Exh-42

IN THE DEBTS RECOVERY TRIBUNAL-I AT AHMEDABAD

Present: Laxman Madnani, I/c. Presiding Officer

INTERLOCUTORY APPLICATION No.106 OF 2022

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ORIGINAL APPLICATION No.650 OF 2018

Date of Filing : 21/07/2018
Date of Decision : 11/03/2022

1. **STATE BANK OF INDIA**
Corporate Accounts Group BKC Branch, at the Capital, 16th Floor, BandraKurla Complex, Bandra (East), Mumbai 400051.

2. **BANK OF INDIA**
Mumbai large Corporate Branch, bank of India building, 4th Floor, 70/80, Mahatma Gandhi Road, Fort, Mumbai 400001.

3. **CANARA BANK**
Prime Corporate Branch-BKC
Canara Bank Building, 'A' Wing,
1st Floor, C-14, G-Block, BandraKurla Complex, Bandra (East),
Mumbai 400051.

4. **Central Bank of India**
Corporate Finance Branch,
Central Bank Building, 1st Floor,
M. G. Road, Fort,
Mumbai – 400001.

5. **Corporation Bank**
Mangaldevi Temple Road,
Pandeshwar, Manglore-575001,
also at Corporate Banking Branch,
Bharat House, No.104, Ground Floor,
M. S. Marg,
Mumbai – 400023.

6. **EDELWEISS ASSET RECONSTRUCTION COMPANY LIMITED,**
(ACTING IN ITS CAPACITY OF TRUSTEE OF EARC TRUST SC 114 AND EARC TRUST SC 292)
Edelweiss House, Off. C.S.T. Road,
Kalina, Mumbai 400098.

7. **IDBI BANK LIMITED**
IDBI Tower, World Trade Centre, Cuffe Parade, Colaba, Mumbai 400005.

8. **Syndicate Bank**
Syndicate Bank Large Corporate Branch,
Market Tower "E",
2nd Floor, Cuffe Parade,
Mumbai – 400005.

9. **UCO Bank**
1st Floor, Mafatlal Centre,
Nariman Point,
Mumbai – 400021.

10. **UNION BANK OF INDIA**
Industrial Finance Branch,
First Floor, Union Bank Bhavan,
239, VidhanBhavan Marg,
Nariman Point,
Mumbai 40002.

11. **Export Import Bank of India**
Centre One Building,
Floor 21, World Trade Centre Complex,
Cuffe Parade,
Mumbai-400005.

...Applicants

Versus

1. **Mr.PRASHANT S. RUIA**
An Indian citizen holding Passport No.Z2479412 and PAN Card No.AABPR5283M, having his permanent residence at 67-A, Ruia House, Opp. Gopi Birla School, Walkeshwar Road, Mumbai 400006 and presently residing at Le Reve – 43rd Floor, Marina, P. O. Box 293778, Dubai, United Arab Emirates and having his addresses also at Essar House, 11 KeshavraoKhadye Marg, Opp. Race Course, Mahalaxmi, Mumbai 400034.

2. **SBICAP TRUSTEE COMPANY LIMITED**
Office No.8, 5th Floor, KhetanBhavan, 198,
Jamshedji Tata Road, Churchgate,
Mumbai 400020.

...Defendants

Present:

Ld. Sr. Counsel Mr.Navin Pahwa with Ld. Counsel Mr.Shalin Jani along with Ld. Counsel. Mr.K.N.Shahfor the Applicants

Ld. Sr. Counsel Mr. Mihir Thakore, Ld. Sr. Counsel Mr. Vikram Nankani with Ld. Counsel Mr.Keyur Gandhi for Defendant Nos.1 & 2

ORDER

1. Defendant No.1 (hereinafter referred to as "the Defendant") has preferred the present application to bring on record relevant facts and events which have occurred subsequent to the filing of Written Statement. The Defendant has sought to reject the present Original Application under powers akin to Order 7, Rule 11 of the Code of Civil Procedure, 1908 and has alternative prayed to frame and decide questions of jurisdiction and maintainability of the present Original Application as preliminary issues and for other incidental reliefs.

2. The brief facts, as narrated in the present application, are as under:

   2.1 The OA has been preferred by the Applicant Banks under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993, ["**The RDB Act"**] seeking recovery of an amount from the Defendant No.1 by invoking the Personal Guarantee executed in favour of the Applicant Banks.

   2.2 Defendant No.1 had executed the Personal Guarantees and guaranteed the amount due and payable by Essar Steel India Limited (now known as ArcelorMittal Nippon Steel India Limited) ["**Principal Borrower**" and/or "**ESIL**"] under various credit/financial facilities.

   2.3 On 08/03/2019, the National Company Law Tribunal, Ahmedabad Bench, has vide a common Judgment approved the resolution plan of one ArcelorMittal India Private Limited ["**ArcelorMittal**"] under Section 31 of the Insolvency and Bankruptcy Code, 2016 ["**the Code**"]. The Hon'ble NCLT has approved the Resolution Plan on various conditions as stipulated in its Judgment dated 08/03/2019.

2.4 The Order dated 08/03/2019 had been challenged by way of separate Appeals by the various stakeholders such as Standard Chartered Bank, Operational Creditors of ESIL, before the Hon'ble National Company Law Appellate Tribunal, New Delhi [**"NCLAT"**], including the Defendant No.1. The challenge before the NCLAT by the Defendant No.1 was to the approval of the Resolution Plan by the Committee of Creditors for not following the required procedure.

2.5 The copy of the relevant extracts of the Resolution Plan was made available to the Defendant No.1 only on 24/04/2019 i.e. during the pendency of the proceedings pending before the NCLAT, pursuant to the oral directions of NCLAT. Pursuant to the receipt of the relevant extracts of the Resolution Plan, the Defendant No.1 by additional submissions also challenged the extinguishment of the right of subrogation of the Defendant No.1 inasmuch as at the relevant point in time, the Applicant Banks have sought recovery of the entire amount borrowed by the Principal Borrower from the Defendant No.1.

2.6 The NCLAT vide its Judgment dated 04/07/2019, rejected the Appeal of the Defendant No.1 and held that the question of subrogation does not arise as the Guarantees stood extinguished on payment of monies to the lenders under the Resolution Plan.

2.7 The Judgment dated 04/07/2019 was challenged before the Hon'ble Supreme Court by State Bank of India, amongst others. The Defendant No.1 had contended, by way of a reply, that the Right of Subrogation cannot be extinguished under the Resolution Plan.

2.8 The Hon'ble Supreme Court vide its Judgment dated 15.11.2019, as reported in (2020) 8 SCC 531, has set aside the observations made by the NCLAT in Para 30 & 31 and has held that the Resolution Plan is binding on the Guarantors. Though the observations of the NCLAT have

been set aside, the Hon'ble Supreme Court has been pleased to observe that no particular observations are made which would otherwise affect the pending litigation i.e. the proceedings before this Hon'ble Tribunal.

2.9 Vide the Judgment dated 15/11/2019, the Resolution Plan of ArcelorMittal stood finally approved.

3. During the pendency of the present proceedings, Defendant No.1 had preferred a Writ Petition before the Hon'ble High Court seeking a writ of prohibition on the grounds mentioned therein. The Petition was dismissed vide a Judgment dated 16/12/2021. The relevant extracts of the Judgment are as under:

> *87. The aforesaid will have to be closely looked into by the Tribunal and the Tribunal will have to give a meaningful interpretation to such understanding and agreement between the parties so as to appreciate the arguments canvassed on behalf of the writ applicants that with the assignment of debt by the State Bank to the ArcelorMittal, they in their capacity as the personal guarantors, are relieved or discharged of all their personal obligations under the deed of guarantees.*
>
> *88. A surety who seeks to be relieved of the obligation imposed upon him as surety and to be absolved from the liability must not only show that the creditor has, by his acts or conduct, either prevented the debtor from doing the things which he undertook to do, or has connived at the debtor's omission to do those things or has enabled him to do something which he ought not to have done, but he must also show that the creditor has done some act inconsistent with the rights of the surety, or omitted to do any act which his duty towards the surety required him to do within the meaning of Section 139. Thus, before the surety is C/SCA/11199/2019 CAV JUDGMENT DATED: 16/12/2021 discharged the following two conditions must be satisfied (1) the creditor must do an act which is inconsistent with the rights of the surety or he must omit to do any act which his duty to the surety requires him to do; and (2) by the action or inaction of the creditor referred to in ground (one), the eventual remedy of the surety himself against the principal debtor is impaired. Whether the said two conditions are fulfilled in the present case or not will have to be closely examined by the Tribunal keeping in mind the terms of the Resolution Plan, the terms of the guarantee and the legal effect of the assignment of debt vis-a-vis the liability of the guarantors. This aspect shall be examined by the Tribunal bearing in mind the dictum laid in decision of HUTCHENS (supra).*
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> *89. As per the scheme of IBC, once the resolution plan is accepted by the Committee of Creditors (CoC) and the*

same is approved by the Adjudicating Authority, the CIRP comes to an end. Once the CIRP is concluded and the plan gets approved by the Adjudicating Authority as per Section 31 of the IBC, the debt which was owed by the Corporate Debtor is settled. No proceedings against the Corporate Debtor can be initiated in relation to the debt that has been settled. The resolution plan so approved is binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the Resolution Plan. It is, therefore, understood that once the Resolution Plan is approved by the Adjudicating Authority, the liabilities of the Corporate Debtor come to an end. However, the creditors may retain the right to proceed against the guarantors of the Corporate Debtor. Is there any specific bar under the IBC that a creditor cannot claim its remaining debt due from the guarantor (which has not been recovered from the Corporate Debtor through CIRP)? It is a settled position of law that the liabilities of guarantors are co-extensive with the borrower. Therefore, if C/SCA/11199/2019 CAV JUDGMENT DATED: 16/12/2021 the borrower is unable to clear the debt, then the right is accrued in favour of the creditor to proceed against the guarantor. This liability is independent in itself as the contract of guarantee is an independent contract. The guarantors, on the other hand, may take defence of Sections 133, 134 and 140 of the Indian Contract Act. As per Section 134, a guarantor is discharged of its liability towards the creditor if the creditor on its own instance discharges the Principal Debtor. The main ingredient of this section is discharge of the debtor through voluntary act of the creditor and not due to operation of law. Any scheme or plan that is approved by a court or Tribunal becomes a statutory scheme and is, therefore, an act of operation of law. Under the IBC, the position is somewhat different. The Corporate Debtor under the IBC is discharged on the approval and implementation of the resolution plan. The resolution plan is approved by the Adjudicating Authority after it is satisfied that the same is approved by the prescribed majority of the members of CoC and its contents are in accordance with law. Therefore, under the IBC, the Corporate Debtor is discharged by the operation of law, i.e. approval of the Resolution Plan by the Adjudicating Authority on its satisfaction and not at the instance of a creditor even if one or any of the creditors may or may not be in favour of Resolution Plan. Once the Resolution Plan is approved by the Adjudicating Authority, the Corporate debtor is discharged and the said decision is binding on the creditor. Thus, whether the guarantors could be said to be discharged of its liability towards the creditor on the discharge of principal debtor's liability under the IBC will have to be decided by the Tribunal keeping in mind that the case on hand is one of assignment of debt.

93. The upshot of the aforesaid discussion is that the case on hand is not one in which it could be said that there is a patent lack of jurisdiction in the Debts Recovery Tribunal to look into all the issues discussed above. Had it been a case of patent lack of jurisdiction, this Court would have gone into the pivotal issue and answered the same.

We are of the view that the Tribunal should be allowed to look into all the relevant aspects of the matter, more particularly, the pivotal issue as regards the assignment of debt vis-a-vis the liabilities of the guarantors under the guarantees deed. The pivotal point raised by the writ applicants is one for which detailed analysis has to be made by the Tribunal itself even to find out as to whether the facts on record would clothe the Tribunal with the necessary jurisdiction to decide the issues raised before it on merits. When we pose a question to ourselves as to instead of issuing a writ of prohibition, as prayed for, by the writ applicants, if by permitting the Tribunal to proceed further, whether any serious prejudice would be caused? We find that by adopting the said course, while no prejudice would be caused to the writ applicants, by issuing a writ as asked for, there is likelihood of a serious injustice being caused to the Bank by preventing a statutory forum from exercising the powers conferred on it by law without there being a strong or convincing grounds for issuing such a prohibition. Therefore, it would be wholly inappropriate at this stage to interfere with the Original Applications preferred by the Bank before the Debts Recovery Tribunal by issuing a writ of prohibition.

96. In the result, all the writ applications fail and are hereby rejected. We leave it open to the Tribunal to decide the pivotal issue on its own and if the Tribunal fits appropriate or upon request of the parties may frame a preliminary issue as regards the jurisdiction and decide the same[see :Shirpur Power Pvt Ltd (supra)]"

4. In view of the aforesaid directions issued by the Hon'ble High Court of Gujarat, the Defendant has raised the following questions before this Tribunal for consideration:

(A) Having assigned the "debt" as defined u/s 2(g) of the RDB Act, for valuable consideration, as part of the Resolution Plan under Insolvency & Bankruptcy Code, 2016 ("IBC"), is the OA maintainable?

(B) Alternatively, having relinquished its right and/or entitlement to pro-rata receive the cash balance (profit) earned by the Principal Borrower, as more particularly set out herein, are the Defendants discharged of their liability under the Personal Guarantees?

(C) Whether absent the existence of jurisdictional fact, namely, "debt" as defined in Section 2(g) of RDB Act, either on account of assignment and/or extinguishment and/or discharge by relinquishment, does this Tribunal have the jurisdiction to entertain the OA?

5. The Applicants have filed reply to the present application vide Exh.R/41 and denied the averments made in the application. It has further contended that the questions raised by the Defendant in the present application are not simple or pure questions of law, but this Tribunal will have to determine a mixed question of facts and law, which cannot be decided as preliminary issue. The disputes raised by the Defendant are not the ones which would go to the root of the jurisdiction of this Tribunal to try the matter on merits. The intention of the Defendant in filing the present application is to create impediments in final adjudication of the present proceedings. The Applicants have further contended that the Defendants being the personal guarantors for the loan facilities extended by the Applicants to Principal Borrower, do not stand discharged from their subsisting liability under the personal guarantees even subsequent to approval and implementation of the Resolution Plan in terms of the IBC. The guarantors cannot avoid their liability since the approved Resolution Plan would be binding upon them and the discharge of the Principal Borrower is by way of operation of law and not through any voluntary act of the financial creditors which would give to the personal guarantors any of the benefits u/s 133, 134, 135, 139 and 141 of the Contract Act. The liability of the Defendant is under the separate contract of personal guarantee and the same is not affected by the Resolution Plan and is expressly preserved from being extinguished and therefore the Defendant is liable to the extent of the unrecovered debt by the Applicants. The Applicants have also contended that the provisions of the Code have overriding effect over any other law being inconsistent with its provisions u/s 238 of the IBC and therefore, any other interpretation would be inapplicable. The personal and corporate guarantees extended by the promoter group of ESIL have expressly not been assigned to the successful Resolution Applicant and have been retained by the financial creditors for the purpose of enforcing their recovery rights against the Defendant in order to realize the unrecovered portion of their outstanding debt. The Applicants have given details of lender-wise outstanding liabilities due and payable by the Defendant as on 31/01/2022 in terms of their respective personal

guarantees, after deducting the exact recoveries made under the Resolution Plan and contended that the Applicants are still entitled to recover such amounts from the Defendants in the OA.

6. I have heard Ld. Counsel for the respective parties at length and perused the documentary evidences placed on record. Ld. Counsel for the Original Applicants (Banks) has relied on the following judgments:-

- Ramesh B. Desai and Ors. Vs. BipinVadilal Mehta and Ors., (2006) 5 SCC 638.
- Chhotanben and Anr. Vs. KiritbhaiJalkrushnabhai Thakkar and Ors., (2018) 3 SCC (Civ) 524.
- Ebix Singapore Pvt. Ltd. Vs. Committee of Creditors of Educomp Solutions Limited and Another, 2021 SCC OnLine SC 707.

Ld. Counsel for the Original Defendants relied on the following judgments:-

- ICICI Bank Limited Vs. Official Liquidator of APS Star Industries Limited and Ors., (2010) 10 SCC 1.
- Shipping Corporation of India Vs. Machado Brother and Others, (2004) 11 SCC 168.

7. I have also gone through the judgments referred to and relied on by the respective parties and the same shall be discussed at an appropriate stage in this order.

JURISDICTION OF THIS TRIBUNAL

8. It is submitted on behalf of the Applicants that in view of the observations made by the Hon'ble High Court of Gujarat in para 93 of its judgment passed in SCA, this is not the case of a patent lack of jurisdiction of this Tribunal and the Hon'ble High Court thought it proper to allow this Tribunal to look into all the issues discussed therein. Ld. Counsel for the Applicants submitted that the said observation would impliedly mean that the jurisdiction of this Tribunal is not barred by any law and this Tribunal does have the jurisdiction to try and entertain the present OA. He relied on Section 2(g) of the RDB

Act and submitted that this Tribunal is empowered to decide the present OA filed for recovery of "debt".

9. Per contra, Ld. Counsel for the Defendant submitted that this Tribunal might have jurisdiction to entertain and decide the present case at the relevant time when it was filed. But due to the subsequent events, which took place during the pendency of the present OA, the jurisdiction of this Tribunal is lost on account of assignment of the "debt" by the Applicants to ArcelorMittal under the Resolution Plan. He further submitted that this Tribunal can exercise jurisdiction only for recovery of debts due to Banks and Financial Institutions, but if there is no existing debt, then there is no question of any recovery. Therefore, in the changed circumstances of the present case, the present OA is not maintainable and the same may be rejected.

10. In this context, it would be pertinent to refer to the definition of the term "debt" contained in Section 2(g) of the RDB Act, which reads as under:

> *"2(g) "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application [and includes any liability towards debt securities which remains unpaid in full or part after notice of ninety days served upon the borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of debt securities or;]"*

11. It is a settled law that the liability of a guarantor is co-extensive with that of the Principal Borrower as per Section 128 of the Contract Act. The Defendants in the present case admittedly stood as sureties for the financial assistance granted by the Applicants to Essar Steel and therefore they were jointly and severally liable to pay the dues of the Applicants along with the Principal Borrower. Therefore, the Applicants were entitled to file Original Application against the

Principal Borrower and/or guarantors for recovery of their debt before this Tribunal u/s 19 of the RDB Act. Under the contract of guarantee executed with the Applicants, the Defendants were liable to pay the dues of the Applicants. It is a different matter that the Applicants later on entered into Deed of Assignment for its debt with the Resolution Applicant – ArcelorMittal. But the contract of guarantee between the Applicants and Defendants was in existence at the time of filing the present OA and it is still subsisting . Therefore, the Applicants were entitled to recover their debt, if any, from the Defendants. In view of the provisions of Section 2(g) read with Section 19 of the RDB Act, it cannot be said that there was lack of inherent jurisdiction of this Tribunal at the time of filing the OA by the Applicants against the Defendants.

12. I am unable to accept the argument of Ld. Counsel for the Defendant that the jurisdiction of this Tribunal is lost on account of subsequent event of assignment of debt by the financial creditors or implementation of the Resolution Plan. As held by the Hon'ble High Court of Gujarat in para 93 of its judgment in SCA, this Tribunal has to examine all relevant aspects, such as survival of debt recoverable by financial creditors, liability of the personal guarantors, etc. in the present OA and this Tribunal cannot do so if at all it lacks inherent jurisdiction to entertain the present OA. The Hon'ble High Court has left all the questions raised by the parties in the said Writ Petition for this Tribunal to decide.It would be examined at a later stage hereinafter whether any debt exists, whether the Defendants are still liable to pay any amount to the financial creditors, whether the Defendants stand discharged from the personal guarantees extended by them. In case this Tribunal comes to the conclusion that on account of assignment of debt by the financial creditors, the Defendants stand discharged as guarantors, the OA may be dismissed for want of cause of action. Hence, at the most it can be said to be non-survival of the cause of action and not loss of jurisdiction of this Tribunal. But all that would happen after exercise of the jurisdiction and examination of the case on

its merits. In view of the aforesaid discussion, I hold that this Tribunal does have jurisdiction to try, entertain and decide the present OA.

FRAMING OF PRELIMINARY ISSUE OF JURISDICTION

13. Ld. Counsel for the Defendant submitted that on account of the assignment of debt by the Applicants to ArcelorMittal, there exists no "debt" as defined u/s 2(g) of the RDB Act. Therefore, the Applicants, as on date, have no right to recover any debt from either the Principal Borrower and/or the Defendants and in absence of any debt being recoverable, the Applicants cannot continue the proceedings u/s 17 read with Section 19 of the RDB Act. He further submitted that in the present Interlocutory Application, the Defendants have raised the issue of jurisdiction of this Tribunal as well as maintainability of OA on the premise that the OA is not maintainable due to subsequent facts and the same is not required to be adjudicated upon. Both the issues go to the root of the matter and are therefore required to be adjudicated upon as preliminary issues before conducting final hearing of the OA. In support of his submission, he relied on the judgment of the Hon'ble High Court of Gujarat dated 28/08/2019 in the case of **Shirpur Power Pvt. Ltd. V/s. State Bank of India in SCA No.10476 of 2019.**

14. Per contra, Ld. Counsel for the Applicants submitted that this Tribunal should check whether a particular question is fit to be framed as a preliminary issue or not. He further submitted that only a question purely of law can be decided as a preliminary issue and not a mixed question of facts and law. He also submitted that in the case of **Shirpur Power (Supra),** the Hon'ble High Court of Gujarat considered that the issues sought to be framed as preliminary issues required deeper analysis of the contractual terms and their interpretation even if the relevant documents were admitted. Therefore, the Hon'ble High Court held that issues were mixed questions of facts and law which could not be allowed to be decided as preliminary issues.

15. Considering the rival submissions of the parties, a reference again deserves to be made to the observations made by the Hon'ble High

Court of Gujarat in para 93 of its judgment in SCA, which read as under:

> *"93.....We are of the view that the Tribunal should be allowed to look into all the relevant aspects of the matter, more particularly, the pivotal issue as regards the assignment of debt vis-à-vis the liabilities of the guarantors under the guarantees deed. The pivotal point raised by the writ applicants is one for which detailed analysis has to be made by the Tribunal itself even to find out as to whether the facts on record would clothe the Tribunal with the necessary jurisdiction to decide the issues raised before it on merits."*

16. In light of the aforesaid observations of the Hon'ble High Court of Gujarat, I am of the opinion that the issues sought to be tried as preliminary issues by the Defendant required detailed analysis, the same are mixed questions of facts and law. It is a settled position of law that only pure question of law can be decided as preliminary issue. It has been held, in **Meher Sing vs. Deepak Sawhny [(1998) 3 Mh.LJ. 940]**, that where an issue of jurisdiction involves a mixed question of fact and law, parties must be given an opportunity to lead evidence. Moreover, when such an issue is raised, two trials have to be conducted, viz., one on the preliminary issue and the other on the remaining issues, each subject to its own round of appeals and Special Leave Petitions. All this needlessly burdens the Court with duplication and results in a waste of judicial time and resources.Therefore, I am of the opinion that the alternative prayer of the Defendant to try the aforesaid issues as preliminary issues cannot be accepted.

EXISTENCE OF DEBT/LIABILITY OF DEFENDANTS ON ASSIGNMENT:

17. In this context, it would be pertinent to look at the relevant clauses of the approved Resolution Plan, which read as under:

> ***"I. Upfront Cash Recovery***
>
> *1. Secured Financial Creditors Payment of INR 42,000 crores to be paid on the effective date as an upfront amount which comprises the following:*

• INR 39,500 crores; and • INR 2,500 crores being the 'Guaranteed Working Capital Adjustment' in accordance with the Revised RFP.

The cost of the committee of creditors amounting to INR 20 crores out of the Upfront Cash Recovery shall be paid to State Bank of India for the payment towards the legal cost and any process advisory costs. This shall include the past and the future costs arising out of the CIRP process of the Corporate Debtor.

An amount of INR 10 crores shall be paid to the Resolution Professional out of the Upfront Cash Recovery amount for the legal cost and other charges which may have been incurred in connection with the CIRP Process of the Corporate Debtor and has not been paid as CIRP cost.

The Resolution Applicant has agreed that the Committee of Creditors will decide the manner in which the financial package being offered by the Resolution Applicant to the Financial Creditors will be distributed to the Secured Financial Creditors. All such allocations to the Financial Creditors will be binding on all Stakeholders. For the avoidance of doubt, such allocation shall be binding on all Financial Creditors, including dissenting Financial Creditors, if any.

For the sake of clarity, INR 42,000 crores is a committed amount even if the working capital adjustment amount is below INR 2,500 crores.

The Upfront Cash Recovery amount will be paid in accordance with this Resolution Plan within 30 days from the Plan Approval Date.

2. Unsecured Financial Creditors A. Payment of INR 17.4 crores to the unsecured financial creditors to be paid on the Effective Date as an upfront amount by the Resolution Applicant which shall be divided proportionately to the unsecured financial creditors.

B. Payment of INR 3,055,738 to be paid to the unsecured financial creditors (whose Admitted Claim is less than INR 10 lakhs) to be paid on the effective date as an upfront amount by the Resolution applicant.

Such amount shall be paid over and above the amount offered to the Secured Financial Creditors."

"4. Acquisition of Debt Simultaneously with acquiring 100% equity ownership of the Corporate Debtor, the Resolution Applicant shall acquire the debt, along with all the underlying securities, owed by the Corporate Debtor to the Financial Creditors, other than corporate guarantees and personal guarantees issued for or on behalf of the Corporate Debtor to the members of the Committee of Creditors; and the Financial Creditors shall assign, and cause all the obligors to, acknowledge and accept such assignment of rights under the loan and security documents in favour of the Resolution Applicant

and/or its Connected Persons, and/or banks or financial institutions designated by the Resolution Applicant.

The external commercial borrowings of the Corporate Debtor shall be acquired, along with the underlying securities, by an offshore entity nominated in this regard by the Resolution Applicant.

The Resolution Applicant shall acquire the entire debt, along with all the underlying securities, upon the payment of INR 42,000 crores on the Effective Date as an upfront amount."

"XII. Terms of Settlement General

Notwithstanding anything stated herein, the total liability of the Resolution Applicant or the Corporate Debtor in relation to the Claims, liabilities and obligations of the Corporate Debtor prior to the Plan Approval Date shall not exceed the payments to be made to the Financial Creditors, and Operational Creditors as specified in Section V above. All claims that may arise post the Plan Approval Date including claims under applicable Law, contract judicial / quasi-judicial proceedings, disputed or undisputed, crystallized or otherwise which relate to the period prior to the Plan Approval Date shall be subject to the limit on liability stated under this Section.

***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:

- *The payments 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 (i) 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 (ii) 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.*

- *In relation to the loans and financial assistance provided to the Corporate Debtor; each of the Financial Creditors, as the case may be, 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 (i) 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.

- Notwithstanding anything contained in this Resolution Plan, the relevant Financial Creditors and the Resolution Applicant may mutually discuss at a later date, the assignment by the relevant Financial Creditors of such corporate and personal guarantees provided for and on behalf of the Corporate Debtor.

• Any Claims made under any guarantees issued by the Corporate Debtor on behalf of its subsidiaries and third parties excluding the guarantees dealt with above (i.e. as issued in favour of Financial Creditors of the Corporate Debtor), shall not constitute financial debt and all such guarantees shall also stand extinguished as a part of the Resolution Plan and the beneficiaries of such guarantees shall be expected to recover the monies with respect to uninvoked guarantees from the principal borrower and for any shortfall, they shall not have any recourse against the Corporate Debtor and/or the Resolution Applicant. For the sake of brevity, the underlying loans to such principal borrower shall continue with right to full recovery

• In the event that the Corporate Debtor is required to pay any amounts pursuant to the invocation of guarantees given on behalf of the Corporate Debtor or payments made thereunder, The Financial Creditors shall jointly reimburse such amounts to the Corporate Debtor within a period of ninety Cays of any such payment being made by the Corporate Debtor. Further, in the event that the Financial Creditors require the Corporate Debtor to contest any clam on the Corporate Debtor Pursuant to the invocation of guarantees given on behalf of the Corporate Debtor or payments made thereunder the Financial Creditors shall bear all litigation costs for contesting such clam."

"Other Terms of the Resolution Plan

Extinguishment of Claims:

1. Notwithstanding anything contained under Applicable Law or otherwise, the Claims pertaining to the Corporate Debtor shall stand extinguished, settled, abated and satisfied in the manner set out hereinafter:

a. Other than the payments/ settlements under this Resolution Plan, no other payments or settlements (of any kind) will have to be made to any other Person in respect of the Claims filed under the Resolution Process and all Claims (including, for the avoidance of doubt, Rejected Claims Amount and Verification Pending Amounts) against the Corporate Debtor as of insolvency Commencement Date along with any related Proceedings, including Proceedings for enforcement of any security interest, shall stand irrevocably and unconditionally abated, discharged, settled and extinguished in perpetuity on the Plan Approval Date.

b. The payments contemplated in this Resolution Plan shall be the Corporate Debtor's full and final performance, and satisfaction of all Claims (including Rejected Claims Amount and Verification Pending Amounts) against the Corporate Debtor as of the Insolvency Commencement Date and Proceedings for enforcement of any security interest, shall stand irrevocably and unconditionally settled and extinguished in perpetuity on the Plan Approval Date.

c. Subject to Clause (g) below, all contingent liabilities of the Corporate Debtor up to the Plan Approval Date arising out of any Proceedings to which the Corporate Debtor is a party shall, unless otherwise stated in this Resolution Plan and irrespective of the final outcome of such Proceedings, stand irrevocably and unconditionally reduced to and capped at the amounts that would be realizable by the Claimant, if the contingent liability had fructified at any time prior to the Plan Approval Date.

d. With effect from the Plan Approval Date, all Encumbrances created or suffered to exist over the assets of the Corporate Debtor or over the Securities of the Corporate Debtor, whether by contract or by Applicable Law, whether created for the benefit of the Corporate Debtor or any Third Party (except the Security Interest that is created or purported to be created for the benefit of the Resolution Applicant and/ or its Connected Persons, and/or banks or financial institutions designated by the Resolution Applicant), shall stand unconditionally and irrevocably assigned or novated in favour of the Resolution Applicant or released (if required by the Resolution Applicant) upon making the relevant payments under the Resolution Plan on the Effective Date and all enforcement of security by any Persons commenced over any of the assets of the Corporate Debtor or over any Securities of the Corporate Debtor shall stand released and reversed, without the requirement of any further deed or action on the part of the Resolution Applicant or the

Corporate Debtor including any priority of claims that could have otherwise been claimed by the Tax Authorities under Section 281 of the Income Tax Act, 1961. The Resolution Applicant shall comply with all necessary procedural requirements for the same.

e. Other than as set out in this Resolution Plan, the Resolution Applicant and the Corporate Debtor shall have no responsibility or liability in respect of any Claims (whether contingent or crystallized, known or unknown, filed or not filed) against the Corporate Debtor attributable to the period prior to the Insolvency Commencement Date, including those relating to any corporate guarantees, indemnities and all other forms of credit support provided by the Corporate Debtor prior to the Plan Approval Date shall stand irrevocably and unconditionally abated, settled and extinguished in perpetuity.

f. Upon the approval of the Resolution Plan by the Adjudicating Authority, all pending Proceedings relating to the winding-up of the Corporate Debtor shall stand irrevocably and unconditionally abated in perpetuity. As on the Plan Approval Date, the Government Creditors and Trade Creditors shall be deemed to have waived all termination rights on account of payment defaults, and rights to payment of penalty, default payment or any payment of like nature under any agreement or arrangement against the Corporate Debtor, including but not limited to any rights arising from any breach, default, act or omission, under any such agreement or arrangement executed by the Corporate Debtor and/ or the Resolution Professional for and on behalf of the Corporate Debtor, till the Plan Approval Date.

g. 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 of 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.

h. On the Plan Approval Date, all the outstanding negotiable instruments issued by the Corporate Debtor including demand promissory notes, post-dated cheques and letters of credit, shall stand terminated and the Corporate Debtor's liability under such instruments shall stand extinguished - unless otherwise determined by the Corporate Debtor in compliance with the provisions of Section VII or solely for the purpose of operating the Corporate Debtor as a going concern.

i. On the Plan Approval Date, other than as contemplated under Section X, the rights of any Person (whether exercisable now or in the future and whether contingent or not) to call for the allotment, issuance, sale or transfer of shares or Securities or loan capital of the Corporate Debtor, whether On a change of control, or otherwise, shall stand unconditionally and irrevocably extinguished.

In addition to the foregoing, on the Plan Approval Date, the right to receive distribution of any shareholder (by way of dividend, coupons etc.) that has accrued or relates to the period prior to the Plan Approval Date, shall stand unconditionally and irrevocably extinguished. All rights of any shareholder of the Corporate (not being the Resolution Applicant or its affiliates), whether arising under law or contract shall stand abated, suspended during the period between the Plan Approval Date and the Effective Date and the shareholder shall not have any rights to cause the Corporate Debtor to take any actions or restrain the Corporate Debtor from carrying on its activities.

j. All Claims (whether contingent or crystallized, known or unknown, filed or not filed) of Government Authorities in relation to all Taxes which the Corporate Debtor was or may be liable to pay (including with respect to financial years under assessment), all deductions and all withholding Taxes on any payment, as required under Applicable Law and pertaining to the period prior to the Insolvency Commencement Date shall stand extinguished on the Plan Approval Date.

k. All liabilities (whether contingent or crystallized, known or unknown, filed or not filed) in relation to any corporate guarantees, indemnities and all other forms of credit support provided by the Corporate Debtor prior to the Plan Approval Date (whether on behalf of Group Companies or otherwise) shall stand extinguished and discharged with effect from the Plan Approval Date.

l. No person shall be entitled to initiate any proceedings to enforce any Claims or continue any proceedings in relation to any Claims in so far as the Claims relate to the period prior to the Plan Approval Date.

2. With respect to the matters stated in paragraph 1 above, any liabilities and/or Claims that arise till the Effective Date shall stand waived, extinguished, abated, discharged in perpetuity and provisions of paragraph 1 above shall mutatis mutandis apply.

3. Nothing in this Resolution Plan shall affect the rights of the Corporate Debtor to recover any amounts due to the Corporate Debtor from the Third Party (including any Related Party) except in the case of personal and corporate guarantees provided for and on behalf of the Corporate Debtor to the Financial Creditors and there shall be no set off of any such amounts recoverable by the Corporate Debtor or any liability extinguished pursuant to this Resolution Plan. If any person receives any payments pursuant to this Resolution Plan recovers any additional amount from any Third Party including but not limited to recovery on account of any guarantees or other securities issued by any Third Parties, then such person shall be liable to pay such additional amounts to the Corporate Debtor."

18. As per the various records presented by the Resolution Professional during the proceedings pending before the Appellate Tribunal and the Hon'ble Supreme Court, the total admitted claims of the Secured Financial Creditors were to the tune of INR 45,559.24 Crores.

19. It is submitted on behalf of the Defendants that the entire amount of liability of INR 45,559.24 Crores has been discharged and no amounts are due and payable to the Secured Financial Creditors, after completion of CIRP. The full discharge is in the following manner:

Sr No.	Particulars	Amount (INR, Crores)	(Amount (INR, Crores)
1.	Total Admitted Claims of Secured Financial Creditors		45,559.24
2.	Total Amount directly received under the CIRP from the Resolution Applicant by Secured Financial Creditors	40,910.74	
3.	Amount allocated by Secured Financial Creditors to Operational Creditors	1000	
4.	Net Working Capital and EBIDTA received by Secured Financial Creditors, as per the Resolution Plan	9766	
Total of 2,3 and 4			51,676.74
Excess net working capital & EBITDA after full payment to all secured financial creditors			6117.50

The figures in the aforesaid table are described and explained by the Defendants as under:

a. The total admitted claims as per the Resolution Professional in CIRP, in respect of Secured Financial Creditors was INR 45,559.24 Crores.

b. ArcelorMittal has made a payment of INR 40,910.74 Crores to the said Secured Financial Creditors (as per the Distribution Chart filed by the CoC before the NCLAT).

c. Out of the Upfront Amount of INR 42,000 Crores offered by ArcelorMittal which was available to the Secured Financial Creditors, an amount of INR 1000 Crores was paid by Secured Financial Creditors to Operational Creditors. This amount therefore was available to the Secured Financial Creditors and has to be adjusted from the dues.

d. With regard to EBIDTA, the Resolution Plan provided that the "*Any surplus cash being the positive difference between Closing Net Working Capital and Normalized Working Capital as at December 21, 2017, less the Guaranteed Working Capital Adjustment (already paid as a part of Upfront Cash Recovery amount) and The EBITDA generated between the Plan Approval Date and the Effective Date*" would be available to the Secured Financial Creditors over and above the Upfront Amount. Therefore, as per the Resolution Plan, the Net Working Capital and EBIDTA, generated between the plan approval date i.e. 08/03/2019 to the effective date i.e. 16/12/2019 is an amount of INR 9766 Crores and was received by the Secured Financial Creditors.

20. Hence, Ld. Counsel for the Defendant submitted that, as described in the table above, the entire liability of all secured financial creditors, stands discharged. He further submitted that the Applicant Banks are part of the Secured Financial Creditors and therefore, their liability also stands fully discharged.

21. Per contra, the Applicant Banks have submitted that the Applicant Banks have still to recover the outstanding amount, by way of interest, from the guarantors – Defendants as on 31/01/2022 as per the details submitted along with their reply to the present Interlocutory Application. Therefore, according to the Applicants, the Defendants are still liable under the Personal Guarantees executed by them.

22. In this context, it would be worthwhile to refer to relevant clauses of the Assignment Agreement executed by the financial creditors in favour of AMIPL in December 2019, which are as under:

> *"**1.1 (c) "Assigned Loans"** means the aggregate of all amounts due and payable, as applicable, and all other monies whatsoever stipulated in or payable, under the Financing Documents, by the Borrower to the Assignors including but not limited to (i) loans mentioned in Schedule II of this Agreement, (ii) past overdues, future payments, interest charges for delayed payments, indemnities and damages or other charges and / or all other monies, if any, to be received by the Assignors under the Financing Documents and (iii) the proceeds of any enforcement of the Financing Documents or any Security Interest and/or any guarantee issued in relation thereto by the Borrower. It is hereby clarified that the definition of Assigned Loans excludes the ESIL Guarantees and the Assignors retain their rights to enforce the ESIL Guarantees for any balance amount that may be recovered from the Existing Promoter Group and/or their respective affiliates;"*
>
> *"**2. ASSIGNMENT***
>
> ***2.1.1.** Subject to the terms and conditions set forth in this Agreement and the Resolution Plan, the Assignors as the true, legal and beneficial owner of the Assigned Loans hereby unconditionally and irrevocably sell, assign, transfer and release to and unto the Assignee on "as is, where is", "as is, what is" and "without recourse" basis, with effect from the Closing Date, all the Assigned Loans forever, together with the underlying Security Interest created under the Financing Documents in favour of the Assignee, other than the ECIL Guarantees, without requiring any further act or deed, and the assignee shall hereafter be deemed to be the full and absolute legal owner and the only person legally entitled to the Assigned Loans or any part thereof, free from any or all encumbrances and to recover and receive all amounts proceedings and take such other action as may be required for the purpose of recovery of the Assigned Loans, in its own name and right and as an assignee and not as a representative or agent of the Assignors and to exercise all other rights of the Assignors in relation thereto. It is hereby clarified that legal proceedings initiated or appealed against the ESIL Guarantees with continue will continue to subsist and the right to enforce or recover for any balance amount that may be recovered from the Existing Promoter Group under the ESIL Guarantees will continue with the Assignors.*
>
> ***2.1.2.** Subject to the terms and conditions set forth in this Agreement and Resolution Plan and in consideration for*

the sale, transfer and assignment of the Assigned Loans by the Assignors, the Assignee shall pay to each Assignor by way of electronic funds transfer or remittance of funds by any other mutually agreed mechanism in the respective bank accounts of the Assignors as provided in Schedule-V hereto such portion of the Total Purchase Consideration as is set out against the name of such Assignor in Schedule-V hereto on the Closing Date.

2.1.3. *The payment of the Total Purchase Consideration (including payments specified in Section 2.1.5 below) in the manner provided herein shall continue full, final and complete discharge of the obligation of the Assignee towards the Assignors with respect to payment of consideration for the Assigned Loans. The Assignors hereby severally admit and acknowledged the sufficiency of the Total Purchase Consideration and that the Assignee and the Borrower shall not be liable to pay any other amounts to the Assignors for the assignment of the Assigned Loans.*

2.1.4. *Each Assignor shall issue and deliver to the Assignee a duly executed no-dues letter acknowledging the receipt of its portion of the Total Purchase Consideration in the format set out in* ***Schedule IV*** *hereto on the date of receipt of its portion of the Total Purchase Consideration."*

23. The above Assignment deed executed and signed by the secured creditors clearly shows that the secured creditors have assigned the entire amounts receivable from the corporate debtor, i.e., principal, interest, other charges and any other payments under the facility agreements to AMIPL. All rights of the secured creditors in respect of the said debts have also been assigned . After assignment, there is no debt due to the secured creditors.. if there is no debt due by virtue of the assignment, there are no amounts which can be claimed by the Applicant Banks (secured creditors) either from the corporate debtors or from the guarantors. The entire liability stands discharged vis a vis the secured financial creditors for Principal, Interest and any other amount due under the facility agreements.

24. The above clauses further demonstrate that the Applicant Banks (financial creditors) had no debt due and recoverable from the Principal Borrower on assignment of debt after approval of the Resolution Plan.

As per Section 128 of the Contract Act, the liability of a surety is co-extensive with that of the principal borrower. When the Applicant Banks have discharged the principal borrower from its entire liability by assigning the debt to ArcelorMittal, the guarantees given by the Defendants for payment of such debt do not survive and the Defendants stand discharged.

25. It is argued on behalf of the Applicant Banks that the Applicant Banks have not assigned the personal guarantees of the guarantors with the assignment of debt. They have specifically retained and reserved the guarantees. Therefore, they are entitled to recover the amounts of guarantees from the Defendants.

26. I am of the considered view that the secured financial creditors invoked the guarantees upon failure of the corporate debtor to make payments under the relevant facility agreements. The jurisdiction of this tribunal in respect of any claims made by the Bank against the guarantors can only be in respect of the debt which is payable by the corporate debtor to the secured financial creditors / bank. Subsequent to the implementation of the Resolution plan, now there is no amount payable by the corporate debtor to the secured financial creditors. Accordingly, the alleged default under the loan agreements is cured and therefore it is not possible to countenance with the submission made by Ld. Counsel for the Applicant Banks as there is now no question of any amount payable under the Guarantee.

27. It is further submitted by Ld. Counsel for the Applicant Banks that once the Resolution Plan is approved, it is binding to all stakeholders as provided u/s 31 of the Code. Therefore, as per the terms of the Resolution Plan, the guarantees of the Defendants having been specifically excluded, the Applicant Banks are entitled to invoke the guarantees for recovery of amount due to them.

28. Per contra, Learned Senior Counsel appearing for the Defendant herein submitted that the resolution plan being confirmed and implemented

has a direct impact on the proceedings initiated by the Bank before the Tribunal inasmuch as the Bank is seeking to recover from the Defendants the amount due and payable by the Principal borrower i.e. ESIL. He further submitted that as the entire debt of the principal borrower came to be assigned to the ArcelorMittal, no debt could be said to be due on the books of account of the Bank. In other words, the argument is that no debt exists as on date so far as the Applicant - Bank is concerned. The entire debt owed by the principal borrower to the Bank stood completely extinguished in light of the resolution plan. In the absence of any debt remaining to be paid to the Bank, the question of enforcing the personal guarantees in relation thereto would not survive.

29. It was submitted that there is a fine distinction between the "assignment of debt" and "discharge or payment of debt". Ld. Counsel for the Defendant further submitted that had it been a case of some adjustment of the amount and pursuant to such adjustment, if there would have been some payment, then, it could not be said that the debt stood assigned. According to the learned Senior Counsel, the case on hand is not one of discharge of debt or part payment of the debt, but the same is one of assignment of debt.

30. In this connection, it is worthwhile to refer to the Judgement of the Hon'ble Supreme Court of India in the case of ***Lalit Kumar Jain versus Union of India*** **reported in (2021) 9 SCC 321,** wherein it has been held as under:

> *"122. 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.*
> ..."
> *"125. 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."*

31. The ratio of law laid down by the Hon'ble Apex Court in **LalitKumar's judgment (Supra)** is to the effect that the guarantors are not ipso facto absolved from their liability on approval of resolution plan.It is required to be noted that in the present case, the principal debtor is discharged on account of assignment of the entire debt owed by it to the Applicant Banks. The legal effect of such assignment is that the debt as a whole is discharged upon receipt of the amounts under the approved Resolution Plan, whereafter, the debt is totally extinguished leaving nothing for recovery from the guarantors. Moreover, the Applicant Banks have no dues recoverable from the principal borrower after assignment of debt. As stated hereinabove, if the Applicants have nothing to recover on the books of accounts from the principal borrower, the guarantors stand absolved from their liabilities under the guarantees and they stand discharged in spite of the fact that the personal guarantees have been retained and specifically excluded by the Applicant Banks in the approved Resolution Plan. Therefore, the aforesaid judgment would not be helpful to the Applicant Banks in the present case.

32. Upon a comprehensive reading of the decision of Hon'ble Supreme Court in **Lalit Kumar Jain's Case (Supra)**, the irresistible conclusion that emerges is that the Hon'ble Supreme Court has only dealt with the validity of the notification in relation to the personal solvency under the IBC and has restricted its analysis as regards the constitutionality of the Notification. While upholding the validity of the said Notification, the Court has not dwelt into individual facts and circumstances of any particular case. The instructive observations of the Hon'ble Supreme Court in **Lalit Kumar Jain's Case (Supra)** are reproduced below:-

> *"108. 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."*

From the above observation of Hon'ble Supreme Court of India, it is clear that both the nature as well as the extent to a guarantor's liability

in any particular case would depend upon the terms of the guarantee itself, which is an independent contract.

33. In the light of the observation of the Hon'ble Supreme Court, I have carefully perused the specific terms contained in the Guarantee and the terms of the Resolution Plan, which have been approved by the NCLT and further confirmed by the Hon'ble Supreme Court.

34. Clause-5 of the Deed of Guarantee dated 28/09/2013 is reproduced below:-

> *"The Guarantee shall not be wholly or partially satisfied or exhausted by any payments made to or settled with the Lenders by the Borrower and shall remain valid, in full force and effect until the Borrower achieves the ratio of Total Outside Liabilities/ Adjusted Tangible Net Worth of 3:1 (three is to one) or the Final Settlement Date, whichever is earlier; and from such date the Guarantor shall stand automatically discharged from all his obligations under this Guarantee without any further act or deed and this Guarantee shall be of no further force and effect."*

35. Chapter – XII of the Resolution Plan (Approved) of ArcelorMittal clearly states as follows:-

> • *"The payments 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 favor 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 Existing Promoter Group or their respective affiliates) shall be deemed to have been (i) 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 (ii) 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.*
>
> • *In relation to the loans and financial assistance provided to the corporate Debtor; each of the Financial Creditors, as the case may be, 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 (i) 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."*

36. A conjoint reading of the aforementioned clauses of the Deed of Guarantee and the approved Resolution Plan reveals that the Secured Financial Creditors have assigned their entire 'debt' from the Borrower (i.e.ESIL) to the resolution applicant (i.e.Arcelor) under the Resolution Plan and have also accepted the amounts paid to them by Arcelor in discharge of the total debt owed by the ESIL to such Financial Creditors. This factual matrix invariably leads to the singular conclusion that the debt owed by the ESIL to the said Financial Creditors stands fully and finally satisfied.

37. Mr. Thakore and Mr. Nankani for the Defendant relied on a Full Bench decision rendered by the High Court of Australia in the case of **Hutchens v. Deauville Investments Pty Ltd reported in 68 Australian Law Reports 367** and relying on the same, it was argued that it would seem to simply impossible, as a matter of basic principle, to assign the benefit of a guarantee or the security for it, (as distinct from the property secured) while retaining the benefit of the guaranteed debt and thereby to convert the one debt owing by both i.e. the principal debtor and guarantor to the one creditor into two debts, one owing by the principal debtor to the creditor and the other owing by the guarantor to the assignee.

38. I have gone through the judgment of the Hon'ble Australian High Court in **Hutchen's case (Supra),** which has also been discussed elaborately

by the Hon'ble High Court of Gujarat in its judgment dated 16/12/2021 in SCA. The relevant observations of the Hon'ble Australian High Court in **Hutchen's case** are reproduced hereunder:

> *"If the debt is assigned but the guarantee is not assigned then the right in the original creditor to recover under the guarantee must at least be suspended so long as the debt is assigned. There cannot be two persons entitled to recover the amount of the same debt, one from the principal debtor, and so long as the principal debtor was in default, another from the surety. Let it be assumed otherwise and suppose that the original creditor, the assignor of the principal debt, could show that it was overdue and thereupon sued the surety. Let it be assumed that the surety paid. Then, the assignee sues the principal debtor. He must be entitled to succeed unless there are some special circumstances of estoppel in the particular case, a factor which I place to one side. The assignee under an absolute assignment could not be deprived of his right to recover from the debtor because the assignor had recovered from the surety."*

39. The principle of law enunciated by the Hon'ble Australian High Court is to the effect that if the debt is assigned but the guarantee is not assigned then the right in the original creditor to recover under the guarantee must at least be suspended so long as the debt is assigned. In the present case it is not disputed that the personal guarantees executed by the Defendants in favour of the Bank are retained by the assignor(Secured Creditors) . However, it is also an admitted fact that the Secured Financial Creditors have under the Resolution Plan accepted the amounts paid to them by Arcelor in discharge of the total debt owed by the ESIL to such Financial Creditors. I am therefore of the view that there is no existing debt which can be claimed against the personal guarantees given by the defendants , for there is no subsisting underlying "debt" due from the Borrower (ESIL) which legally acts as a precondition for the Secured Financial Creditors to invoke the Guarantees. In other words, in the absence of any subsisting underlying debt due from ESIL, the Secured Financial Creditors cannot in law trigger the personal guarantees that have been given by the defendants

40. In view of the aforesaid discussion, I am of the opinion that the present Original Application does not survive as the cause of action for recovery of alleged debt of the Financial Creditors has come to an end

on assignment of the entire debt of the Corporate Debtor by the Financial Creditors in favour of AMIPL. In this context, it is worthwhile to refer to following observations of the Hon'ble Supreme Court in the case of **Shipping Corporation of India (Supra)** :-

> *"Thus it is clear that by the subsequent event if the original proceeding has become infructuous, ex debitojustitiae, it will be the duty of the court to take such action as is necessary in the interest of justice which includes disposing of infructuous litigation. For the said purpose it will be open to the parties concerned to make an application under Section 151 of CPC to bring to the notice of the court the facts and circumstances which have made the pending litigation infructuous. Of course, when such an application is made, the court will enquire into the alleged facts and circumstances to find out whether the pending litigation has in fact become infructuous or not."*

41. In the facts and circumstances of the present case, I am inclined to exercise powers u/s 19(25) of the RDB Act (which are analogous to the powers of the Court u/s 151 of the CPC) to dismiss the present Original Application as having become infructuous. Hence, I pass the following order:

ORDER

(1) The present Interlocutory Application filed by the Defendants is allowed.

(2) Since no debt is found due and recoverable by the Applicant Banks from the Defendants, the present Original Application is hereby dismissed with no order as to cost.

File be consigned to record.

Pronounced in open Court on this 11th day of March 2022.

(LaxmanMadnani)
I/c. Presiding Officer
DRT-I, Ahmedabad