IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 221 OF 2010
IN
COMMERCIAL SUIT NO.44 OF 2010
IN
COMMERCIAL SUIT NO.44 OF 2010

M/s. Sicom Investments and Finance Ltd ..Plaintiff

Vs.

Rajesh Kumar Drolia and Another ..Defendants

Mr. Sharan Jagtiani a/w Mr.Suyash Gadre I/b Utangale and Co, for the Plaintiff.

Mr. Tushar Goradia a/w Ms. Kausar Banatwala, for the Defendants.

Mr. Rohaan Cama, Amicus Curiae, present.

CORAM :- **B. P. COLABAWALLA, J.**
DATE :- **NOVEMBER 28, 2017.**

ORAL JUDGMENT :- [PER B. P. COLABAWALLA, J.]

1. This Summons for Judgment has been filed seeking a judgment against the Defendants jointly and severally to pay to the Plaintiffs a sum of Rs.3,22,25,615/- as per particulars of claim annexed at Exhibit-I to the plaint together with further interest @

23% per annum from the date of filing of the suit till payment and/or realization.

2. The cause of action in the present Suit is based on two separate Deeds of Guarantee that were executed by Defendant Nos.1 and 2 respectively. Both these guarantees are dated 17th December, 2008. Under these Deeds of Guarantee, the guarantors have acknowledged that the Plaintiff had advanced to **"Today's Writing Products Limited (now changed to Today's Writing Instruments Limited)** and (hereinafter referred to as **"the princpal borrower"**), a short term loan of Rs.4 Crores on the terms and conditions contained in the loan agreement of the same date entered into between the principal borrower and the Plaintiff. Since there was a default in the payment of the short term loan, these Deeds of Guarantee were invoked and it is on this basis that the present Summary Suit has been filed and a decree is sought against the Defendants in the Summons for Judgment.

3. The brief facts giving rise to the present controversy are that the Plaintiff is a non-banking financial institution doing business of advancing finance to its customers. Defendant No.1 at

all material times was a Director of the principal borrower and has also executed a guarantee as mentioned earlier. Defendant No.2 is also sued as a guarantor who has offered a corporate guarantee in favour of the Plaintiff and guaranteed repayment of the dues of the principal borrower.

4. According to the Plaintiff, on or about 10th December, 2008, the principal borrower, through Defendant No.1, approached the Plaintiff for sanction of a short term loan of Rs. 4 Crores for the business activities of the principal borrower. After considering the aforesaid request, the Plaintiff by its letter dated 16th December, 2008 duly sanctioned the short term loan of Rs. 4 Crores to the principal borrower on various terms and conditions as more particularly set out in the sanction letter.

5. In consideration of sanctioning the aforesaid term loan of Rs.4 Crores, the principal borrower executed and delivered to the Plaintiff an agreement dated 17th December, 2008, whereby the principal borrower agreed and undertook to repay the said loan in a single installment at the end of 45 days from the date of disbursement with interest @ 23% p.a. To further secure this loan,

Defendant Nos.1 and 2 duly executed two separate Deeds of Guarantee both dated 17th December, 2008, under which the Defendants duly guaranteed the repayment of the dues of the principal borrower to the Plaintiff.

6. It is the case of the Plaintiff that even though the principal borrower had agreed to secure the said term loan of Rs. 4 Crores by way of a mortgage of all the assets of the principal borrower, however, the principal borrower failed to execute the same and the Plaintiff as on the date of filing of the suit have security only in the form of a pledge of shares, which according to the Plaintiff, is not sufficient to recover its entire dues. In other words, it has been averred in the plaint that the pledged securities available to the Plaintiff are insufficient insofar as the claim of the Plaintiff against the principal borrower is concerned. The Plaintiff has therefore pleaded that the principal borrower had given a post-dated cheque of Rs. 4 Crores for repayment of the said term loan. However, upon presentation of the said cheque, the same was dishonoured by the principal borrower for the reason "insufficient funds". Subsequently, the principal borrower paid an amount of Rs.125 Lakhs and issued a fresh cheque for Rs. 2

Crores. However, upon presentation of that cheque also the same was dishonoured.

7. It is in these circumstances, the Plaintiff, by its advocate's letter dated 6th November, 2009, addressed to the principal borrower with a copy marked to the Defendants herein, called upon the principal borrower to pay to the Plaintiff the sum of Rs.3,34,82,362/- within 15 days from the date of the said letter with further interest thereon. Since the principal borrower did not comply with the aforesaid requisitions, the Plaintiff by its advocate's letter dated 10th December, 2009 called upon the Defendants, as guarantors, to pay to the Plaintiff the sum of Rs.3,44,22,936/- on or before 24th December, 2009 failing which appropriate proceedings would be initiated. Despite this notice, no payment was coming forth and it is in these circumstances that the present Suit is filed.

8. After filing of the present Suit, the writ of summons was served upon the Defendants and thereafter the Defendants filed their appearance. It is thereafter that the Plaintiff has taken out this Summons for Judgment. An affidavit-in-reply dated 20th

October, 2011 opposing the Summons for Judgment has also been filed on behalf of the Defendants. The Defendants have also filed an additional affidavit dated 20th November, 2017 seeking to bring on record certain other subsequent developments.

9. The basic defences that have been taken in the affidavit in reply are as under:-

(i) the Plaintiff is a 100% subsidiary of SICOM Ltd, and therefore, the Plaintiff ought to have filed proceedings before the Debts Recovery Tribunal which was conferred exclusive jurisdiction to adjudicate upon and recover the dues of banks and financial institutions which would include even their subsidiaries;

(ii) the Plaintiff holds security of shares of the principal borrower and the Plaintiff has released some of those shares and appropriated the same towards itself. The Plaintiff is still holding huge volume of shares of the principal borrower and has thus not approached this Court with clean hands, and therefore, the present suit is not maintainable as a Summary Suit; and

(iii) the third argument and of-course which does not find

place in the affidavit-in-reply, is that the Deeds of Guarantee executed by the Defendants are insufficiently stamped, and therefore, cannot be looked at for any purpose whatsoever much less for passing a decree or even an conditional order of deposit as contemplated under Order XXXVII of the Code of Civil Procedure, 1908 (hereinafter referred to as the **"CPC"**).

10. In the additional affidavit of the Defendants it is stated that after coming into the force of the *Insolvency and Bankruptcy Code, 2016* (for short **"IBC, 2016"** or **"the Code"**), one Coburg Print and Pack had filed proceedings under the said Code before the National Company Law Tribunal (for short **"NCLT"**), Ahmedabad Bench against the principal borrower. By an order dated 5th October, 2017, the NCLT has admitted the Petition under Section 9(1) of the Code and has appointed one Mr. Navnitlal Bhatia as the interim Insolvency Resolution Professional (**"IRP"**) under Section 13(1)(c) of the Code with effect from 6th October, 2017. It has been further brought on record that by the order dated 5th October, 2017, the Adjudicating Authority (namely the

NCLT) has ordered a moratorium as contemplated under Section 14 and has prohibited institution of suits or continuation of the pending suits or proceedings against the principal borrower including execution of any judgment, decree or order in any Court of law, Tribunal, Arbitration Panel or other Authority. It is on the basis of this order that the primary contention that was raised before me was that in view of the fact that no suit can be proceeded with against the principal borrower, the same protection should also be afforded to the guarantors, and therefore, this suit also should not proceed till the period of moratorium granted to the principal borrower is in force. It is on these pleadings that the matter has proceeded before me.

11. In this factual backdrop Mr. Jagtiani, the learned counsel appearing on behalf of the Plaintiff submitted that the Defendants have no defence on the merits of the present case. He submitted that admittedly a short term loan was availed of by the principal borrower and which was duly guaranteed by the Defendants by executing two separate Deeds of Guarantee. He submitted that the only defences that are raised in the affidavit in reply are that the Plaintiff being a 100% subsidiary of SICOM, the

Debts Recovery Tribunal would have the exclusive jurisdiction to entertain and try the present suit and the second is that the Suit is not maintainable as a Summary Suit because the Plaintiff has got adequate security. The third argument regarding the guarantees being insufficiently stamped is concerned, Mr. Jagtiani submitted that this is not a defence that is taken by the Defendants even though they have filed two affidavits and hence I should not entertain such a defence. Further, even across the bar it has not even been stated as what was the correct stamp duty payable and according to the Plaintiff the deeds of guarantees were sufficiently stamped. On all these counts Mr. Jagtiani submitted that the defences raised have no merit.

12. As far as the exclusive jurisdiction being conferred upon the Debts Recovery Tribunal is concerned, Mr. Jagtiani submitted, and in my view correctly, that the Plaintiff is not a bank and/or financial institution as contemplated under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which has now inter alia been renamed, by virtue of an amendment, as the *Recovery of Debts and Bankruptcy Act, 1993* (for short **"the RDB Act, 1993**). In this regard he

brought to my attention the definition of the word "bank", "banking company" "corresponding the new bank", "financial institution" and "subsidiary bank". He submitted that the Plaintiff does not fall within any of these definitions so as to invest the Debts Recovery Tribunal with jurisdiction to adjudicate upon the claim made by the Plaintiff in the present suit. I fully agree with the submissions of Mr. Jagtiani and therefore do not find that there is any substance in this argument canvassed by the learned counsel appearing on behalf of the Defendants. The DRT under the RDB Act, 1993 is invested with jurisdiction to only entertain proceedings filed by Banks and Financial Institutions for recovery of their dues as well as proceedings for Insolvency of individuals as contemplated in PART III of the IBC, 2016. Proceedings for Insolvency of individuals can be filed by any person, even other than a Bank or a Financial Institution. This is clear from sections 17 and 18 of the RDB Act, 1993 which read as under:-

> **"17. Jurisdiction, powers and authority of Tribunals.—(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.**
>
> **(1-A) Without prejudice to sub-section (1),—**
>
> **(*a*) the Tribunal shall exercise, on and from the date to be appointed by the Central Government, the**

jurisdiction, powers and authority to entertain and decide applications under Part III of Insolvency and Bankruptcy Code, 2016;

(*b*) the Tribunal shall have circuit sittings in all district headquarters.

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.

(2-A) Without prejudice to sub-section (2), the Appellate Tribunal shall exercise, on and from the date to be appointed by the Central Government, the jurisdiction, powers and authority to entertain appeals against the order made by the Adjudicating Authority under Part III of the Insolvency and Bankruptcy Code, 2016."

13. I must mention here that PART III of the IBC, 2016 has not yet been brought into force.

"18. Bar of jurisdiction.—On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17:

Provided that any proceedings in relation to the recovery of debts due to any multi-State co-operative bank pending before the date of commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 under the Multi-State Co-operative Societies Act, 2002 ((39 of 2002) shall be continued and nothing contained in this section shall, after such commencement, apply to such proceedings."

14. On a plain reading of these sections it is clear that the

DRT is invested with limited jurisdiction as set out in section 17. Admittedly, the Plaintiff is not a Bank or a Financial Institution as contemplated under the provisions of the RDB Act, 1993. This being the case, I have no hesitation in rejecting the first argument canvassed by the Defendants.

15. As far as the second argument is concerned, namely, that the present Suit is not maintainable as a Summary Suit because the Plaintiff has adequate security, I find that this defence is also without any merit. As correctly submitted by Mr. Jagtiani, the summary procedure can be invoked by a party under Order XXXVII of the CPC as more particularly set out in Rule (1) sub-rule (2) thereof. Order XXXVII Rule (1) sub-rule (2) stipulates that subject to the provisions of sub-rule (1), this Order applies to the following classes of suits, namely (a) suits upon bills of exchange, hundies and promissory notes; and (b) suits in which the Plaintiff seeks only to recover a debt or liquidated demand in money payable by the Defendant, with or without interest arising (i) on a written contract; or (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or (iii) on a guarantee, where the

claim against the principal is in respect of a debt or liquidated demand only. He submitted that admittedly in the facts of the present case, the suit is based on the guarantees executed by Defendant Nos.1 and 2 which is in respect of a debt granted by the Plaintiff to the principal borrower. There is no stipulation under Order XXXVII that the suit would not be maintainable as a Summary Suit because a security is given to the Plaintiff. There is no such impediment in order XXXVII. In any event, in the facts of the present case, it has been specifically averred by the Plaintiff that the security in the form of pledge of shares is insufficient to cover the claim made in the present suit. Further, the alleged security has not been given by the Defendants but by the principal borrower. Looking to all these facts as well as the provisions of Order XXXVII, I do not think that the Defendants are correct in their submission that the present Suit is not maintainable as a Summary Suit merely on the ground that the Plaintiff has got security in the form of pledge of shares. This argument therefore also stands rejected.

16. The third argument that was canvassed before me was that the guarantees executed by the Defendants are insufficiently

stamped, and therefore, cannot be looked at for any purpose whatsoever. I am afraid I am unable to accept this argument for more than one reason. Firstly, this argument has never been raised either in the affidavit in reply or the additional affidavit which has been filed on 20th November, 2017. This argument, for the first time was canvassed across the bar by the learned counsel appearing for the Defendants. I would be justified in not entertaining this argument on this count alone. Despite this, I find that these Deeds of Guarantee have been duly franked on 17th December, 2008 with a stamp duty of Rs.100/-. The Defendants have not brought anything to my notice which would indicate that the stamps put on the Deeds of Guarantee are insufficient or that a larger amount of stamp duty was payable on the Deeds of Guarantee on the date when they were executed. This being the case, even this argument holds no merit and is rejected.

17. This, therefore, now brings me to the main question namely, whether by virtue of the fact that an order of moratorium has been passed under Section 14 of the IBC, 2016 in favour of the principal borrower, the present Suit against the guarantors also has to be stayed and cannot proceed. To assist the Court on this

issue, Mr. Cama, was appointed as Amicus Curiae by me. Mr. Cama as well as Mr. Jagtiani, the learned counsel appearing on behalf of the Plaintiff, have in detail taken me through the provisions of the IBC, 2016. My attention has been brought to several provisions of the Code including Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 18, 30, 31, 60, 94, 95, 96, 100, 101, 179, 231, 238 and 243. Taking me through these provisions (and to which I shall advert to in greater detail later), Mr Cama as well as Mr. Jagtiani both submitted before me that the scheme of the Code is such that there is no question of granting any protection or benefit to a third party and who is not before the Adjudicating Authority in insolvency or bankruptcy proceedings. In this regard, both counsel placed heavy reliance on the words of Section 14 which clearly states that subject to the provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order, declare a moratorium for prohibiting all of the following namely, (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any Court of law, Tribunal, Arbitration Panel or other Authority. What was brought to my notice was also the definition of the word “corporate debtor” which

has been defined in Section 3 (8) of the IBC, 2016 to mean a corporate person who owes a debt to any person. In turn, "corporate person" is defined in Section 3 (7) to mean a company as defined in Clause (20) of Section 2 of the Companies Act, 2013; a limited liability partnership as defined in clause (n) of sub-section (1) of Section 2 of the Limited Liability Partnership Act, 2008; or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider. Looking to these definitions, Mr. Cama as well as Mr. Jagtiani submitted that a "guarantor" albeit a "corporate guarantor" or "personal guarantor" is not included in the definition of the word "corporate debtor". Only institution of suits or continuation of pending suits against the corporate debtor are prohibited. That prohibition does not extend to the guarantor of the corporate debtor. Further fortifying this argument, Mr. Cama as well as Mr. Jagtiani both brought to my attention the definition of the word "personal guarantor" as defined under Section 5 (22) which states that a "personal guarantor" means an individual who is the surety in a contract of guarantee to a corporate debtor. Relying upon these definitions, Mr. Cama and Mr. Jagtiani both submitted that the Act itself contemplates that

the "guarantor" is a separate person from a "corporate debtor", and therefore, cannot be included in the definition of the words "corporate debtor". This would then certainly lead to the irresistible conclusion that the prohibition from instituting any suit or continuing with a pending suit would apply only in relation to the "corporate debtor" who is in insolvency and in whose favour an order of moratorium under section 14 has been passed, and not to any individual who is the surety in a contract of guarantee to the said corporate debtor.

18. Mr. Cama and Mr. Jagtiani both submitted that the language of Section 14 is absolutely clear and unambiguous and has to be read the way it appears. There is no room for adding words to the said section under the guise of interpretation, was the submission of the learned counsel. To further fortify this argument, they also placed reliance on Sections 94, 95 and 96 of the IBC, 2016 which fall within Part III thereof. Part III deals with Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms. Mr. Jagtiani as well as Mr. Cama submitted that Part III applies to insolvency of partnership firms (other than limited liability partnerships) as well as individuals. They

submitted that only when a guarantor invokes the provisions as more particularly set out in Part III and follows the procedure laid down therein, that the guarantor would be entitled to the protection of a moratorium. However, that protection can be granted only in its own proceedings and as more particularly set out in Part III of the IBC, 2016. In this regard, it was brought to my attention that under section 94, a debtor who commits a default may apply personally or through a resolution professional to the Adjudicating Authority for initiating the insolvency resolution process by submitting an application. Similarly, under Section 95, a creditor may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an insolvency resolution process by submitting an application. Section 96 provides for interim moratorium and states that when an application is filed under Sections 94 or 95, then an interim moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application. One of the protections afforded in the interim moratorium is that any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed. Once the

interim moratorium period is over, the same can only be continued once the application is admitted under Section 100 and an order of moratorium is passed under Section 101. Looking to the scheme of these provisions, Mr. Jagtiani and Mr. Cama submitted that there is no question of the guarantor getting the benefits of the order of moratorium passed under section 14 in favour of the principal borrower. If the guarantor wanted the benefit of a moratorium then insolvency proceedings had to be initiated in relation to such guarantor as contemplated under Part III and only then would it get such benefit.

19. Over and above this, Mr. Jagtiani as well as Mr. Cama submitted that the wordings of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short **"SICA, 1985"**) clearly gave a limited protection to the guarantors of a Sick Industrial Company and which had approached the BIFR for the purposes of revival. This Act was brought into force to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner. Mr. Jagtiani and Mr. Cama placed reliance on the statement of objects and reasons to fortify

their argument that since there was not a single law in India that deals with insolvency and bankruptcy, that this particular Code was brought into force. The provisions relating to insolvency and bankruptcy for companies could be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provided for creation of multiple fora such as the BIFR, DRT, NCLT and their respective appellate tribunals. Liquidation of companies was handled by the High Courts. Individual bankruptcy and insolvency was dealt with under the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 and was also dealt with by the courts. Since there was considerable delay in disposing of insolvency and bankruptcy proceedings and since the existing framework was inadequate, that the present Code was brought into force, was the submission. Mr. Jagtiani and Mr. Cama both submitted that the Legislature, while drafting this Code, was very much aware of the provisions of SICA, 1985 and more particularly Section 22 thereof which categorically gave a limited protection to

the guarantor. This limited protection is conspicuously absent from section 14 of the IBC, 2016 was the submission. This being the case, Mr. Jagtiani and Mr. Cama both submitted that this is yet another factor which would clearly go to establish that the guarantor would not get any protection or benefit under an order of moratorium that has been passed in favour of the corporate debtor under section 14 of the IBC, 2016.

20. On the other hand, Mr. Goradia, the learned counsel appearing on behalf of the Defendants, placed reliance on Sections 30, 31 and 60 of the IBC, 2016 to contend that the protection that is accorded to the corporate debtor shall also enure to the benefit of the guarantor. He submitted that Section 30 deals with Submission of a Resolution Plan and states that the Resolution Applicant may submit a Resolution Plan to the Resolution Professional prepared on the basis of the Information Memorandum. Once such a Resolution Plan is submitted to the Resolution Professional, he (the Resolution Professional) shall examine each Resolution Plan received by him and he is to ensure that the same conforms to all that is stated in sub-section 2 of Section 30. Once the Resolution Professional is satisfied that the

Resolution Plan complies with the provisions of Section 30 (2), he shall then present the same to the Committee of Creditors for its approval. The Committee in turn has to approve the Resolution Plan by the vote of not less than 75% of voting shares of the financial creditors. Once the Plan is approved by the Committee of Creditors, the same is submitted to the Adjudicating Authority.

21. Mr. Gordia then drew my attention to Section 31 which deals with Approval of the Resolution Plan. Mr. Goradia submitted that once the Resolution Plan is submitted to the Adjudicating Authority, the Adjudicating Authority has to satisfy itself that the Resolution Plan, as approved by the Committee of Creditors, meets the requirements as referred to in Section 30(2), and if it does, it shall by order, approve the Resolution Plan. This approved Resolution Plan would be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the Resolution Plan. Mr. Goradia submitted that looking to the language of Section 31 and especially considering that any Resolution Plan that is approved by the Adjudicating Authority would be binding on the guarantors would clearly go to show that whilst the Resolution Plan is in its

formulation, the order of moratorium passed in favour of the corporate debtor under section 14, would also enure to the benefit of the guarantor. If this be the case, Mr. Goradia submitted that the suit in the present case cannot proceed and has to be stayed because admittedly in the facts of the present case, the NCLT has by its order dated 5th October, 2017 ordered a moratorium in favour of the corporate debtor (namely principal borrower in the present case) prohibiting the continuation of all the suits against the corporate debtor.

22. To further fortify this argument, Mr. Goradia also placed reliance on Section 60 of the IBC, 2016. He submitted that under Section 60, the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the NCLT having territorial jurisdiction over the place where the registered office of the corporate person is located. He submitted that sub-section 2 of Section 60 stipulates that notwithstanding anything to the contrary contained in the Code, where a corporate insolvency resolution process or liquidation proceedings of a corporate debtor are pending before the NCLT, an

application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such NCLT. Looking to this provision, Mr. Goradia submitted that this clearly shows that the order of moratorium that is passed pending the formulation of the Resolution Plan clearly enures to the benefit of the guarantor as well. For all the aforesaid reasons, Mr. Goradia submitted that the present suit against the guarantors ought to be stayed in view of the order passed by the NCLT dated 5th October, 2017 and liberty may be granted to the parties to apply once any further orders are passed by the NCLT in that regard. In support of this proposition Mr. Goradia also relied upon a decision of the Allahabad High Court in the case of **Sanjeev Shriya v/s State Bank of India and Others reported in 2017 (9) ADJ 23.**

23. I have heard the learned counsel for the parties at length on this issue. Before I proceed to analyze the relevant provisions of the Code, I must mention here that when I first heard this matter (on 21st and 22nd November, 2017), the parties had addressed me on the provisions of the IBC, 2016. Thereafter, in exercise of the powers conferred by clause (1) of article 123 of the

Constitution of India, the President, on 23rd November, 2017 was pleased to promulgate *The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017* (for short **"the Ordinance"**). I therefore asked the learned counsel to even address me on this Ordinance, which they have done today. I shall also deal with the Ordinance in so far it relates to the issue before me.

24. Before I proceed to analyze the relevant provisions of the Code and the Ordinance, it would be apposite to refer to the statement of objects and reasons as to why this Code was brought into force. The statements of objects and reasons state that there was no special law in India that deals with insolvency and bankruptcy. Provisions relating to the insolvency and bankruptcy for companies could be found in SICA 1985, the Recovery of Debts and Bankruptcy Act, 1993, SARFAESI Act, 2002 and the Companies Act, 2013. These statutes provided for creation of multiple fora such as the BIFR, DRT, NCLT as well as their respective appellate tribunals. Over and above this, liquidation of companies was handled by the High Courts and individual bankruptcy and insolvency was dealt with under the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act,

1920. The objectives of the IBC, 2016 was to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. The Government was of the opinion that an effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve ease of doing business, and facilitate more investments leading to higher economic growth and development. In a nutshell, the Code sought to achieve the above objectives and it was in this light that the IBC, 2016 was brought in the force.

25. For the sake of completeness, I must also refer to the statement of objects and reasons for enacting the Sick Industrial Companies (Special Provisions) Act, 1985. The Government found the ill effects of sickness in industrial companies such as loss of

production, loss of employment, loss of revenue to the Central and State Governments and locking up of investible funds of financial institutions as a serious concern to the Government and the society at large. There was also an increase in the incidences of sickness in industrial companies. In order to fully utilize the productive industrial assets, afford maximum protection of employment and optimize the use of the funds of banks and financial institutions, the Government felt that it would be imperative to revive and rehabilitate the potentially viable sick industrial companies as quickly as possible. The Government was also of the view that it would also be equally imperative to salvage the productive assets and realize the amounts due to the banks and financial institutions, to the extent possible, from the non-viable sick industrial companies through liquidation of those companies. In view of all these facts, the Government felt the need to enact in public interest, a legislation to provide for timely determination, by a body of experts, the preventive, ameliorative, remedial and other measures that would need to be adopted with respect to such companies and for enforcement of the measures considered appropriate with utmost practicable dispatch. Keeping these objects in mind SICA, 1985 was enacted. In other words,

SICA, 1985 was enacted with the avowed object of identifying sick and potentially sick companies and then try to revive and rehabilitate them.

26. However, as time went by, the Government felt that BIFR and AAIFR (the authorities under SICA, 1985 entrusted with the object to ensure revival of sick companies) had not been able to fulfill the purpose and mandate as envisaged under SICA, 1985. It is in this light that in the year 1999, the Government constituted a Committee under the Chairmanship of Justice V. Balakrishna Eradi, (**"the Eradi Committee"**) a retired Judge of the Supreme Court, to review the law relating to Insolvency and Winding up of Companies. This Committee presented a Report on 31.7.2000, under the caption "Report of The High Level Committee on Law Relating to Insolvency and Winding up of Companies". This Committee, after hearing all the parties and analysing the statistical data made available to it, opined that the facts and figures spoke for themselves and they placed a big question-mark on the utility of the institution of the BIFR and SICA, 1985. The problem of endemic delays inherent in SICA, 1985, procedures of revival and reconstruction was to a great

extent exacerbated by the large scale abuse of the provisions relating to suspension of legal proceedings, suits and enforcement of contracts and other remedies contained in Section 22 of the Act. The Eradi Committee pointed out that the effectiveness of SICA, 1985 had been severely undermined by reason of the enormous delays involved in the disposal of cases by BIFR. The Committee also observed that the success rate of revival of sick companies had fallen far too short of the expectations. Consequently, the Committee recommended that SICA, 1985 should be repealed and the provisions contained therein for revival and rehabilitation, should be telescoped into the structure of the Companies Act, 1956 itself. A detailed analysis of the Eradi Committee report can be found in a Full Bench decision of the Madras High Court in the case of **M/s. Salem Textiles Limited Vs. M/s. Phoenix ARC Private Ltd. & Ors reported in 2013 SCC Online MAD 1450**

27. The only reason why I am referring to the report of the Eradi Committee is because it throws light on how SICA, 1985, despite its laudable objects, has, at least in spirit, failed to achieve the purpose for which it was enacted. Though the Eradi Committee had recommended that SICA, 1985 should be repealed

and the provisions contained therein for revival and rehabilitation, should be telescoped into the structure of the Companies Act, 1956, the same never took place. Now, of course, the Legislature has enacted IBC, 2016 which comprehensively deals with the revival as well as liquidation not only of corporate persons but also of individuals and partnership firms.

28. Having said this, I shall now advert to certain provisions of the IBC, 2016. The IBC, 2016 is bifurcated in five parts. Part I deals with preliminary issues regarding short title, extent, application and commencement of the Code. It comprises of Sections 1, 2, and 3. Part II deals with Insolvency Resolution and Liquidation for Corporate Persons and comprises of Sections 4 to 77. Part III (and which has still not been brought into force) deals with Insolvency Resolution and Bankruptcy for Individuals and Partnership firms (other than Limited Liability Partnerships) and comprises of Sections 78 to 187. Part IV deals with Regulation of Insolvency Professionals, Agencies and Information Utilities and comprises of Sections 188 to 223. Part V deals with the Miscellaneous Provisions and comprises of sections 224 to 255 along with 11 Schedules.

29. Section 2 of the IBC, 2016 (and which falls in Part I) deals with its application and reads as under:-

> **" 2. The provisions of this Code shall apply to—**
>
> **(a) any company incorporated under the Companies Act, 2013 or under any previous company law;**
>
> **(b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;**
>
> **(c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008;**
>
> **(d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf; and**
>
> **(e) partnership firms and individuals,**
>
> **in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be."**
>
> (emphasis supplied)

30. Section 2 clearly stipulates that the provisions of this Code shall apply inter alia to any company incorporated under the Companies Act, 2013 or under any previous company law; any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act; any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008; such other body incorporated under any law for the

time being in force, as the Central Government may, by notification, specify in this behalf; and partnership firms and individuals; in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy as the case may be.

31. By virtue of the Ordinance, section 2 has been amended. Clause (d) of section 2 has been amended & clause (e) of section 2 has been substituted. Further, Clauses (f) & (g) have been added to section 2. The relevant portion of the Ordinance reads thus:-

> **"In the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the principal Act), in section 2,—**
>
> **(i) in clause (d), the word "and" shall be omitted;**
>
> **(ii) for clause *(e),* the following clauses shall be substituted, namely:—**
>
> **"(e) personal guarantors to corporate debtors;**
>
> **(f) partnership firms and proprietorship firms; and**
>
> ***(g)* individuals, other than persons referred to in clause *(e),".***

32. On a plain reading of this section, even after the Ordinance, it is clear that the provisions of this Code shall apply to the aforesaid persons as mentioned therein only in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy

as the case may be, and not otherwise. In other words, this Code has no application when a party has not invoked the provisions thereof. This is of course subject to any provision in the Act which may specifically refer to a third party who has not initiated any action or is not brought before the NCLT or the DRT under this Code. One such provision can immediately be found in Section 31 of the Act which clearly stipulates that once the Resolution Plan is approved by the Adjudicating Authority, the same shall be binding on the corporate debtor, its employees, creditors, guarantors and other stakeholders involved in the Resolution Plan.

33. In Section 3(7), the words "corporate person" has been defined which reads thus:-

> **"(7) "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;"**

34. Similarly, the words "corporate debtor" has been defined in Section 3(8) and reads thus:-

> **"(8) "corporate debtor" means a corporate person who owes a debt to any person;"**

35. What is clear from the aforesaid definition is that a "corporate debtor" means a "corporate person" who owes a debt to any person. A "corporate person" has also been defined which means the company as defined in clause 20 of Section 2 of the Companies Act, 2013, a limited liability partnership as defined in clause (n) of sub-section (1) of Section 2 of the Limited Liability Partnership Act, 2008 or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider. On a plain reading of these definitions namely, sections 3 (7) and 3 (8), what becomes clear is that an individual can never been a corporate debtor. I must also mention here that the words "insolvency professional" have also been defined in section 3(19) and read thus:-

> ***"(19)*** **"insolvency professional" means a person enrolled under Section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under Section 207;"**

36. After the definitions in section 3 of the IBC, 2016 comes PART II of the Code. Section 4 (and which falls in Part II) sets out its application and reads thus:-

> **"4. Application of this Part.— (1) This Part shall apply to matters relating to the insolvency and liquidation of corporate**

debtors where the minimum amount of the default is one lakh rupees:

Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees."

37. What is ex-facie clear from this provision is that Part II of the Code applies to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees. Part II does not apply to insolvency of individuals who are guarantors of the Corporate Debtor. They are governed by Part III. The only exception to this is that if an individual is a guarantor to a coporate debtor then for the purposes of insolvency/bankruptcy of such guarantor, the Adjudicating Authority would be the NCLT and not the DRT. However, the insolvency/bankruptcy procedure to be followed for such gaurantor would still be governed by Part III and not Part II of the Code (see section 60 of the Code).

38. Part II of the IBC, 2016 itself has a definitions section namely, Section 5. Sections 5(5), 5(7), 5(8), 5(10), 5(12), 5(20), 5(21), 5(22), 5(25) and 5(26) are relevant for our purpose and read thus:-

(5) "corporate applicant" means—

(*a*) corporate debtor; or

(*b*) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or

(*c*) an individual who is in charge of managing the operations and resources of the corporate debtor; or

(*d*) a person who has the control and supervision over the financial affairs of the corporate debtor;

(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

(*a*) money borrowed against the payment of interest;

(*b*) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(*c*) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(*d*) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(*e*) receivables sold or discounted other than any receivables sold on non-recourse basis;

(*f*) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(*g*) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(*h*) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(*i*) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (*a*) to (*h*) of this clause;

(10) "information memorandum" means a memorandum prepared by resolution professional under sub-section (1) of Section 29;

(12) "insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under Sections 7, 9 or Section 10, as the case may be;

(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

(22) "personal guarantor" means an individual who is the surety in a contract of guarantee to a corporate debtor;

(25) "resolution applicant" means any person who submits a resolution plan to the resolution professional;

(26) "resolution plan" means a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;

39. I must mention here that the definitions of the words "resolution applicant" and "resolution plan" have been substituted by the Ordinance. The relevant portion of the Ordinance reads thus:-

"In section 5 of the principal Act,—

***(a)* for clause (25), the following clause shall be substituted, namely:—**

'(25) "resolution applicant" means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (A) of sub-section *(2)* of section 25;';

***(b)* in clause *(26),* for the words "any person", the words "resolution applicant" shall be substituted."**

40. I must mention here that as clearly stated in Section 5, these definitions apply only to Part II of the Code and not to the entire Code itself. As far as the definitions for Part III are concerned, the same are contained in Section 79 and which I shall advert to later. Be that as it may, as can be seen from these definitions, the "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. In turn, "financial debt" has been defined to mean a debt along with interest, if any, which is disbursed against consideration for the time value of money and includes nine items mentioned in Clauses (a) to (i) in Section 5(8). On the other hand, an "operational creditor" means a person to whom an "operational debt" is owed and includes any person to whom such debt has been legally assigned or transferred. In turn, the word "operational debt" has been defined

to mean a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority. The words "personal guarantor" are also defined to mean an individual who is the surety in a contract of guarantee to a corporate debtor. What can be discerned from the definition of the words "personal guarantor" is that it makes a clear distinction between a "personal guarantor" and a "corporate debtor". These two have been clearly defined in the Act. A "corporate debtor" is defined in Section 3(8) whereas a "personal guarantor" has been defined in Section 5(22). This being the case, there is no question of reading the word "guarantor" or "personal guarantor" to also to be included in the definition of the words "corporate debtor". Before parting with the definitions section, it would also be apposite to refer to the definition of the word "resolution plan" to mean a plan proposed by a "resolution applicant" for insolvency resolution of the corporate debtor as a going concern in accordance with Part II of the Code.

41. Chapter II of Part II of the IBC, 2016 deals with the

"corporate insolvency resolution process" and consists of Sections 6 to 32. Section 6 provides as to the persons who may initiate a corporate insolvency resolution process. They are either a financial creditor or an operational creditor or the corporate debtor itself. Section 7 deals with initiation of the corporate insolvency resolution process by a financial creditor. Sections 8 and 9 deal with Insolvency resolution by an operational creditor and Section 10 deals with initiation of the corporate insolvency resolution process by a corporate applicant. As set out earlier, "corporate applicant" has been defined in Section 5(5) to mean (a) the corporate debtor; or (b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or (c) an individual who is in charge of managing the operations and resources of the corporate debtor; or (d) a person who has the control and supervision over the financial affairs of the corporate debtor. Section 11 deals with persons not entitled to make an application to initiate the corporate insolvency resolution process under Chapter II. We are not really concerned with this section at this stage.

42. Thereafter, Section 12 sets out the time-limit for completion of the insolvency resolution process. Section 12 reads thus:-

> **"12. Time-limit for completion of insolvency resolution process.— (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.**
>
> **(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent of the voting shares.**
>
> **(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject-matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:**
>
> **Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once."**

43. What this section basically provides is that subject to sub-section 2, the corporate insolvency resolution process shall be completed within a period of 180 days from the date of admission of the application to initiate such process. This period may be

extended which shall not exceed a further period of 90 days. What in effect Section 12 stipulates is that that insolvency resolution process has to be completed within a period of 180 days and if an extension is granted, then a further maximum period of 90 days can be granted and no more. This is clear from a plain reading of Section 12.

44. Section 13 deals with Declaration of moratorium and public announcement and inter alia stipulates that the Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10 shall by an order (a) declare a moratorium for the purposes referred to in section 14; (b) cause a public announcement of the initiation of the corporate insolvency resolution process and call for submission of claims under section 15; and also (c) appoint an interim resolution professional in the manner as laid down in section 16. When the public announcement has to be made is also set out in Section 13(2) which is immediately after the appointment of the interim resolution professional.

45. Section 14, and which is the crux of the matter, deals

with moratorium and reads as follows:-

> **"14. Moratorium.— (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely—**
>
> **(*a*) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;**
>
> **(*b*) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;**
>
> **(*c*) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);**
>
> **(*d*) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.**
>
> **(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.**
>
> **(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.**
>
> **(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:**
>
> **Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."**

46. Section 14(1) clearly stipulates that subject to the provisions of sub-sections (2) and (3), on the insolvency commencement date [which is defined in Section 5(12)], the Adjudicating Authority shall by order declare a moratorium to prohibit (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; and (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

47. What is important to note is that the moratorium under section 14 applies only to the "corporate debtor". This is

clear from a plain reading of the language of Section 14. What is prohibited under Section 14(1)(a) is the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any Court of law, Tribunal, Arbitration Panel or other Authority. Under section 14(1)(b), a "corporate debtor" is prohibited from transferring, encumbering, alienating or disposing of any of its assets or any legal right or beneficial interest therein. Section 14(1)(c) prohibits any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; and Section 14(1)(d) prohibits the recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor.

48. Section 14 is as clear as it can be. On reading Section 14, it is clear that the benefits as well as the liabilities mentioned therein are only that of the corporate debtor and corporate debtor alone. As far as prohibiting the institution of suits or continuation of pending suits or proceedings are concerned, the same applies

only against the corporate debtor in insolvency and not a third party such as a guarantor, be it an individual or a corporate guarantor.

49. This is further fortified when one peruses the provisions of Part III of the IBC, 2016. Part III deals with Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms (other than Limited Liability Partnerships). Chapter III of Part III deals with the Insolvency Resolution Process. Chapter III (which deals with Insolvency Resolution Process) consists of Section 94 to Section 120. Sections 94, 95 and 96 of Part III reads as under:-

> **"94. Application by debtor to initiate insolvency resolution process.— (1) A debtor who commits a default may apply, either personally or through a resolution professional, to the Adjudicating Authority for initiating the insolvency resolution process, by submitting an application.**
>
> **(2) Where the debtor is a partner of a firm, such debtor shall not apply under this Chapter to the Adjudicating Authority in respect of the firm unless all or a majority of the partners of the firm file the application jointly.**
>
> **(3) An application under sub-section (1) shall be submitted only in respect of debts which are not excluded debts.**
>
> **(4) A debtor shall not be entitled to make an application under sub-section (1) if he is—**
>
> **(*a*) an undischarged bankrupt;**
>
> **(*b*) undergoing a fresh start process;**

(*c*) undergoing an insolvency resolution process; or

(*d*) undergoing a bankruptcy process.

(5) A debtor shall not be eligible to apply under sub-section (1) if an application under this Chapter has been admitted in respect of the debtor during the period of twelve months preceding the date of submission of the application under this section.

(6) The application referred to in sub-section (1) shall be in such form and manner and accompanied with such fee as may be prescribed."

"95. Application by creditor to initiate insolvency resolution process.— (1) A creditor may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application.

(2) A creditor may apply under sub-section (1) in relation to any partnership debt owed to him for initiating an insolvency resolution process against—

(*a*) any one or more partners of the firm; or

(*b*) the firm.

(3) Where an application has been made against one partner in a firm, any other application against another partner in the same firm shall be presented in or transferred to the Adjudicating Authority in which the first mentioned application is pending for adjudication and such Adjudicating Authority may give such directions for consolidating the proceedings under the applications as it thinks just.

(4) An application under sub-section (1) shall be accompanied with details and documents relating to—

(*a*) the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application;

(*b*) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand; and

(*c*) relevant evidence of such default or non-repayment of debt.

(5) The creditor shall also provide a copy of the application made under sub-section (1) to the debtor.

(6) The application referred to in sub-section (1) shall be in such form and manner and accompanied by such fee as may be prescribed.

(7) The details and documents required to be submitted under sub-section (4) shall be such as may be specified."

"96. Interim-moratorium.— (1) When an application is filed under Section 94 or Section 95—

(*a*) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and

(*b*) during the interim-moratorium period—

(*i*) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and

(*ii*) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

(2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator."

50. Section 94 deals with an application filed by the debtor to initiate the insolvency resolution process subject to what is stated in Section 94. Section 95 on the other hand deals with an application filed by a creditor to initiate the insolvency resolution

process of the debtor (who may be an individual or a partnership firm). This too is subject to what is further stated in Section 95. Thereafter, Section 96 provides for an interim-moratorium and clearly stipulates that when an application is filed under section 94 or section 95, the interim moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application. During the interim-moratorium period, any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed and the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt. Sub-section 2 of Section 96 further shows that where the application has been made in relation to a firm, the interim-moratorium under sub-section 1 shall operate against all the partners of the firm as on the date of the application.

51. Thereafter, Section 100 deals with admission or rejection of the application filed either under Sections 94 or 95. Section 100 stipulates that the Adjudicating Authority shall, within fourteen days from the date of submission of the report under section 99 pass an order either admitting or rejecting the

application referred to in section 94 or 95, as the case may be. If the application is admitted under Section 100, then Section 101 provides that a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under Section 114, whichever is earlier. The moratorium as contemplated under Section 101 also prohibits (during the moratorium period) inter alia any continuation of pending proceedings in respect of any debt and further bars the creditors from initiating any legal action or legal proceedings in respect of any debt. During the moratorium period, the debtor is also prohibited from transferring, alienating, encumbering or disposing of any of his assets or his legal rights or beneficial interest therein.

52. What can be discerned from the aforesaid provisions of Part III (and which I might hasten to add have not yet been brought in force) is that for an individual, be it a guarantor or otherwise, the benefit of the moratorium would be available to such individual only if the insolvency resolution process has been

initiated either by or against such individual. It would make no difference whether that individual was a "personal guarantor" of a "corporate debtor" as contemplated under Part II of the Code. In these circumstances, I do not think that a personal guarantor of a "corporate debtor" or even a corporate guarantor of a "corporate debtor" can contend that the benefits granted to the corporate debtor under the order of moratorium under section 14 can be availed of by the personal guarantor or the corporate guarantor of the "corporate debtor".

53. I am further fortified in this view when one looks at the objects and reasons as to why the IBC, 2016 was brought into force. As mentioned earlier, the Eradi Committee had clearly taken note of the fact that SICA, 1985 had miserably failed in achieving the objects for which it was enacted. One of the primary reasons that the Eradi Committee came to the aforesaid finding was because there was abuse of the provisions of Section 22 of SICA, 1985 which stalled legal proceedings against the Sick company as well as against the guarantor (albeit only to a limited extent). Over and above this, the Eradi Committee also opined that matters before the BIFR languished for years without any

final resolution, thereby allowing the debtors to stall legal proceedings against themselves by their creditors. Keeping all this in mind, SICA, 1985 was repealed by S.O.3568 (E) with effect from 1st December, 2016. What is interesting to note is that by S. O. 3594 (E) in exercise of the powers conferred by sub-section 3 of Section 1 of the IBC, 2016, the Central Government, with effect from the same date (namely, 1st December, 2016) also brought into force inter alia section 14 of the IBC, 2016. In other words, on the date when SICA, 1985 was repealed, Section 14 and which deals with moratorium, was brought into effect. The Legislature obviously was aware of the provisions of SICA, 1985 and more particularly Section 22 thereof which gave a limited protection to the guarantor. Despite repealing the provisions of SICA, 1985 on 1st December, 2016 and bringing into force Section 14 of the IBC, 2016 (which deals with moratorium), the Legislature did not think it fit to grant any such protection, limited or otherwise, to the guarantor. This is another factor (apart from the clear language of Section 14) which clearly goes to show that the benefits granted to the corporate debtor under Section 14 (during the moratorium period), does not enure to the benefit of the guarantor. To my mind, therefore, I find considerable force in the

argument canvassed by Mr. Cama (Amicus Curiae) as well as Mr. Jagtiani, the learned counsel appearing for the Plaintiff, that Section 14 does not enure to the benefit of the guarantor, and therefore, there is no question of staying the present suit till the entire insolvency resolution process of the principal borrower is completed and carried to its logical conclusion. In fact, if I was to interpret Section 14 in the fashion the Defendants want to interpret it, the same would defeat the very purpose for which Section 14 was enacted. The Legislature has specifically chosen to remedy the mischief that was caused by Section 22 of SICA, 1985. If I was to interpret Section 14 in such a fashion that the guarantor also got protection, I would be re-introducing the same mischief that was sought to be done away with by the Legislature. For all these reasons, I am clearly of the view that the order of moratorium passed under Section 14 in relation to a corporate debtor can never enure to the benefit of the guarantor of that corporate debtor. I may hasten to add that this would not be the case if the guarantor, be it an individual or a corporate entity, has been brought before the Adjudicating Authority for the purpose of insolvency resolution. Different considerations would arise in such a case as discussed earlier. However, that is not the situation

in the facts and circumstances of the present case.

54. This now only leaves me to deal with Sections 31 and 60, as well as the decision of the Single Judge of the Allahabad High Court in the case of **Sanjeev Shriya v/s State Bank of India and Others reported in 2017 (9) ADJ 23** and on which heavy reliance was placed by Mr. Goradia, the learned advocate appearing on behalf of the Defendants. Before I deal with Section 31 it would be apposite to refer to certain other provisions. Section 29 contemplates Preparation of an information memorandum. Once this is done, Section 30 provides for submission of a resolution plan and stipulates that the resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum. Thereafter, the resolution professional has to examine each resolution plan to confirm that the same complies with the provisions of Section 30(2). Thereafter, the resolution professional has to present the resolution plan to the committee of creditors for its approval. Once this is done, the committee of creditors may approve a resolution plan by a vote of not less than 75% of voting share of the financial creditors. Once the resolution

plan is approved by the committee of creditors as contemplated under Section 30(4), the same has to be placed before the Adjudicating Authority for approval as contemplated under Section 31.

55. Section 31(1) stipulates that if the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of Section 30 meets the requirements as set out in Section 30 (2), it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. Section 31(2) stipulates that if the Adjudicating Authority is satisfied that the resolution plan does not conform to the requirements of section 31(1), it may by order reject the resolution plan. However, if the Adjudicating Authority approves the resolution plan, then (a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect and (b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its

database. Naturally, the moratorium order passed under Section 14 shall cease to have effect once the resolution plan is approved because thereafter all the parties have to act as per the approved resolution plan. I do not see how this provision, namely Section 31, comes to the assistance of the Defendants, as contended by Mr. Goradia. Section 31 only contemplates the approval of a resolution plan that has been formulated and placed before it. Once this resolution plan is approved, if at all, it would be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. This, by no stretch of the imagination can be relied upon to contend that the moratorium order passed under section 14 for the benefit of the corporate debtor would also extend to the guarantor. Section 31 statutorily only provides that once the resolution plan has been approved, it would be binding on all the parties including the guarantors and nothing further. I, therefore, do not see how Section 31 can be relied upon to contend that the guarantor also gets the benefit of an order of moratorium passed in favour of the corporate debtor.

56. As far as Section 60 is concerned, the same falls under

Chapter VI of Part II of the IBC, 2016. Section 60 deals with the Adjudicating Authority for Corporate Persons and reads as under:-

> **"60. Adjudicating Authority for corporate persons.— (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.**
>
> **(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such National Company Law Tribunal.**
>
> **(3) An insolvency resolution process or bankruptcy proceeding of a personal guarantor of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.**
>
> **(4) The National Company Law Tribunal shall be vested with all the powers of the Debts Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).**
>
> **(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—**
>
> **(*a*) any application or proceeding by or against the corporate debtor or corporate person;**
>
> **(*b*) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and**
>
> **(*c*) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.**

(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded."

57. What Section 60 (1) contemplates is that the Adjudicating Authority, in relation to insolvency resolution and the liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the NCLT having territorial jurisdiction over the place where the registered office of the corporate person is located. What sub-section (1) simply means is that when a personal guarantor [as defined in section 5(22)] is in insolvency/bankruptcy, then in relation to his insolvency resolution and bankruptcy, the Adjudicating Authority would be the NCLT having territorial jurisdiction over the place where the registered office of the corporate person is located. This provision has been enacted simply for the reason that otherwise the Adjudicating Authority for the personal guarantor (being an individual), would be the DRT under Section 79 (1) which falls in Part III of the IBC, 2016. Section 60 (2) stipulates that without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in the Code, where a corporate insolvency

resolution process or liquidation proceedings of a corporate debtor are pending before the NCLT, then an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such NCLT. In other words, when a corporate debtor is either in liquidation or in the insolvency resolution process, then notwithstanding anything contained in the Code the insolvency resolution or bankruptcy of its personal guarantor shall be filed before the very same NCLT that is handling the proceedings with reference to the corporate debtor. What is important to also note is that for the purposes of sub-section 2 of Section 60, the NCLT shall be vested with all the powers of the Debts Recovery Tribunal as contemplated under Part III of the Code. This is clear from a plain reading of section 60(4). As I see it, Section 60 carves out an exception with reference to the Adjudicating Authority when it comes to insolvency resolution or bankruptcy of a personal guarantor of a corporate debtor. This, to my mind, is perfectly logical in view of the fact that where the corporate debtor itself is undergoing the insolvency resolution process or liquidation, then, it should be the same Adjudicating Authority (namely the NCLT) who would also undertake the insolvency resolution process and/or bankruptcy

of a personal guarantor so that there would not be multiplicity of proceedings and avoid conflicting decisions of two different authorities (namely the NCLT and the DRT).

58. I do not see how this provision (section 60) can come to the help of the Defendants to contend that a guarantor would also get the benefits of an order of moratorium passed under Section 14 in relation to the corporate debtor. If the personal guarantor was to get benefit of any order of moratorium then he would have to file an application as contemplated under Section 94 or an application would have to be filed by his creditor to initiate the insolvency resolution process as contemplated under section 95 of the Code. It is only then that the interim moratorium as contemplated under Section 96 gets triggered and if an application filed under Sections 94 or 95 is admitted, a final order of moratorium would be passed under Section 101 which also would have effect for a period of 180 days beginning with the date of admission of the application or till the date the Adjudicating Authority passes the order on the repayment plan under Section 114, whichever is earlier.

59. What is absolutely clear from the Code is that for the guarantor (be it a personal guarantor or a corporate guarantor), there is no automatic protection. It is only once the insolvency resolution process has been initiated either by or against the guarantor (be it a personal guarantor or a corporate guarantor), only then the benefit of the moratorium would be available to the guarantor subject of-course to the other provisions of the IBC, 2016. This being the case, I find that the reliance placed on Section 60 to establish that the guarantor automatically gets benefit of the moratorium order passed in favour of the corporate debtor under Section 14, is wholly misplaced.

60. This now only leaves me to deal with the decision of the Allahabad High Court in the case of **Sanjeev Shriya (supra).** I have given my careful consideration to the decision of the Allahabad High Court. On carefully going through this decision, I find that the Allahabad High Court reproduces several provisions of the IBC, 2016 but gives no real reasoning as to how the order passed under Section 14 in favour of the corporate debtor automatically enures to the benefit of the guarantor without any insolvency resolution process being initiated by or against the

guarantor. Paragraph 29 of this decision and which is the only reasoning I could find, reads as under:-

> ***"29**. In the present matter, it has been urged that while passing the impugned order the DRT has failed to take notice of Part-III of IBC, 2016, which prevails over the provisions of the Act of 1993. It has also been urged that the entire proceeding before the DRT is completely without jurisdiction precisely in the backdrop that once the proceeding has already been commenced under IBC, 2016 and Moratorium under Section 14 of IBC, 2016 has already been issued and even in the said proceeding the parties have put their appearance before the insolvency professionals, then the impugned proceeding against the guarantors of principal debtor is per se bad. The argument advanced by Shri Navin sinah is also fortified on the ground that once the liability is still in fluid situation and the same has not been crystallized, then in such situation two parallel/split proceedings in different jurisdiction should be avoided, if possible. In the aforementioned circumstances, the objection so raised by learned counsel for the respondent bank regarding alternative remedy cannot sustain and is rejected."*

61. On reading this decision, I find that the Allahabad High Court does not give any reason why the proceedings against the guarantor are per se bad when the moratorium under Section 14 has already been issued and even in the said proceeding the parties have appeared before the insolvency professional. There is absolutely no discussion on this point at all by the Allahabad High Court. As mentioned earlier, under Section 14, an order of moratorium is passed in favour of a corporate debtor and not in

favour of a guarantor. The Allahabad High Court has also come to the aforesaid conclusion because according to it once the liability is still in a fluid situation and the same has not been crystallized, then in such situation two parallel/split proceedings in different jurisdictions should be avoided, if possible. Firstly, I fail to understand as to how two proceedings are either parallel/split proceedings. The proceedings under the IBC, 2016 are not recovery proceedings but proceedings for either insolvency resolution or liquidation and/or bankruptcy as the case may be. On the other hand, the suit filed in this Court against the present Defendants (as guarantors), is a proceeding for recovery of money. The two proceedings operate in totally different fields. Hence, to my mind at least, the same cannot be equated as parallel/split proceedings as held by the Allahabad High Court. This is more so when one takes into consideration that the proceedings before the NCLT and initiated under the provisions of the IBC, 2016 are in relation to the corporate debtor whereas the present suit is for recovery of money against the guarantor. It is now well settled that one can initiate proceedings against the guarantor without initiating action against the principal borrower. If one requires any authority on this subject, it would be apposite

to reproduce paragraphs 37 to 40 of the decision of the Supreme Court in the case of **United Bank of India v/s Satyawati Tondon and Others reported in (2010) 8 SCC 110.** The relevant paragraphs read as under:-

> ***"37.*** *The question whether the appellant could have issued notices to Respondent 1 under Sections 13(2) and (4) and filed an application under Section 14 of the SARFAESI Act without first initiating action against the borrower i.e. Respondent 2 for recovery of the outstanding dues is no longer res integra. In Bank of Bihar Ltd. v. Dr. Damodar Prasad [AIR 1969 SC 297 : (1969) 1 SCR 620] this Court considered and answered in affirmative the question whether the Bank is entitled to recover its dues from the surety and observed: (AIR p. 299, para 6)*
>
> > *"6. ... It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under Section 140 of the Contract Act and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down."*
>
> ***38.*** *In SBI v. Indexport Registered [(1992) 3 SCC 159] this Court held that the decree-holder Bank can execute the decree against the guarantor without proceeding against the principal borrower and then proceeded to observe: (SCC p. 164, para 10)*
>
> > *"10. ... The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree-holder. The question arises whether a decree*

> *which is framed as a composite decree, as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of decretal amount covering mortgage decree can be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the [principal debtor].”*
>
> ***39.*** *In Industrial Investment Bank of India Ltd. v. Biswanath Jhunjhunwala [(2009) 9 SCC 478] this Court again held that the liability of the guarantor and principal debtor is coextensive and not in alternative and the creditor/decree-holder has the right to proceed against either for recovery of dues or realisation of the decretal amount.*
>
> ***40.*** *In view of the law laid down in the aforementioned cases, it must be held that the High Court completely misdirected itself in assuming that the appellant could not have initiated action against Respondent 1 without making efforts for recovery of its dues from the borrower, Respondent 2.”*

62. In view of my discussion earlier, I am unable to agree with the view taken by the Allahabad High Court.

63. As far as the argument on the merits of the case are concerned, I have already dealt with them earlier. The defences raised on merits is totally moonshine and illusory. There is no real dispute on the merits of the case. However, purely out of mercy, leave is granted to the Defendants to contest the suit

subject to:-

(i) The Defendants jointly and/or severally depositing in this Court the sum of Rs.3.22 Crores within a period of Twelve weeks from today.

(ii) If the aforesaid deposit is made, the Suit shall get transferred to the list of Commercial Causes and the Defendants shall file their Written Statement within a period of eight weeks from the date of deposit.

(iii) If the order of deposit is not complied with within the stipulated period as mentioned earlier, the Plaintiff shall be entitled to apply for an ex-parte decree against the Defendants after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

64. The Summons for Judgment is disposed of in the aforesaid terms. However, in the facts and circumstances of the case, there shall be no order as to costs.

(B. P. COLABAWALLA, J.)