NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1104 of 2020

(Arising out of the Order dated 26.10.2020 passed by the National Company Law Tribunal, New Delhi, Principal Bench in CA No. 1393 (PB)/2019 in C.P. No. (IB)- 50(PB)/ 2018)

IN THE MATTER OF:

Mr. Vikas Aggarwal
Personal Guarantor of the Corporate Debtor,
Resident of House No. 1380,
Sector – 37, Faridabad, Haryana – 122003.
Address of Counsel
Gravitas Legal
Second Floor, C-91, Panchsheel Enclave,
New Delhi – 110017.
Email: litigation@gravitaslegal.co.in **…Appellant**

Versus

1. **Asian Colour Coated Ispat Limited**
through its Authorized Representative Nth Complex,
4th Floor A-2,
Shaheed Jeet Singh Marg,
Qutub Institutional Area,
New Delhi – 110067.
Address of Counsel
Chandhiok and Mahajan
Advocates and Solicitors
C-524, Defence Colony
New Delhi 110024.
Email : pooja.mahajan@chandhiok.com **…Respondent No. 1**

2. **JSW Steel Coated Products Limited**
(Through its Authorized Representative)
JSW Centre Bandra Kurla Complex, Bandra (East)
Mumbai – 400051.
Address of Counsel
Cyril Amarchand Mangaldas
IV Floor, Prius Platinum Building

D-3, District Centre
Saket, New Delhi – 110017.
Email : bishwajit.dubey@cyrilshroff.com **…Respondent No. 2**

3. Committee of Creditors of Asian Colour Coated Ispat Limited
Unit No. 410, Level 4, Centrum Plaza,
Golf Course Road, Sector 53,
Gurugram – 122001, Haryana

Address of Counsel
Mital & Mital Advocates
C-347, First Floor, Defence Colony
New Delhi – 110024.
Email: ankur@mitalandmital.com **…Respondent No. 3**

4. Mr. Kuldeep Kumar Bassi
Resolution Professional of Asian Colour Coated Ispat Limited,
Nth Complex, 4th Floor,
A-2, Shaheed Jeet Singh Marg,
Qutub Institutional Area,
New Delhi – 110067.

Address of Counsel
Chandhiok and Mahajan
Advocates and Solicitors
C-524, Defence Colony
New Delhi 110024.
Email : pooja.mahajan@chandhiok.com **…Respondent No. 4**

Present

For Appellant: Mr. Krishnendu Dutta, Sr. Adv. with Mr. Ajay Kumar, Ms. Stuti Vatsa, Mr. Vaibhav Tiwari, Mr. Vijayant Goel, Advocates.

For Respondents: Mr. Savar Mahajan, Advocates for R4.
Ms. Aishwarya Gupta, Adv. for R2.
Mr. Ankur Mittal, Mr. Bhaskar, Adv. for R3.

With

Comp. App. (AT) (Ins) No. 1105 of 2020

(Arising out of the Order dated 26.10.2020 passed by the National Company Law Tribunal, New Delhi, Principal Bench in CA No. 1393 (PB)/2019 in C.P. No. (IB)- 50(PB)/ 2018)

IN THE MATTER OF:

Mrs. Sapna Aggarwal
Personal Guarantor of the corporate Debtor,
Resident of House No. 1380,
Sector – 37, Faridabad,
Haryana – 122003.
Address of Counsel
Gravitas Legal
Second Floor, C-91, Panchsheel Enclave,
New Delhi – 110017.
Email: litigation@gravitaslegal.co.in **…Appellant**

Versus

1. **Asian Colour Coated Ispat Limited**
through its Authorized Representative Nth Complex,
4th Floor A-2,
Shaheed Jeet Singh Marg,
Qutub Institutional Area,
New Delhi – 110067.
Address of Counsel
Chandhiok and Mahajan
Advocates and Solicitors
C-524, Defence Colony
New Delhi 110024.
Email : pooja.mahajan@chandhiok.com **…Respondent No. 1**

2. **JSW Steel Coated Products Limited**
(Through its Authorized Representative)
JSW Centre Bandra Kurla Complex, Bandra (East)
Mumbai – 400051.

Address of Counsel
Cyril Amarchand Mangaldas
IV Floor, Prius Platinum Building
D-3, District Centre
Saket, New Delhi – 110017.
Email : bishwajit.dubey@cyrilshroff.com **…Respondent No. 2**

3. Committee of Creditors of Asian Colour Coated Ispat Limited
Unit No. 410, Level 4, Centrum Plaza,
Golf Course Road, Sector 53,
Gurugram – 122001, Haryana
Address of Counsel
Mital & Mital Advocates
C-347, First Floor, Defence Colony
New Delhi – 110024.
Email: ankur@mitalandmital.com **…Respondent No. 3**

4. Mr. Kuldeep Kumar Bassi
Resolution Professional of Asian Colour Coated Ispat Limited,
Nth Complex, 4th Floor,
A-2, Shaheed Jeet Singh Marg,
Qutub Institutional Area,
New Delhi – 110067.
Address of Counsel
Chandhiok and Mahajan
Advocates and Solicitors **…Respondent No. 4**
C-524, Defence Colony
New Delhi 110024.
Email : pooja.mahajan@chandhiok.com

Present

For Appellant: Mr. Anand Chibhar, Sr. Advocate and Mr. Krishnendu Datta, Sr. Adv. with Mr. Ajay Kumar, Ms. Stuti Vatsa, Mr. Vaibhav Tiwari, Mr. Vijayant Goel, Advocates.

For Respondents: Mr. Savar Mahajan, Advocates for R4.
Ms. Aishwarya Gupta, Adv. for R2.

Mr. Ankur Mittal, Mr. Bhaskar, Adv. for R3.

With

Comp. App. (AT) (Ins) No. 1107 of 2020

(Arising out of the Order dated 26.10.2020 passed by the National Company Law Tribunal, New Delhi, Principal Bench in CA No. 1393 (PB)/2019 in C.P. No. (IB)- 50(PB)/ 2018)

IN THE MATTER OF:

Mrs. Archana Aggarwal
Personal Guarantor of the corporate Debtor,
Resident of House No. 1380,
Sector – 37, Faridabad,
Haryana – 122003.
Address of Counsel
Gravitas Legal
Second Floor, C-91, Panchsheel Enclave,
New Delhi – 110017.
Email: litigation@gravitaslegal.co.in **…Appellant**

Versus

1. **Asian Colour Coated Ispat Limited**
through its Authorized Representative Nth Complex,
4th Floor A-2,
Shaheed Jeet Singh Marg,
Qutub Institutional Area,
New Delhi – 110067.
Address of Counsel
Chandhiok and Mahajan
Advocates and Solicitors
C-524, Defence Colony
New Delhi 110024.
Email : pooja.mahajan@chandhiok.com **…Respondent No. 1**

2. **JSW Steel Coated Products Limited**
(Through its Authorized Representative)

JSW Centre Bandra Kurla Complex, Bandra (East)
Mumbai – 400051.

Address of Counsel

Cyril Amarchand Mangaldas
IV Floor, Prius Platinum Building
D-3, District Centre
Saket, New Delhi – 110017.
Email : bishwajit.dubey@cyrilshroff.com **…Respondent No. 2**

3. Committee of Creditors of Asian Colour Coated Ispat Limited
Unit No. 410, Level 4, Centrum Plaza,
Golf Course Road, Sector 53,
Gurugram – 122001, Haryana

Address of Counsel

Mital & Mital Advocates
C-347, First Floor, Defence Colony
New Delhi – 110024.
Email: ankur@mitalandmital.com **…Respondent No. 3**

4. Mr. Kuldeep Kumar Bassi
Resolution Professional of Asian Colour Coated Ispat Limited,
Nth Complex, 4th Floor,
A-2, Shaheed Jeet Singh Marg,
Qutub Institutional Area,
New Delhi – 110067.

Address of Counsel

Chandhiok and Mahajan
Advocates and Solicitors **…Respondent No. 4**
C-524, Defence Colony
New Delhi 110024.
Email : pooja.mahajan@chandhiok.com

Present

For Appellant:	Mr. Krishnendu Datta, Sr. Adv. with Mr. Ajay Kumar, Ms. Stuti Vatsa, Mr. Vaibhav Tiwari, Mr. Vijayant Goel, Advocates.
For Respondents:	Mr. Savar Mahajan, Advocates for R4.

Ms. Aishwarya Gupta, Adv. for R2.
Mr. Ankur Mittal, Mr. Bhaskar, Adv. for R3.

With

Comp. App. (AT) (Ins) No. 1108 of 2020

(Arising out of the Order dated 26.10.2020 passed by the National Company Law Tribunal, New Delhi, Principal Bench in CA No. 1393 (PB)/2019 in C.P. No. (IB)- 50(PB)/ 2018)

IN THE MATTER OF:

Smt. Kamlesh Devo Aggarwal
Personal Guarantor of the corporate Debtor,
Resident of House No. 1380,
Sector – 37, Faridabad,
Haryana – 122003.
Address of Counsel
Gravitas Legal
Second Floor, C-91, Panchsheel Enclave,
New Delhi – 110017.
Email: litigation@gravitaslegal.co.in **…Appellant**

Versus

1. **Asian Colour Coated Ispat Limited**
through its Authorized Representative Nth Complex,
4th Floor A-2,
Shaheed Jeet Singh Marg,
Qutub Institutional Area,
New Delhi – 110067.
Address of Counsel
Chandhiok and Mahajan
Advocates and Solicitors
C-524, Defence Colony
New Delhi 110024.
Email : pooja.mahajan@chandhiok.com **…Respondent No. 1**

2. **JSW Steel Coated Products Limited**

(Through its Authorized Representative)
JSW Centre Bandra Kurla Complex, Bandra (East)
Mumbai – 400051.

Address of Counsel

Cyril Amarchand Mangaldas
IV Floor, Prius Platinum Building
D-3, District Centre
Saket, New Delhi – 110017.
Email : bishwajit.dubey@cyrilshroff.com **…Respondent No. 2**

3. Committee of Creditors of Asian Colour Coated Ispat Limited
Unit No. 410, Level 4, Centrum Plaza,
Golf Course Road, Sector 53,
Gurugram – 122001, Haryana

Address of Counsel

Mital & Mital Advocates
C-347, First Floor, Defence Colony
New Delhi – 110024.
Email: ankur@mitalandmital.com **…Respondent No. 3**

4. Mr. Kuldeep Kumar Bassi
Resolution Professional of Asian Colour Coated Ispat Limited,
Nth Complex, 4th Floor,
A-2, Shaheed Jeet Singh Marg,
Qutub Institutional Area,
New Delhi – 110067.

Address of Counsel

Chandhiok and Mahajan
Advocates and Solicitors
C-524, Defence Colony
New Delhi 110024.
Email : pooja.mahajan@chandhiok.com **…Respondent No. 4**

Present

For Appellant: Mr. Krishnendu Dutta, Sr. Adv. with Mr. Ajay Kumar, Ms. Stuti Vatsa, Mr. Vaibhav Tiwari, Mr. Vijayant Goel, Advocates.

For Respondents: Mr. Savar Mahajan, Advocates for R4.
Ms. Aishwarya Gupta, Adv. for R2.
Mr. Ankur Mittal, Mr. Bhaskar, Adv. for R3

J U D G E M E N T

(01.03.2024)

NARESH SALECHA, MEMBER (TECHNICAL)

1. There are four appeals i.e., Company Appeal (AT) (Insolvency) No. 1104, 1105, 1107 & 1108 of 2020 filed under Section 61 of the Insolvency & Bankruptcy Code, 2016 (in short '**Code**') in CA No. 1393(PB)/2019 in CP No. (IB) – 50 (PB)/2018 under which the Resolution Plan was approved by the Adjudicating Authority. The Appellants have filed the present Appeals being aggrieved to the extent as it allows recourse to the Financial Creditors against the Personal Guarantors of Asian Colour Coated Ispat Limited (in short **'Corporate Debtor**'), the Respondent No. 1 herein.

2. Since the subject matter, the facts of all the four Appeals, the Impugned Order dated 26.10.2020 passed by the National Company Law Tribunal, New Delhi, Principal Bench (in short '**Adjudicating Authority**') is common and these four Appeals were conjointly pleaded by Appellants as well as by the Respondents, we shall examine all these four Appeals together and decide by way of one common order covering all four appeals.

3. Heard the Counsel for the Parties and perused the records made available including the cited judgements.

4. It is noted that the Corporate Insolvency Resolution Process (in short '**CIRP**') of the Corporate Debtor was initiated on 28.07.2018 in CP No. (IB) – 50 (PB)/2018 passed by the Adjudicating Authority. The Resolution Plan of the Corporate Debtor was approved, on the recommendation of the Committee of Creditors (in short '**CoC**') with 79.3% voting shares by the Adjudicating Authority on 19.10.2020 in CA No. 1393(PB)/2019 in CP No. (IB) – 50 (PB)/2018.

5. Aggrieved by the same, the present four Appeals have been filed by the Appellants challenging the Impugned Order dated 26.10.2020.

6. Mr. Vikas Aggarwal is the Appellant in the Appeal bearing Company Appeal (AT) (Insolvency) No. 1104 of 2020, Mrs. Sapna Aggarwal is the Appellant in Company Appeal (AT) (Insolvency) No. 1105 of 2020, Mrs. Archana Aggarwal is the Appellant in Company Appeal (AT) (Insolvency) No. 1107 of 2020 and Smt. Kamlesh Devo Aggarwal is the Appellant in Company Appeal (AT) (Insolvency) No. 1108 of 2020.

Asian Colour Coated Ispat Limited is the Corporate Debtor which underwent CIRP and is the Respondent No. 1 herein in all four appeals.

JSW Steel Coated Products Limited who is the Successful Resolution Applicant (in short '**SRA**') is the Respondent No. 2 herein, in all four appeals.

CoC of the Corporate Debtor is the Respondent No. 3 herein in all four appeals and Mr. Kuldeep Kumar Bassi is the Respondent No. 4 herein an in all four appeals who was the Resolution Professional of the Corporate Debtor.

7. The Appellants brought out that the Resolution Plan submitted by the SRA/ Respondent No. 2 provided for assignment of debt of Financial Creditors to the Special Purpose Vehicle (in short '**SPV**') of SRA named as Hasaud Steels Limited. The Appellants further brought out that on the request of the Financial Creditors, the concept of "Excluded Rights" was incorporated as part of the final Resolution Plan dated 06.05.2019 r/w Addendum dated 17.06.2019.

8. The Appellants stated that the Resolution Plan was approved with a voting percentage of 79.3% by the CoC and thereafter the entire debt of the Corporate Debtor owed to the Financial Creditors were assigned to the SPV and the assignment deed dated 27.10.2020 was signed.

9. The Appellants further stated that the Financial Creditors also gave no due Certificate dated 23.11.2020 in favour of the Corporate Debtor.

10. It is the case of the Appellants that since the entire debt owed by the Corporate Debtor was assigned to the SPV, such debt stood transferred from the Financial Creditors to the SPV in totality and therefore there could not have been

any concept of "Excluded Rights" being part of the Resolution Plan and the approval of the Resolution Plan containing such provisions is illegal and perverse.

11. The Appellants emphasised that the approval of the Resolution Plan by the Adjudicating Authority ought to be within the ambit of the code and anything contravening the provisions of the code is to be treated as illegal. In this connection, the Appellants submitted that the portion of Resolution Plan which permitted the Financial Creditors to retain the rights to pursue their legal remedies against the Appellants as the Personal Guarantor to the Corporate Debtor in absence of any debt, which ceased to exist after assignment of the entire debt to the SPV, such legal remedy in guise "Excluded Rights" could not have been approved and was the not examined properly and such pleadings were not deliberated adequately by the Adjudicating Authority.

12. The Appellants submitted that the Impugned Order is illegal because it seeks to enforce the security interest without the existence of debt qua the Financial Creditor as the same is against the Indian Contract Act, 1872 and Transfer of Property Act, 1882.

13. The Appellants further submitted that such Resolution Plan approval by the Adjudicating Authority is also against the norms stipulated by the Reserve Bank of India (in short 'RBI') which issued detailed guidelines from time to time i.e., prudential norms which stated that in case of assignment of debt, the entire debt

get extinguished and therefore no exposure remains in the books of the Financial Creditors.

14. The Appellants submitted that in terms of Section 31(1) of the Code, the Adjudicating Authority is duty bound to ensure that the Resolution Plan under consideration is in compliance with Section 30(2) of the Code especially Section 30(2) (e) of the Code which require that the Resolution Plan should not contravene any provision of the law for the time being inforce. The Appellants cited the judgement of the Hon'ble Supreme Court of India in the matter of ***Ebix Singapore Private Limited and Ors Vs. CoC of Educomp Solutions Limited and Ors.*** *[(2021) 4 RCR (Civil) 282]*, in support of their arguments.

15. The Appellants brought to the notice of this appellant Tribunal about Para-249 of the Impugned Order which categorically mentioned that whichever provision that is inconsistent with Section 30(2)(e) of the Code shall be treated as not approved.

> *"249. For this plan is spread in various schedules running into several pages, since all these aspects have not been brought to the notice of this Bench at the time of making submissions. we hereby hold that whichever provision that is inconsistent with Section 30(2)(e) of the Code, it shall be treated as not approved by this Bench*"
>
> *(Emphasis Supplied)*

16. The Appellants submitted that it is a settled law that once debt is assigned by the Financial Creditors in favour of any other third entity, he does not retain any independent right and subsequent rights to pursue any legal remedies arising of such debts. Elaborating further, the Appellants submitted that in the present Appeals, since the entire financial debt was transferred to the SPV by the Financial Creditors, the Financial Creditors did not have any right against the Personal Guarantors after the deed of assignment has been signed by the Financial Creditors in favour of the SPV.

17. The Appellants empathetically submitted that the rights arising out of the debt are integral rights and need to be transported to the third party after signing the deed of assignment. It is the case of the Appellants that no-one can claim that pure debt can be transferred but the right to sue against the Personal Guarantors to the Corporate Debtor would remain with the Financial Creditors.

18. The Appellants submitted that in view of this legal position, if any party who could pursue the legal remedies against the Appellants being the Personal Guarantors to the Corporate Debtor could have been only the SPV and by no way the Financial Creditors could vest themselves the rights under the illegal pretext of "Excluded Rights" which was unlawfully inserted in the Resolution Plan and was illegally approved by the Adjudicating Authority violating the provisions of the Code.

19. The Appellants submitted that the Impugned Order has relied upon three judgments of the Hon'ble Supreme court of Indian, namely, ***Lalit Kumar Jain vs. Union of India & Ors.*** *[(2021) 9 SCC 321]*, ***State Bank of India Vs. v. Ramakrishnan & Anr.*** *Civil Appeal No. 4553 of 2018* ***and Gauri Shankar Jain Vs. Punjab National Bank & Anr.*** *W.P. No. 10147 (W) of 2019* which are not applicable in the present cases as legal questions raised by them in the present Appeals were not covered in the above said judgments.

20. The Appellants submitted that in the case of ***Essar Steel India Ltd. Committee of Creditors Vs. Satish Kumar Gupta*** *[(2020) 8 SCC 531]*, the Hon'ble Supreme Court of India has specifically stated that they are not commenting upon the pending litigation on account of invocation of these guarantees since these litigation were pending before the Debts Recovery Tribunal and High Court of Gujarat.

21. The Appellants submitted that the Impugned Order is clearly hit by the wrong interpretation of the judgments discussed in the Impugned Order and therefore the Impugned Order deserves to be set aside.

22. The Appellant cited the judgments in the matter of ***Vikas Aggarwal Vs. Reserve Bank of India & Ors.*** *CWP 1160/2022* passed by the Hon'ble High Court, wherein the Hon'ble High Court has taken the suitable note regarding similar issue of assignment of debt and noted that **:-**

> *"Since the Resolution Plan approved by the NCLT on 19.10.2020 itself contemplated assignment of the debt of the principal borrower to Hasaud Steel Limited, and such assignment. by virtue of the above provisions, would take effect only if the exposure to the borrower is fully extinguished as per Clause 16 of the RBI circular RB/2018-19/203 dt. 7.6.2019, prima facie. there would be extinguishment of debt in the books of respondents No.3 to 11. This is because if such debt is not extinguished in the books of respondents No.3 to 11, the Resolution Plan itself cannot be deemed to be implemented."*

23. The Appellants reiterated that the approval of Resolution Plan vide Impugned Order dated 26.10.2020 in allowing the 'term loan and working capital lenders' of the Corporate Debtor who were defined as 'Direct Financial Creditors' (in short '**DFCs**') to have ability and right recourse against the guarantees given by the Personal Guarantors, despite the entire debt being assigned to the SPV as a result of which no debt whatsoever remained in the books of Corporate Debtor as well the Financial Creditors and therefore, no recourse to the guarantees could survive with the Financial Creditors after signing the assignment deed in favour of the SPV.

24. The Appellants further argued that in case the Financial Creditors retained some portion of the financial debt, perhaps the Financial Creditors could have pursued against the Personal Guarantors for remaining debts which is not the case here.

25. The Appellants pleaded this Appellate tribunal to look into the spirit of the Code which is for the revival of the Corporate Debtor and not to be allowed as recovery mechanism by the Financial Creditors which will defeat the very purpose of the Code and will compromise position of various Stakeholders including the Personal Guarantors to the Corporate Debtor.

26. The Appellants submitted that if no outstanding debt is reflected in the books of the Financial Creditors, how such Financial Creditors can contemplate any legal remedy against the Personal Guarantors, simply because the financial debt does not survive in the books of the Corporate Debtor as well as the Financial Creditors and after the assignment such financial debts along with the underlying rights could vest only with the assignee of the debt i.e., SPV in the present case.

27. The Appellants stated that the liabilities towards the guarantees which were directly connected with the debts and therefore become inseparable from the assignment and it has to be exercised only by the party in whose favour debts have been transferred and therefore the Financial Creditors have no locus to move against the Personal Guarantors and the provisions contained in the Resolution Plan were unlawful.

28. The Appellants emphasised that the "mere right to sue " is clear violation of Section 6(e) of Transfer of Property Act, 1882, according to which the property of any kind may be transferred except the properties which have been excluded

to be transferred and further Section 6(e) clearly indicate that "mere right to sue" cannot be transferred.

29. The Appellant cited judgment of ***Union of India Vs. Sri Sarada Mills Ltd.*** *[(1972) 2 SCC 877]* and drew attention of this Appellate Tribunal to Para 14 to 17 of the judgement which held that transfer of mere right to sue is bad in law and also in another matter of ***Maharaj Singh Vs. Kumud Board*** *[MANU/UP/3476/2016]*. the similar decision was rendered.

30. The Appellants elaborated further that since the debt stood transferred in favour of the assignee i.e., SPV, therefore, what is being pursued by the Financial Creditors against the Personal Guarantors are mere right to sue and therefore the same is expressly prohibited by the law and the Impugned Order approving the said provisions regarding "Excluded Rights" which has been used by the Financial Creditors to pursue legal remedies against the Personal Guarantors is bad in law.

31. The Appellants also assailed the Adjudicating Authority for lack of application of mind and dereliction of duty in examining the crucial aspect of Resolution Plan which was violative of the Code as reflected in para 249 of the Impugned Order.

32. The Appellants also assailed the Impugned Order with reference to Para 197 which entitled the Financial Creditors to initiate proceedings against the

Personal Guarantors whereas the Financial Creditors have already made claims against the Corporate Debtor and received the payment through the Resolution Plan.

33. The Appellants reiterated that since no debt remains and survives both in the books of the Corporate Debtor and in the books of the Financial Creditors, the portion of the Resolution Plan which empowers the Financial Creditors to pursue legal remedies against the Personal Guarantors is against the law of the land as it is a settled law that liability towards the guarantee travels along with the debts and cannot be separated from debt assignment.

34. The Appellants assailed the Impugned Order whereby the Resolution Plan has extinguished its statutory rights of subrogation as guarantors of the Corporate Debtor contravening the provisions of Indian Contract Act, 1872 and the Appellant further submitted that since the terms of restructuring of debt are not spelt out in the Resolution Plan, the Appellants automatically get discharged in the capacity of Guarantor under the provision of the Indian Contract Act, 1872. The Appellant stated that after implementation of Resolution Plan of claims against the Corporate Debtor are extinguished except as provided in the Resolution Plan by the SRA and become binding on of Stakeholders including Financial Creditors, Operational Creditors, Corporate Debtor and other Stakeholders in terms of Section 31 of the Code.

35. The Appellants submitted that the RBI guidelines are very clear and are in nature of mandatory directives and cannot be violated by the Stakeholders including the Financial Creditors.

36. Concluding their arguments, the Appellants submitted that the Impugned Order be set aside.

37. Per contra, the Contesting Respondent i.e, JSW Steel Coated Products Limited/ SRA, who is the Respondent No. 2 herein, countered all the averments made by the Appellants treating these to be malicious, misleading, untruthful and without any substance.

38. The Respondent No. 2 stated that the Appeals have been filed only to avoid the financial liabilities of the Appellants who stood as Personal Guarantors to the Corporate Debtor.

39. The Respondent No. 2 stated that the revised Resolution Plan submitted by him was recommended by the CoC with a voting share of 79.3% and the same was approved by the Adjudicating Authority after taking into consideration of all facts and legal provision including compliance with the code and therefore, the Impugned Order is perfectly legal and valid.

40. The Respondent No. 2 submitted that the decision has been taken to approve the Resolution Plan by the CoC, exercising its commercial wisdom which cannot be challenged by the Appellants and even Hon'ble Supreme Court has

given a clear verdict regarding supremacy of the commercial wisdom of the CoC in catena of the judgment including ***K. Shashidhar Vs. Indian Overseas Bank*** *[(2019) 12 SCC 150]*, whereas similar issue was considered and a clear ratio was given regarding rights of the assignment of debt to the Resolution Applicant and retentions of the Financial Creditors with the guarantee, along with extinguishment of right of subrogation of the guarantor.

41. The Respondent No. 2 further cited judgment of Hon'ble Supreme Court of India in the matter of ***SBI Vs. Ramakrishnan*** *[(2018) 17 SCC 394]*, where it was held that the Guarantors cannot escape payment obligation on the Resolution Plan taking effect under Section 133 of the Indian Contract Act, 1872 and therefore, the principle that any change made to the debt owed by the Corporate Debtor without the consent of the surety, discharge surety is, inapplicable in the present case as the Resolution Plan is binding on the Guarantors in terms of the Code.

42. The Respondent No. 2 gave an overall scheme of the Resolution Plan and submitted that the unpaid part of the debt of the Corporate Debtor was assigned to the SPV established by him as SRA whereas the personal guarantees furnished by the Appellants continued with the Financial Creditors.

The Respondent No. 2 stated that this was very specific and clear part of the Resolution Plan and therefore cannot be challenged by the Appellants to avoid

their financial obligations and further submitted that the Resolution Plan also extinguished the rights of the subrogation of the Appellants.

The Respondent No. 2 submitted that the similar contentions was earlier discussed by the Hon'ble Supreme Court of India in the matter of ***Essar Steel India Ltd. Committee of Creditors*** *[(2020) 8 SCC 531],* where the Apex Court after considering the similar objections of the Guarantors found no infirmity in the Resolution Plan and refused to make any observation regarding impacting the proceedings regarding the invocation of such guarantees.

43. The Respondent No. 2 submitted that the Stakeholders including the Guarantors of the Corporate Debtor are bound by the approved Resolution Plan in terms of the Section 31 (1) of the Code. The Respondent No. 2 further submitted that it is a settled position of the law that the Guarantor's liabilities are co-extensive with the Corporate Debtor.

44. The Respondent No. 2 reiterated that since the Resolution Plan specifically provided for extinguishment of right of subrogation available to the Appellants as Guarantors, the arguments of the Appellants herein that the Resolution Plan is not in compliance with the Indian Contract Act, 1872, is without any legal standing.

45. The Respondent No. 2 elaborated that it was conscious decision taken by him as SRA to provide for such arrangement of assigning debt to their own SPV retaining exclusive rights of the Financial Creditors regarding their rights to

proceed legally against the Guarantors and the same was approved by the CoC with full consciousness and exercising its commercial wisdom and therefore is beyond challenge by the Appellants in terms of catena of judgments of the Hon'ble Supreme Court of India.

46. Concluding his remarks, the Respondent No. 2 submitted that the present Appeals devoid of any merit are required to be dismissed with heavy cost.

47. The Respondent No. 3 i.e., Committee of Creditors of the Corporate Debtor also denied all the averments of the Appellants to be untruthful, frivolous and misconceived and therefore the Appeals deserve to be dismissed with exemplary cost.

48. The Respondent No. 3 submitted that the Resolution Plan approved by the Adjudicating Authority is aimed at resolution of debt of the Corporate Debtor and not for the resolution of the Personal Guarantors to the Corporate Debtor.

49. The Respondent No. 3 further submitted that the very purpose and intent of the code is quite clear which provide for resolution of the Corporate Debtor to bring back such entity on its own legs in helping revival of the Corporate Debtor and therefore the intention of the Code is not to provide of free exit to such Personal Guarantors to the Corporate Debtor without fulfilling their stipulated financial liabilities based on which the Financial Creditors gave the loans and credit facilities to the Corporate Debtor.

50. The Respondent No. 3 stated that the Impugned Order in Para 197 clearly mentioned that resolution of debt cannot be mis-constitute as full satisfaction of debts payable to the Creditors as resolution of debt under the approved Resolution Plan is only to the extent of application against the insolvent corporate debtor which cannot take away rights of the Financial Creditors to proceed against the Personal Guarantors to the Corporate Debtor.

51. The Respondent No. 3 stated that CoC deliberated extensively before approving the Resolution Plan of the Respondent No. 2 and provided specific clause regarding the "Excluded Rights" of the Financial Creditors to proceed legally against the Personal Guarantors to the Corporate Debtor in order to recover their money not provided in the Resolution Plan.

52. The Respondent No. 3 submitted that the various clauses of the incorporated as part of the final Resolution Plan dated 06.05.2019 r/w Addendum dated 17.06.2019 i.e., Clause 1.3, 1.8, 1.10, 1.12, 1.13, 1.14 read along with relevant definition in Schedule I- List of defined terms, clearly indicate that nothing in the Resolution Plan shall operate or have the effect or assignment, revoking or cancelling or extinguishing the "Excluded Right" as defined and directs the Financial Creditors (DFC) and/or related creditors as applicable, are free to pursue such remedies and exercise such rights as the Financial Creditors may under applicable laws in respect of such "Excluded Rights".

53. The Respondent No. 3 clarified that it was only remaining debt according incorporated as part of the final Resolution Plan dated 06.05.2019 r/w Addendum dated 17.06.2019 which was assigned to the SPV of the Respondent No. 2 in accordance with the Resolution Plan but carved out "Excluded Rights" and financial contracts, except which legal rights of recovery through "Excluded Rights", were assigned to the SPV of the SRA.

54. The Respondent No. 3 took pains to explain that consciously Resolution Plan protected the rights of the Financial Creditors to pursue legal remedies against the Personal Guarantors including the Appellants herein and there is not illegality in the same and such provision of "Excluded Rights" were provided after exercising the commercial wisdom by the CoC.

55. The Respondent No. 3 also cited judgment of Hon'ble Supreme Court of India in the matter of ***Lalit Kumar Jain Vs. Union of India*** *[(2021) SCC Online SC 396]*, where it was decided that approval of the Resolution Plan of the Corporate Debtor does not operate as to discharge the Personal Guarantors by the Corporate Debtor .

56. The Respondent No. 3 stated that the assignment of debts under the Resolution Plan under the Code cannot be equated with general principle of assignment as the Code itself is self contained Code with non obstante clause as provided under Section 238 of the Code.

57. The Respondent No. 3 also refuted that arguments of the Appellants regarding their rights of subrogation and stated that the subrogation rights are statutory rights available under normal circumstances to a surety against the principle debtor, however, under the Code, subrogation rights against the corporate Debtor gets extinguished with approval of the Resolution Plan by the Adjudicating Authority.

58. Concluding their arguments, the Respondent No. 3 requested this Appellate Tribunal to dismiss the Appeals with heavy cost.

59. Mr. Kuldeep Kumar Bassi is the Respondent No. 4 in the present Appeal and Erstwhile Resolution Professional of the Corporate Debtor also denied all the averments made by the Appellants on similar grounds as brought out by the Respondent Nos. 2 & 3, discussed above.

60. The Respondent No. 4 brought out the relevant facts and the history of the case and particularly highlighted Para 197 of the Impugned Order dated 26.10.2020 which clearly recognised the facts regarding non availability of right of the subrogation to the Appellants herein.

61. The Respondent No. 4 also submitted that it is the absolutely legally tenable provisions provided in the Resolution Plan for continuation of personal guarantees which can be independently pursued by the Financial Creditors for unpaid debts.

62. The Respondent No. 4 submitted that it was business decisions of the SRA as detailed out in Resolution Plan to revive the Corporate Debtor and has provided the legal rights and liabilities including the rights of the Financial Creditors to carve out the concept of "Excluded Rights" in favour of the Financial Creditors to pursue recoveries against the Personal Guarantors for the remaining unpaid portion of debts not provided in the Resolution Plan.

63. Concluding his arguments the Respondent No. 4 submitted that the Appeals deserves to be dismissed.

Findings

64. At the outset, we take into consideration the facts regarding admitted debt and proposed payment by the SRA w.r.t. Financial Creditors and Operational Creditors and therefore following picture emerges :-

"Resolution Plan submitted by the Respondent No. 2 proposes the following :-

S.No.	*Parties*	*Admitted Debt (Approx.) (INR)*	*Payment Proposed by Respondent No. 2 (INR)*
	Total	*7801,82,87,850*	*1550,00,00,00*
1.	*Secured Financial Creditors*	*4864,39,65,599*	*1499,98,93,253 (Loan Assignment Payment)*

2.	*Unsecured Financial Creditors*	*1702,60,19,604*	*25,00,00,000*
3.	*Operational Creditors*	*507,87,66,450*	*25,00,00,000*

➤For a consideration of Loan Assignment Payment ("LAP"), a 'Purchaser' will step into the shoes of the DFCs and exercise rights in respect of the entire admitted financial debt presently owed to the DFCs;

➤Admitted Financial Debt: INR 6566,99,85,203 (Total of Direct Financial Debt and Indirect Financial Debt);

➤ Corporate Guarantee Debt (i.e. the debt of financial creditors by virtue of corporate guarantee furnished by Corporate Debtor): INR 1,566,14,03,006;

➤Residual Guarantee Amount: INR 3,500,86.88,943 (difference between the Admitted Financial Debt and the Loan Assignment Payment);

➤ Remaining Debt: INR 5,000,85,82,197 (difference between Admitted Financial Debt and Corporate Guarantee Debt).”

65. Thus, against the admitted debts of Rs. 7801 Crores, the payment proposed by the SRA was only of Rs. 1550 Crores i.e., 19.87% of the Admitted debts, implying huge hair cut of 80.13% for creditors.

In this background, it is worth noting that of Rs. 1550 Crores, Rs. 1499 Crores was as loan assignment payment and remaining payment of Rs. 25 Crores each to the Operational Creditors and other Unsecured Financial Creditors.

66. We would also like to take into consideration the significate provisions of Resolution Plan approved by the Adjudicating Authority by the Impugned Order dated 26.10.2021 which have been referred by all the parties in the present appeals filed before us. This important provisions reads as under :-

> ***1. Section 1.2(d)(ii) of the Plan***
>
> *"Post the payment of unpaid CIRP Costs (in the manner set out on Section 1.1 of Part B) and payments to the Operational Creditors (in the manner set out in Section 1.3. Section 1.4 and Section 1.5 of Part B below), the Admitted Financial Debt owing to the Financial Creditors will be dealt with, in the following manner:*
>
> *(i)* ***The Corporate Guarantee Debt Payment*** *shall be paid to the Related Entity Creditors on a pro rata basis to the amount payable to such creditor, in the manner set out in Step 3 of Schedule 2 (Resolution Plan Steps)*
>
> *(ii)* ***The Remaining Debt*** *(and all rights of the Financial Creditors in respect of such debt), shall stand assigned/novated to the purchaser and the Loan Assignment Payment shall be paid in the manner set out in Step 4 of Schedule 2 (Resolution Plan Steps). on a pro rata basis to the amount payable to the Direct Financial Creditors. Upon such assignment, the Purchaser shall be entitled to exercise all rights as a creditor in respect of the Remaining Debt,*

including the right to enforce any security, guarantee or mortgage granted in respect of such debt.

2. Para 1.13 of the Addendum: ***Definition of "Remaining Debt"-***

""Remaining Debt" shall mean all rights, title, interests of the creditors in and to Admitted Financial Debt less the Corporate Guarantee Debt, along with all rights, assets, title, charges, encumbrances, mortgages and guarantees (including the personal guarantees issued by Mr. Pradeep Kumar Aggarwal to the Direct Financial Creditors, to the extent of the Loan Assignment Payment), and any beneficial interest therein, securing such debt. ***(but excluding the Excluded Rights),*** *which will be assigned/novated to the Purchaser pursuant to this Resolution Plan. The assignment and novation of the personal guarantees issued by Mr. Pradeep Kumar Aggarwal to the Direct Financial Creditors, to the extent of the Loan Assignment Payment is an integral part of the Resolution Plan."*

3. Para 1.12 of the Addendum: Definition of "Excluded Rights"-

""Excluded Rights" shall mean (A) personal guarantees provided by persons other than Mr. Pradeep Aggarwal, (B) any mortgage and/or hypothecation provided by ACCIL

Hospitality Limited, and (C) corporate guarantees provided by AGR Steel Strips Private Limited and ACCIL Hospitality Limited (D) the personal guarantees provided by Mr. Pradeep Aggarwal to the Direct Financial Creditors, but only to the extent of the Residual Guarantee Amount, and (b) the mortgage created by the Company over land bearing Plot No. 6 & 13 measuring 18900 sq.mts., located in the Industrial estate, Bawal, Haryana, pursuant to the Memorandum of Entry dated June 27, 2013 executed by the Company in favour of IL & FS Trust Company Limited (now known as Vistra ITCL (India) Limited) for the benefit of Andhra Bank, Central Bank of India, Corporation Bank and Dena Bank (now Bank of Baroda), for securing the loans granted to ACCIL Auto Steel Private Limited by the aforesaid lenders."

4. ***Para 1.14 of the Addendum: Definition of "Residual Guarantee Amount"***

*"**Residual Guarantee Amount" shall mean the amount equal to the Admitted Financial Debt owed to the Direct Financial Creditors less than the Loan Assignment Payment**"*

(Emphasis Supplied)

67. Based on the averments made before us, the issue which emerges is whether recourse to the guarantee, provided by the Appellants herein, survive after the entire debt of the Corporate Debtor stand assigned in favour of the SPV

of the Respondent No. 2 by the Financial Creditors as per approved Resolution Plan.

The moot question is whether the Financial Creditor can proceed against the Personal Guarantors in absence of any debt after extinguishment of such debts upon assignment in terms of the RBI Prudential Framework for Resolution of Stressed Assets dated 07.06.2019 and as stipulated in the approved Resolution Plan.

Other issues which are required to be considered shall, inter-alia, includes:

a. Whether, the right of subrogation shall stand extinguished after approval of the Resolution Plan under the Code or the same will continue to vest with Personal Guarantors in terms of the Indian Contract Act, 1872.

b. Whether, "mere right to sue" in terms of Section 6(e) of the Transfer of Property Act, 1882 will come into play in the present Appeals.

c. The implications on the rights and obligations of the Personal Guarantor to the Corporate Debtor in case the entire debt stand transferred or assigned and the Financial Creditors retained rights to peruse legal remedies against such Personal Guarantor by way of "Excluded Rights"..

All such issues are inter mingled, inter connected and to some extent depends upon each other, therefore, we shall take up and discuss al above issue in joint manner in subsequent paras.

68. We are of the opinion that the intent of the legislature behind the provisions of the Code is for resolution of the Corporate Debtor and not of the Personal Guarantors of the Corporate Debtor. The financial creditors have a right to proceed against the personal guarantors of the Corporate Debtor, and further, that the personal guarantors, in terms of section 31 of the Code are duty bound by the terms of the Resolution Plan approved by the Adjudicating Authority. We also feel that a Resolution Plan itself can vary and modify the rights of the creditors and guarantors of the corporate debtor and provide for continuation of personal guarantees which do not need any confirmation from Personal Guarantor to the Corporate Debtor. We carefully note that there is a categorical right carved out in favour of the Financial Creditors, through the specific term i.e., the 'Excluded Rights' which have not been assigned to the SPV. The Resolution Plan defined the term 'Remaining Debt' which has been assigned to the SPV of the Respondent No. 2 and perusal of the relevant provisions clearly reveal that such 'Remaining Debt' assigned to the SPV of the i.e. Respondent No. 2 explicitly preclude the “Excluded Rights”.

69. We have noted that the approved Resolution Plan categorically provides that nothing in the Resolution Plan shall operate or have the effect of assigning, revoking, cancelling or extinguishing the "Excluded Rights" and the Direct Financial Creditors are free to pursue such remedies and exercise such rights as they may have under applicable laws in respect of the "Excluded Rights". We have taken into consideration of the fact that it is the Remaining Debt, as defined in the Resolution Plan including the Addendum that has been assigned to Respondent No.2 in terms of the Resolution Plan, but precluding the "Excluded Rights". There are clear and express provisions and stipulations under the Resolution Plan safeguarding the right of the Financial Creditors to pursue legal remedies against the personal guarantors, including the Appellants.

70. As regard "right of subrogation", we need to appreciate that Subrogation is the right to equity and natural justice. Doctrine of subrogation allows the Personal Guarantors to resume the rights or remedies of the Financial Creditors against the Corporate Debtor which implies that in case the Personal Guarantors fulfil their obligations and pay the debts in full and satisfy the Financial Creditors, such Personal Guarantors will become entitled to take over the rights or remedies which the Financial Creditors had against the Corporate Debtor.

71. We shall take into account the Section 140 and 141 of the Indian Contract Act, 1872 which reads as under :-

"140. Rights of surety on payment or performance.— *Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.*

141. Surety's right to benefit of creditor's securities.— *A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.*

Illustrations

(a) C, advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b)C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c)A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged."

(Emphasis Supplied)

72. From Section 140 of the Indian Contract Act, 1872 it becomes clear that the surety is vested with all the rights of the creditors against the principles debtor once surety has paid his full obligations towards the Financial Creditors and he would be subrogated in the shoes of the Creditors and becomes entitled to enforce securities available to the Creditors against the Corporate Debtor. Similarly, Section 141 of the Indian Contract Act, 1872 is to protect the surety or the Guarantors against creditors act of losing or without surety/ guarantors consent parting with the security.

73. We also note that Personal Guarantors like Appellants herein are generally speaking the original promoters of the Corporate Debtors. They are also responsible for success or failure of such Corporate Debtor and such promotors might have been profited from such Corporate Debtors or alternatively could have been the reason for the failure of the Corporate Debtor which led to the insolvency of the Corporate Debtors.

74. As a general rule, the doctrine of subrogation is an absolute right of the guarantor, however, the issue becomes different, if it falls within the domain of

the Code in the context of CIRP proceedings. We note that as per notification dated 15.11.2019, the Personal Guarantors became liable under the Code and therefore, the treatment of Personal Guarantors under the Code are to be treated differently vis-à-vis under the contract of guarantees under the Indian Contract Act, 1872.

In this connection, we would like to reiterate that the objective of the code is to revive and rehabilitate the Corporate Debtor and therefore the right to subrogation may not survive in such situation. The extinguishment of the Personal Guarantors right of subrogation is clear departure from establish principles of contract guarantee which are covered under Section 140 and 141of the Indian Contract Act, 1872.

75. It may be alternative argument that if the Corporate Debtor is not required to pay the guarantors as a consequence of subrogation right, the Corporate Debtor may unjustly get enriched at the expense of the Guarantors, in case the financial conditions of the Corporate Debtor improve and the Corporate Debtor becomes capable to settle all the claims of the original lenders which have been paid or settled by the guarantors.

On the other hand, if such contingencies and uncertainties on account of rights of subrogation is allowed to be continue, the Corporate Debtor even after resolution as a result of approved Resolution Plan, will always be subject to

financial uncertainties and vagaries due to such claims by the Personal Guarantors in future. This clearly is not the intent of the code which has been consciously made for the revival of the Corporate Debtor and has adopted the concept of clean slate theory for the reborn corporate entity under new management.

76. Now we will also look into the aspect of Section 140 and 141 of the Indian Contract Act, 1872 vis-à-vis Section 238 of the Code. We note that Section 238 of the Code describes categorically that the code take precedent over any inconsistency contained in any other existing law which includes Indian Contract Act, 1872, therefore, despite provisions of Section 140 and 141 of the Indian Contract Act, 1872 the Personal Guarantors cannot claim any relief in view of clear provisions of Section 238 of the Code.

77. The denial of right of subrogation is no more res-judicata and has been decided in catena of the judgments by the Hon'ble Supreme Court of India.

78. At this juncture, we will go through few of judgments on the issue of subrogation.

79. ***Essar Steel India Ltd. Committee of Creditors*** *(Supra) :-*

> *"102. Also, under the caption "terms of settlement", the final resolution plan dated 2-4-2018, as approved on 23-10-2018. specifically provided:*
>
> *"Financial Creditors: Pursuant to the approval of this resolution plan by the Adjudicating Authority, each of the*

financial creditors shall be deemed to have agreed and acknowledged the following terms:

(i)The payment to the financial creditors in accordance with this resolution plan shall be treated as full and final payment of all outstanding dues of the corporate debtor to each of the financial creditors as of the effective date, and all agreements and arrangements entered into by or in favour of each of the financial creditors, including but not limited to loan agreements and security agreements (other than corporate or personal guarantees provided in relation to the corporate debtor by the existing promoter group or their respective affiliates) shall be deemed to have been (1) assigned/novated to the resolution applicant, or any person nominated by the resolution applicant, with effect from the effective date, with no rights subsisting or accruing to the financial creditors for the period prior to such assignment or novation; and (i) to the extent not legally capable of assigned or novated-terminated with effect from the effective date, with no rights accruing or subsisting to the financial creditors for the period prior to termination.

(ii) In relation to the loan and financial assistance provided to the corporate debtor, each of the financial creditors, at the case maybe shall -Assign/novate all security given (including but not limited to encumbrance over assets of the corporate debtor, pledge of shares of

the corporate debtor (other than corporate guarantees and personal guarantees) related in any manner to the corporate debtor) to the resolution applicant and/or its connected persons, and/or banks or financial institutions designated by the resolution applicant in this regard, pursuant to the Acquisition Structure, with effect from the effective date:

-Issue such letters and communications, and take such other actions, as may be required or deemed necessary for the release, assignment or novation of (1) the encumbrance over the assets of the corporate debtor, and (ii) the pledge over the shares of the corporate debtor: within 5 (five) business days from the effective date: and

- Be deemed to have waived all claims and dues (including interest and penalty, if any) from the corporate debtor arising on and from the insolvency commencement date, until the effective date"

103. Shri Rohatgi, learned Senior Advocate appearing on behalf of Shri Prashant Ruia, also pointed out Section XIII(1)(g) of the resolution plan dated 23-10-2018, in which it is stated as follows:

"Upon the approval of the resolution plan by the Adjudicating Authority in relation to guarantees provided for and on behalf of, and in order to secure the financial

assistance availed by the corporate debtor, which have been invoked prior to the effective date, claims of the guarantor on account of subrogation, if any, under any such guarantee shall be deemed to have been abated, released, discharged and extinguished.

It is hereby clarified that, the aforementioned clause shall not apply in any manner which may extinguish/affect the rights of the financial creditors to enforce the corporate guarantees and personal guarantees issued for and on behalf of the corporate debtor by existing promoter group or their respective affiliates, which guarantees shall continue to be retained by the financial creditors and shall continue to be enforceable by them." (emphasis supplied)

"106. Following this judgment in V. Ramakrishnan case (SBI v. V Ramakrishnan, (2018) 17 SCC 394: (2019) 2 SCC (Civ) 4581, it is difficult to accept Shri Rohatgi's argument that, that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile Directors of the corporate debtor. So far as the present case is concerned, we hasten to add that we are saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, NCLAT Judgment being contrary to Section 31(1) of the Code and this Court's judgment in V. Ramakrishnan case [SBI v. V.

Ramakrishnan, (2018) 17 SCC 394: (2019) 2 SCC (Civ) 458), is set aside."

(Emphasis Supplied)

Based on above, we observe that Hon'ble Supreme Court of India noted that the Financial Creditors can pursue their claims against the Personal Guarantors to the Corporate Debtor and right of subrogation gets extinguished, although the apex Court decided not to express conclusive opinion which might have affected them pending litigations on account of invocation of such guarantees.

80. ***State Bank of India Vs. v. Ramakrishnan & Anr. (Supra)***

"25. Section 31 of the Act was also strongly relied upon by the respondents. This section only states that once a resolution plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Contract Act 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may well include provisions us to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal

guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him."

(Emphasis Supplied)

We note that the ratio emerges from above judgment is that in view of Section 31 of the Code, the Financial Creditors can pursue against the Personal Guarantors to the Corporate Debtor.

81. ***Lalit Kumar Jain vs. Union of India & Ors.*** *[(2021) 9 SCC 321]*

"130. The rationale for allowing directors to participate in meetings of the CoC is that the directors' liability as personal guarantors persists against the creditors and an approved resolution plan can only lead to a revision of amount or exposure for the entire amount. Any recourse under Section 133 of the Contract Act to discharge the liability of the surety on account of variance in terms of the contract, without her or his consent, stands negated by this court, in V. Ramakrishnan where it was observed that the language of Section 31 makes it clear that the approved plan is binding on the guarantor, to avoid any attempt to escape liability under the provisions of the Contract Act. It was observed that:

"25. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may well include provisions as to payments to be made by such guarantor...."

132. In Committee of Creditors of Essar Steel (1) Ltd. v. Satish Kumar Gupta (the "Essar Steel case") this court refused to interfere with proceedings initiated to enforce personal guarantees by financial creditors; it was observed as follows:

....

133. It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In Maharashtra State Electricity Board (supra) the liability of the guarantor (in a case where liability of the principal debtor was discharged under the insolvency law or the company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realize the same from the guarantor in view of the language of Section

128 of the Contract Act as there is no discharge under Section 134 of that Act….

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

137. For the foregoing reasons, it is held that the impugned notification is legal and valid. It is also held that approval of a resolution plan relating to a corporate debtor does not operate so as to discharge the liabilities of personal guarantors (to corporate debtors)...."

(Emphasis Supplied)

This judgement paves clear way for the Financial Creditors to pursue their legal remedies against the Personal Guarantor to the Corporate Debtor.

Having noted above judgment, it will not be worthwhile to repeat what flows clearly from above judgment. The above judgement of the Apex Court is binding and by a large applicable to the facts of these appeals.

82. It is now well settled law, in light of the ***Essar Case*** (Supra) that rights of subrogation that may arise against the Corporate Debtor can be extinguished under the Resolution Plan and therefore the arguments of the Appellant on issue of rights of subrogation's are not convincing. If the rights of subrogation are allowed to continue against the Corporate Debtor under the management of the new SRA, the same would have the effect of putting the SRA and the Corporate Debtor in the same position as prior to its insolvency resolution. The allegation of the Appellant pertaining to differential treatment due to extinguishing their rights of subrogation under the approved Resolution Plan against the Corporate Debtor is unfounded, which is only to ensure that the SRA takes control of the Corporate Debtor on a clean slate without carrying any previous liability baggage.

83. We feel that the extinguishment of Personal Guarantors right of subrogation is unavoidable and inaccessible fact in insolvency cases and it requires to be respected by all stakeholders and any departure from such principles will have adverse impact on revival of the Corporate Debtors, interest of the Financial Creditors and overall negative impact on the national economy.

84. Therefore, we are not inclined to accept the pleas of the Appellants regarding their rights of subrogation.

Be that as it may, we are of the clear opinion that the Code seeks to prevent such Personal Guarantors to the Corporate Debtor from benefitting themselves

from the CIRP at the expenses of the Financial Creditors who takes a big hit through substantial hair cuts and therefore cannot be allowed to take shelter of Section 140 and 141 of the India Contract Act, 1872.

85. Now, we shall deal with the aspect relating to "Mere right to sue" in terms of Section 6(e) of the Transfer of Property Act, 1882 as raised by the Appellants, who submitted that mere right to sue is bad in law and is prohibited under Section 6(e) of the Transfer of Property Act, 1882.

Section 6 of the Transfer of Property Act, 1882 reads as under :-

> *"6. What may be transferred.—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force:*
> *(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.*
> *(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.*
> *(c) An easement cannot be transferred apart from the dominant heritage.*
> *(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him. 4 [(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.]*

*(e) A mere right to sue 5 *** cannot be transferred.*

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military, 6 [naval], 7 [air-force] and civil pensioners of 8 [the Government] Government] and political pensions cannot be transferred.

(h) No transfer can be made (1) in so far as it opposed to the nature of the interest affected thereby, or (2) 9 [an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872 (9 of 1872), or (3) to a person legally disqualified to be transferee].

[(i) Nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a court of Wards, to assign his interest as such tenant, farmer or lessee.]"

(Emphasis Supplied)

It may be argued that the purpose of stipulating Section 6(e) i.e., non-transferable of mere right to sue or such actionable claims is to prohibit the practice of gambling out of litigation.

We observe that right to sue has been preceded by the word "mere" meaning only right to sue but if the right to sue is not simpliciter right or involves direct or

indirect interests in the property (including financial debt) such right to sue can be argued to be assignable and therefore may not fall in the ambit of Section 6(e) of the Transfer of Property Act, 1882.

Normally speaking, when the entire business or entire debt is transferred to the new entity, right to sue should automatically presumed to be transferred to the new entity.

86. In the present Appeals, we have already noted the final Resolution Plan dated 06.05.2019 r/w Addendum dated 17.06.2019, contained specific clause regarding the rights of the Financial Creditors along with the rights of the SPV.

87. We are conscious of the fact that clear and deliberate decision was taken by the SRA/ the Respondent No. 2, the CoC / the Respondent No. 3 which included the original Financial Creditors under which the Financial Creditors retained the rights to pursue their legal remedies against the Personal Guarantors.

88. This is quite clear that the creditors took huge hit only to help revive the Corporate Debtor through the new management of the Respondent No.2. We have already noted that the Code was promulgated with a clear aim to revive the Corporate Debtor and help the Corporate Debtor to stand on its own legs and help the national economy. It was never contemplated that the other parties who were to meet their contractual liabilities, will get scot free or shall be entitled to exit the scene without fulfilling their obligations. Afterall, the code is not for Resolution

of such Personal Guarantors and it may not be out of context to note that the Financial Creditors sanction huge credit facilities to the Corporate Debtor based on several protections including the Personal Guarantees of the Promotors which are generally in nature of irrevocable continuing guarantees.

89. The Appellant cited judgment of ***Union of India Vs. Sri Sarada Mills Ltd.*** *[(1972) 2 SCC 877]* and drew attention of this Appellate Tribunal to Para 14 to 17 of the judgement which held that transfer of mere right to sue is bad in law and also in another matter of ***Maharaj Singh Vs. Kumud Board*** *[MANU/UP/3476/2016]*. the similar decision was rendered :-

> *"14. Section 6(e) of the Transfer of Property Act states that a mere right to sue cannot be transferred. A bare right of action might be claims to damages for breach of contract or claims to damages for tort. An assignment of a mere right of litigation is bad... The reason behind the rule is that a bure right of action for damages is not assignable because the law will not recognise any transaction which may savour of maintenance of champerty. It is only when there is some interest in the subject matter that a transaction can be saved from the imputation of maintenance. That interest must exist apart from the assignment and to) that extent must be independent of it.*
>
> *15…A bare right of action is not assignable. When however the right of action is one of the incidents attached to the*

property or contract assigned it will not be treated as a bare fight of action."

It is submitted that the same has been reiterated by Supreme Court as well as high courts in various judgments, for instance in Agri Marketing Co. vs. Imperial Exports Limited, 2001 SCC OnLine Bom 841, by the Hon'ble Bombay High Court. Thus, the survival of guarantees is clearly in contravention of Section 6(e) of the Transfer of Property Act, 1882 and as such in violation of Section 30(2)(e) of the Code.

(Emphasis supplied)

90. We also look into the cited judgment about Section 6(e) of the Transfer of Property Act, 1882 and the relevant portion of the judgment passed in ***Union of India Vs. Sri Sarada Mills Ltd.*** *[(1972) 2 SCC 877]* and ***Maharaj Singh Vs. Kumud Board*** *[MANU/UP/3476/2016]*, reads as under :-

"16. For the case in hand we are concerned with Section 6(e) which says a "mere right to sue" cannot be transferred. Section 6 come up for consideration in Union of India Sri Sarada Miis Led MANU/SC/0410/1972: A.I.R. 1973 SC 281 wherein it held that a bare right of action, might be, claims to damages for breach of contract or claims to damages for tort and assignment of the mere right of litigation, is bad. An assignment of property is valid even although that property may be incapable of being received without litigation. The reason behind the rule is that a bare right of action for

> *damages is not assignable because the law will not recognize any transaction which may savour maintenance of champerty. It is only when there is some interest in the subject matter that a transaction can be saved from imputation of maintenance. That interest must exist apart from the assignment and to that extent must be independent of it."*
>
> *(Emphasis Supplied)*

Thus, one significant part is noted from above judgment is that some independent intent must exist apart from the assignment. We note that in the present appeals what has been assigned was 'remaining debts' and what survived as independent intent was "Excluded Rights" of the Financial Creditors to pursue necessary legal remedies against the Personal Guarantors to the Corporate Debtor. Thus, in light of above cited judgments it emerges that there has been no violation of Section 6(e) of the Transfer of Property Act, 1882 as alleged by the Appellants.

91. In light of such "Excluded Rights" continuing to exist with the Financial Creditors under the terms of the approved Resolution Plan, transfer of "mere right to sue" under the provisions of the Transfer of Property Act, 1882 Section 6(e) is not applicable. We observe that when the Resolution Plan provides for specific provisions, whereby the Financial Creditors exclusively retain the rights to proceed against the Personal Guarantors and provisions stating that nothing in the Resolution Plan shall have the effect of assigning such rights to the Resolution

Applicant, it is clear that the CoC in its commercial wisdom has approved such provisos for continued rights of the Financial Creditors against the Personal Guarantors and that there has been no assignment of such rights to proceed against the Personal Guarantors to the SPV of the Successful Resolution Applicant/ Respondent No. 2. This was in fact proposed by the SRA in finally approved Resolution Plan and seems to be have done after due deliberations with the CoC. In such eventuality there is no applicability of transfer of "mere rights to sue", as the said rights were never assigned and have been retained by the Financial Creditors all along. The Appellants cannot seek undue benefits on account of the Resolution Plan and avoid their huge financial liabilities accrued based on the Personal Guarantees given by the Personal Guarantors to the Corporate Debtor.

92. We are of clear opinion that the financial creditors have reserved the rights to proceed against the personal guarantors like the Appellant herein in terms of the "Excluded Rights" in approved Resolution Plan. There is no question of transfer of a "mere right to sue" and in such circumstances, we feel that it is a structured financial deal in form of Resolution Plan exercised based on the commercial wisdom, with aim of resolution of a corporate debtor, as well as to ensure that financial creditors are able to recover their outstanding debts as guaranteed by the Personal Guarantors, the Appellants herein. We endorse the views that resolution of debts cannot be misconstrued as full satisfaction of debts

payable to the creditors and Resolution of debts under the Resolution Plan is only to the extent of the obligations against and this will not take away the rights of the Financial Creditors to proceed against the Appellants as Promotors who stood as guarantors and the assets mortgaged by others against the loan availed by the principal debtor.

93. The above proposition is further fortified by section 238 of the Code which specifically provides that the provisions of the Code shall have an overriding effect on inconsistent laws. Section 238 of the Code is reproduced herein below-

> **238. Provisions of this Code to override other laws. -The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*
>
> *(Emphasis Supplied)*

94. We have already noted overall adverse financial scenario of the Corporate Debtor for which the Resolution Plans were invited after admission of the Corporate Debtor under the CIRP by the Adjudicating Authority. It is a matter record that after several detailed rounds of negotiation, the final Resolution Plan dated 06.05.2019 r/w Addendum dated 17.06.2019 was approved and the "Excluded Rights" were carved out in favour of the Financial Creditors.

95. In the present Appeals, it has been argued that after the entire debts have been transferred in favour of the SPV by the Financial Creditors, the legal

remedies including right to recovery from the Personal Guarantors (Appellants herein) and also get transferred to the SPV and nothing remain with the Financial Creditors of the Respondent No. 2.

96. We have already seen that in catena of judgment including Lalit Kumar Jain (Supra) and in the matter of ***State Bank of India Vs. v. Ramakrishnan & Anr. (Supra),*** the issue has been well settled that the Financial Creditors can independently pursue its legal remedies against the Personal Guarantors.

97. We also take into account the averments made by the Appellants regarding the judgment of Hon'ble High Court in the matte of Vikas Aggarwal Vs. Reserve Bank of India (Supra) regarding extinguishment of debts. We have already recorded the relevant para of the said judgment while discussing the averments made by the Appellants in our earlier discussion. On this judgement, during the hearing, one specific query was put by the bench as whether any final decision has been taken by the Hon'ble High Court on these observations, however, it was stated that the Hon'ble High Court only noted but did not give any ruling and left to the DRT to look into. Thus, the averments of the Appellants in citing the ***Vikas Aggarwal (Supra)*** cannot give any rescue to the Appellants.

98. Now we will take issue regarding alleged non existing of debts in the books of the Financial Creditors and regarding treatment in the books of the financial creditors with respect to such continuing rights of the financial creditors against

the personal guarantors of the Corporate Debtor after the approval of the Resolution Plan. We feel that it the prerogative and within the purview of such Financial Creditors (within the applicable regulatory framework as applicable) and it does not come to rescue of the Appellants to escape their liability under the guarantee agreements on the-basis of such grounds.

We observe that the treatment in the Books of the Financial Creditors is based on RBI Prudential norms which were issued with several purposes, including and not limited to, discouraging the Financial Creditors to resort to ever greening of loans. We feel that such RBI guidelines do not intent to give undue benefits to the Personal Guarantors of the Corporate Debtors or debar the Financial Creditors in pursuing their legal rights to recover their outstanding debts from the Personal Guarantors to the Corporate Debtor. After all, it cannot be anyone's case to write off public money by such circuitous route or hypothetical legal assumption.

99. The Hon'ble ***Supreme Court, in Swiss Ribbons Pvt Ltd vs Union of India*** *[(2019) 4 SCC 17],* has categorically recognised the concept of preserving the corporate debtor as a going concern while ensuring maximum recovery for all creditors to be the intent of the Code.

100. We note that the Hon'ble Supreme Court of India has described the specific role to the Adjudicating Authority before according its approval to the Resolution

Plan i.e., the Resolution Plan to be in compliance with Section 30(2) of the Code and is capable of effective implementation under Section 31(1) of the Code. The relevant portion of the judgment passed in the matter of ***Ebix Singapore Private Limited*** *(Supra)* reads as under :-

> *"Essentially, the Adjudicating Authority functions as a check on the role of the RP to ensure compliance with Section 30(2) of the IBC and satisfies itself that the plan approved by the CoC can be effectively implemented as provided under the proviso to Section 31(1) of the IBC'.*
>
> *(Emphasis Supplied)*

101. We will look into aspect about role of commercial wisdom of CoC vis-à-vis judicial review and interference, which has been elaborately discussed in the case of ***K. Shashidhar Vs. Indian Overseas Bank (Supra)*** which reads as under :-

> *"52. As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more: but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history*

and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable

59. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (Nclat) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority per cent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 6-6-2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postul postulated in Chapter III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified per cent (25% in October 2017; and now after the amendment w.e.f. 6-6-2018, 44%). The inevitable outcome of voting by not less than requisite per cent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection."

(Emphasis Supplied)

102. We observe that commercial wisdom of the CoC has been given supremacy and no grounds exist for the Adjudicating Authority or Appellate Tribunal to interfere.

103. In this connection, we note that the Adjudicating Authority has examined all the legal submissions including the provisions of Transfer of Property Act, 1882 and therefore approved the Resolution Plan including the rights of the Financial Creditors to pursue remedy against the Personal Guarantors and as recorded in the Impugned Order in Para 197 which reads as under :-

> *"197. With regard to guarantee liability, when loan assignment is done, the ability of guarantee being connected to the debt, it cannot be separated from assignment, it goes along with assignment, therefore he promoter director cannot take out this argument against the plan. Right of subrogation is not a primary right, it is not conditional that creditor shall hot proceed against the guarantor unless right of subrogation is available to the guarantor against the principal debtor. This right of subrogation is not a right emanated out of any contractual rights; indeed this right will be available to the guarantor only after it has paid the dues of the principal debtor to the creditor. The creditor is under no obligation as to this subrogation right. It is the guarantor who comes forward to take the liability of surety upon itself notwithstanding whether it could realise its monies in the event creditor realised principal debtor dues from the*

guarantor. Since IBC has categorically envisaged that no liability will remain in force against the corporate debtor after plan approval, right of subrogation will not be available to the guarantors. It makes no difference to the right to proceed against the surety. The right to proceed against guarantor will remain in force because loan has been assigned to a purchaser. To the extent it has paid to the creditor, it is entitled to proceed against the guarantor Resolution of debts cannot be misconstrued as full satisfaction of debts payable to the creditors. This is only a compromise or arrangement to the extent of the obligations against an insolvent company, but this will not take away the right of creditors to proceed against others who stood as guarantors and the assets mortgaged by others against the loan availed by the principal debtor."

(Emphasis Supplied)

104. We do not find any error in the Impugned Order.

105. In fine, the Appeals devoid of any merit, fail and stand rejected. No costs.

Interlocutory Applications, if any, are Closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

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