by this Tribunal:
>
> > *"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 Guarantors' or one 'Corporate Guarantor' and other 'Corporate Guarantor'), till it is shown that the 'Corporate Debtors' combinedly are joint venture company."*

15. The above judgment was delivered by this Tribunal on 08.01.2019. We may notice a subsequent judgment of Hon'ble Supreme Court in ***"Laxmi Pat Surana vs. Union of India & Anr., (2021) 8 SCC 481"***. The Hon'ble Supreme Court had occasion to consider the right to proceed against Guarantor in aforesaid case. Hon'ble Supreme Court has held in the above judgment that Section 7 is an enabling provision which permits the Financial Creditor to initiate CIRP against a Corporate Debtor. The Corporate Debtor can be the Principal Borrower as well as the Corporate Guarantor. The Hon'ble Supreme Court held that right or cause of action would enure to the lender to proceed against the Principal Borrower, as well as the guarantor in equal measure referred to in Para 23, which is to the following effect:

"23. Indubitably, a right or cause of action would enure 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 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 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 nonpayment 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."

16. The scheme of I&B Code, in view of law laid down by the Hon'ble Supreme Court in ***"Laxmi Pat Surana vs. Union of India & Anr."***, we are not persuaded to follow judgment of this Tribunal in Dr. Vishnu Kumar Agarwal (Supra)."

20. It may not be out of place to mention here that the decision of this Tribunal in ***Naresh Kumar Aggarwal (supra)*** has been challenged in the Hon'ble Supreme Court. However, since the matter is pending adjudication before the

Hon'ble Apex Court and has not been stayed, the judgment of this Tribunal continues to hold sway.

21. As already noticed by us at para 10 above, the issue of debt and default on the part of the Corporate Debtor is not in contention and no submissions have been made in this regard by the Appellant. In result, we find no error in the impugned order admitting the Section 7 application. We have also carefully considered the other submissions made by the Appellant and for reasons stated above, find them to be devoid of merit. The appeal is accordingly dismissed. The Respondent No.2-IRP has submitted a status report on the steps taken so far in CIRP proceedings. Since the CoC has already been constituted, the IRP may take up the matter of CIRP costs including IRP's fees with the CoC in accordance with law.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 21.09.2023

PKM