

**National Company Law Appellate Tribunal**

**Principal Bench, New Delhi**

**COMPANY APPEAL (AT) (INSOLVENCY) No. 189 of 2021**

(Arising out of Order dated 19<sup>th</sup> October, 2020 passed by National Company Law Tribunal, New Delhi, Principal Bench, in CA No. 925/2018 in C.P. (IB) No.- 50/(PB)/2018).

**IN THE MATTER OF:**

**John Cockerill India Limited**

Mehta House – 64,  
Road No. – 13, MIDC,  
Andheri (E), Mumbai – 400093,  
Maharashtra.

**Versus**

**1. JSW Steel Coated Products Limited**

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

**...Respondent No. 1**

**2. Kuldip Kumar Bassi**

Erstwhile Resolution Professional of  
Asian Colour Coated Ispat Limited,  
Unit No. 410, Level 4, Centrum Plaza,  
Gold Course Road, Sector 53,  
Gurugram, Haryana – 122001.

**...Respondent No. 2**

**For Appellant:**

**Mr. Abhishek Sharma, Ms. Harshita Agarwal,  
Kiran Rahate & Grishma Dalvi, Advocates.**

**For Respondent No. 1:**

**Mr. Gopal Jain, Sr. Advocate with Mr. Bishwajit Dube, Ms. Aishwarya Gupta & Mr. Spandan Biswal, Advocates for R-1.**

**For Respondent No. 2:**

**Mr. Savar Mahajan, Advocate for R-2/RP.**

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

**[Per; Shreesha Merla, Member (T)]**

1. This Appeal is preferred against the Impugned Order dated 19.10.2020 passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi, Principal Bench) in CA 925/2018 in CP

(IB) No.- 50(PB)/2018, whereby the Adjudicating Authority has approved the Resolution Plan by '*JSW Steel Coated Products Limited*'/the 'Successful Resolution Applicant' ('SRA') which was approved with 79.3% voting share of the Committed of Creditors ('CoC').

**2.** Facts in brief are that the Appellant is an 'Operational Creditor' of '*M/s. Asian Color Coated Ispat Ltd.*'/the 'Corporate Debtor' and entered into four contracts dated 24.12.2009 and 25.05.2010. The 'Corporate Debtor' defaulted in payments and the outstanding amount totalled to Rs.21,89,16,893.57/-. It is stated that a settlement was entered into between the parties and the 'Corporate Debtor' was issued 12 postdated cheques amounting to Rs.6Crores/- as part payment, however the cheques were dishonored and the Appellant initiated proceedings under Section 138 of the Negotiable Instrument Act, 1881. Subsequently, on 12.12.2017 a Demand Notice was issued under Section 8 of IBC for initiation of CIRP against the 'Corporate Debtor'. Once again, a settlement was arrived at and the 'Corporate Debtor' assured to repay the dues of Rs.18,65,75,394/- by 30.09.2019. It is pleaded that as a security, the then Promotor of the 'Corporate Debtor', Mr. Pradeep Agarwal executed a registered Mortgage Deed dated 27.03.2018 creating a Mortgage over its personal property i.e., a piece of land admeasuring 26,100 sq. mts. situated in Raigarh District, Maharashtra in favour of the Appellant, the Mortgagee.

**3.** While so, CIRP was initiated against the 'Corporate Debtor' by SBI and the Appellant filed its claim with the RP on 16.10.2018 for an amount of Rs.42,72,14,454/- which includes both the principal and the interest amounts. During the CIRP, RP with a view to keep the 'Corporate Debtor' as

‘a going concern’ RP approached the Appellant for provision of requisite operational services which was provided as the Appellant was assured the payment of Rs.1,86,575,394/- which is the principal amount. The compliant of Section 138 was also withdrawn. Subsequently, the RP made a payment of Rs.10,69,00,000/- and amount of Rs.7,96,75,394/- was outstanding. Subsequently, the Resolution Plan submitted by the first Respondent/ ‘JSW Steel Coated Products Limited’ was approved by the CoC and Application was filed by the RP before the Adjudicating Authority that approval of the Resolution Plan, which was vide Order dated 19.10.2020.

**4.** Learned Counsel submitted that the personal property could not have been made a part of the Resolution Plan as it is not an asset of the ‘Corporate Debtor’; that the personal property is not reflected in the Books of Accounts of the ‘Corporate Debtor’; that the personal asset of the Ex-Director Mr. Pradeep Agarwal who created Mortgage in favour of the Appellant to secure the repayment of dues owned by the ‘Corporate Debtor’, Appellant is not an Asset of the ‘Corporate Debtor’ as it is not in the name of the ‘Corporate Debtor’ and therefore cannot be included in the Resolution Plan. It is contended that as per Section 18(f) of the IBC, the RP can only take control and custody of any asset over which the ‘Corporate Debtor’ has ownership rights as recorded in the Balance Sheet or with the Information Utility or any other registry that records the ownership of assets. It is strenuously contended that the personal property of the third-party Mortgager does not fall within the definition of Section 18(f) of the IBC.

**5.** It is argued that the Tribunal, without giving an opportunity to the Appellant of being heard passed the Impugned Order. No Notice was given to

the Appellant and the Resolution Plan was approved, in violation of the principles of natural justice. The Adjudicating Authority failed to appreciate that the RP and the SRA, in view of the undertaking given in the email dated 04.02.2019 to resolve the Appellant's Mortgage Deed over the personal property were estopped from taking the steps for unilateral Assignment of Mortgage from the Appellant under the guise of the Resolution Plan. The RP is aware about the terms of the settlement arrived at between the Appellant and Mr. Pradeep Agarwal and the prayer in I.A. 569/2020 with regard to the proposed transfer of the land, which is in the name of Mr. Pradeep Agarwal. It is contended that the Appellant herein was not a party to the said I.A. i.e., whether the personal property was included in the terms of settlement. The settlement was approved by the Adjudicating Authority vide Order dated 02.02.2021. The Resolution Plan cannot deal or extinguish the Mortgage claim of the Appellant over the personal property without express consent from the Appellant. It is submitted that the Appellant would be entitled to recover only the remaining outside amount of Rs.7,96,75,394/- and the right of the Creditor to proceed against the Personal Guarantor for balance dues has been upheld by the Hon'ble Supreme Court in '**Lalit Kumar Jain' Vs. 'Union of India & Ors.', (2021) 9 SCC 321**, in which the Hon'ble Apex Court has clarified that approval of a Resolution Plan does not *Ispo Facto* discharge a Personal Guarantor (of a 'Corporate Debtor') of his or her liabilities under a contract of guarantee and release or discharge of the Principal Borrower from the debt owed by it to its Creditor, by an involuntary process, i.e., by oppression of law or due to Liquidation or Insolvency Proceedings, does not absolve the surety/Guarantor of his or her

liabilities, which arises out of an independent contract. It is argued that the enforcement of Mortgage claim by the Appellant over the personal property would lie against third party Mortgager and not against the SRA and therefore the RP cannot oppose the right of the Appellant to proceed against the Personal Guarantor for recovering the remaining dues.

6. Learned Counsel in support of his contention placed reliance on the Judgements of the Hon'ble Supreme Court in '*State Bank of India*' Vs. '*V. Ramakrishnan & Anr.*', (2018) 17 SCC 394, in '*Suresh Chand Garg*' Vs. '*Aditya Birla Finance Limited*', (2018) SCC OnLine NCLAT 332, in '*Alpha & Omega Diagnostics (India) Limited*' Vs. '*Asset Reconstruction Company of India Ltd. & Ors.*', (2017) SCC OnLine NCLAT 394, and in '*Nitin Chandrakant Naik & Anr.*' Vs. '*Sanidhya Industries LLP & Ors.*', (2021) SCC OnLine NCLAT 302.

7. Learned Counsel appearing for the SRA contended that the Resolution Plan was approved vide Order dated 19.10.2020 and was also implemented on 27.10.2020 as Rs.1,550Crores/- was paid by the Respondent in accordance with the terms of the Resolution Plan. The Appellant filed this belated Appeal on 19.02.2021, challenging the Impugned Order, after the Plan was already implemented. Learned Counsel placed reliance on the ratio of the Judgement of the Hon'ble Supreme Court in '***K. Sashidhar***' Vs. '***Indian Overseas Bank***', (2019) 12 SCC 150, in support of his argument that the commercial decision of the CoC is non-justiciable. It is submitted that in the present case, the CoC approved the Plan with a majority of 79.3% and the 'Operational Debt' owed to the Appellant and all rights incidental and ancillary thereto including the security, mortgages,

encumbrances and collaterals were assigned to the purchaser in lieu of the payments made under the Resolution Plan. Hence, the 'Operational Debt' would be deemed to be permanently extinguished subsequent to the approval of the Plan. Learned Counsel drew our attention to Schedule-I of the Resolution Plan which provides as under:

*"Purchaser: shall mean the SPV or a nominee of the Resolution Applicant, in whose favour (i) the Remaining Debt; and (ii) the Operational Debt owed to Jyoti Strips, **CMI FPE Limited** and Ajay Metal Alloys Pvt. Ltd. & Metal Trading Company, along with securities, mortgages and rights, and guarantees, shall be assigned, in accordance with the terms of this Resolution Plan".*

*(Emphasis Supplied)*

8. The Liquidation value of the 'Corporate Debtor' was computed at Rs.619.15Crores/- whereas the SRA paid Rs.1,550Crores/- and the amount payable to the 'Operational Creditors' in the occasion of Liquidation was 'NIL' and the SRA had paid 2.21% of the admitted claims of all 'Operational Creditors' including that of the Appellant and hence, the treatment of the Appellant's claim under the Resolution Plan is in compliance with the IBC. Further, the SRA has also paid the Appellant in priority over the Financial Creditors', in compliance the Regulation 38(1)(a) of the CIRP Regulations. The 'Operational Debt' of the Appellant has been satisfied in terms of the approved Resolution Plan and the Appellant has no locus to invoke Mortgage Deed as a security. The underlying security against the Deed stands assigned to the purchaser and therefore the Appellant has no right to invoke the Mortgage Deed. Learned Counsel for the SRA submitted that there has been full and final settlement of the claims of the Appellant in support of the security related to the 'Operational Debt' of the 'Corporate Debtor' and in

case the Appellant is permitted to invoke the Mortgage Deed even after the Appellant's claim has been settled through the IBC framework, it would amount to bypassing the IBC regime and recovering the same debt twice.

**9.** Learned Counsel appearing for the second Respondent/Mr. Kuldip Kumar Bassi/the erstwhile RP of the 'Corporate Debtor' submitted that as per the Plan approval Order, the recovery percentage due to the 'Operational Creditors' was 2.21% and accordingly an amount of Rs.17,40,287/- was disbursed to the Appellant. It is submitted that the Resolution Plan has been implemented and the amounts have been disbursed to the Creditors in accordance with the Plan and the SRA has taken over the management and custody of the 'Corporate Debtor' with effect from 27.10.2020.

**Assessment:**

**10.** The Appellant herein is challenging the approval of the Resolution Plan on the ground that all claims/demands/liabilities owed or payable to the 'Operational Creditors' including the Appellant itself ought not to be permanently extinguished, keeping in view that 'Mortgage Deed'. It is the case of the Appellant that the personal property of the Promotor, Mr. Pradeep Agarwal could not have been made a part of the Resolution Plan as it is not an asset of the 'Corporate Debtor'. A Mortgage Deed was executed between Mr. Pradeep Agarwal the Ex-Promotor of the 'Corporate Debtor', the Company/M/s. Asian Color Coated Ispat Limited and the 'Operational Creditor'/M/s. CMI FPE Ltd. whereby, Mr. Pradeep Agarwal is arrayed as the 'Mortgager' and the 'Corporate Debtor' as *'the Confirming Party'*.

**11.** Learned Counsel for the Appellant drew our attention to Clauses 4 & 8 of the Mortgage Deed in support of his argument that if the confirming party

i.e., the ‘Corporate Debtor’ fails to make the payment of the outstanding within the timeline stipulated by the Mortgagee, the Mortgagee may exercise its right available pursuant to applicable law. The Mortgager is the sole and absolute owner and beneficiary of the said land and is entitled to the same and to all incidental rights thereof. The Learned Counsel relied on paras 25, 26 & 26.1 of the Judgement of the Hon’ble Supreme Court in **‘State Bank of India (Supra)**, wherein it is observed as follows:

*“25. Section 31 of the Act was also strongly relied upon by the respondents. This section only states that once a resolution plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety’s consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him.*

*26. We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a personal guarantor. When an application is filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. Secondly, the protection of the moratorium under these sections is far greater than that of Section 14 in that pending legal proceedings in respect of the debt*

and not the debtor are stayed. The difference in language between Sections 14 and 101 is for a reason.

**26.1.** Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor – often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor.”

**12.** Learned Counsel also drew our attention to the Judgement of the Hon’ble Supreme Court in **‘Lalit Kumar Jain’ (Supra)**, in which in para 120-122, the Hon’ble Supreme Court has discussed the liability of the Personal Guarantor:

**“120.** The rationale for allowing Directors to participate in meetings of the CoC is that the Directors’ liability as personal guarantors persists against the creditors and an approved resolution plan can only lead to a revision of amount or exposure for the entire amount. Any recourse under Section 133 of the Contract Act, 1872 to discharge the liability of the surety on account of variance in terms of the contract, without her or his consent, stands negated by this Court, in V. Ramakrishnan [SBI v. V. Ramakrishnan, (2018) 17 SCC 394 : (2019) 2 SCC (Civ) 458] wherein it was observed that the language of Section 31 makes it clear that the approved plan is binding on the guarantor, to avoid any attempt to escape liability under the provisions of the Contract Act, 1872. It was observed that: (SCC p. 411, para 25)

“25. ... Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may

*well include provisions as to payments to be made by such guarantor.”*

*And further that: (V. Ramakrishnan case [SBI v. V. Ramakrishnan, (2018) 17 SCC 394 : (2019) 2 SCC (Civ) 458] , SCC p. 412, para 26)*

*“26.1 Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor — often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor.”*

**121.** *In Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta [Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] (the “Essar Steel case”) this Court refused to interfere with proceedings initiated to enforce personal guarantees by financial creditors; it was observed as follows: (SCC pp. 615-16, para 106)*

*“106. Following this judgment in V. Ramakrishnan case [SBI v. V. Ramakrishnan, (2018) 17 SCC 394 : (2019) 2 SCC (Civ) 458] , it is difficult to accept Shri Rohatgi's argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile Directors of the corporate debtor. So far as the present case is concerned, we hasten to add that we are saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, Nclat judgment [Standard Chartered Bank v. Satish Kumar Gupta, 2019 SCC OnLine*

*NCLAT 388] being contrary to Section 31(1) of the Code and this Court's judgment in V. Ramakrishnan case [SBI v. V. Ramakrishnan, (2018) 17 SCC 394 : (2019) 2 SCC (Civ) 458] , is set aside.”*

**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. However, this Court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In Maharashtra SEB [Maharashtra SEB v. Official Liquidator, (1982) 3 SCC 358] the liability of the guarantor (in a case where liability of the principal debtor was discharged under the Insolvency law or the Company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realise the same from the guarantor in view of the language of Section 128 of the Contract Act, 1872 as there is no discharge under Section 134 of that Act. This Court observed as follows: (SCC pp. 362-63, para 7).....”*

**13.** The salient points which need to be considered in this Appeal, which are peculiar to the facts of this case are that the Mortgage Deed was entered into on 27.03.2018, between Mr. Pradeep Agarwal, the Promoter of ‘Corporate Debtor’ and the Appellant/‘Operational Creditor’ prior to the initiation of CIRP (CIRP was initiated on 16.10.2018); in the claim Form-B the Appellant/‘Operational Creditor’ mentioned in Column 8, the specific details of the Mortgage Deed; the letter dated 04.10.2019 by the Appellant seeking to enforce the Mortgage Deed; the Reply by the RP stating that the Plan was approved by a majority of the CoC on 28.06.2019 and the Application CA 1393 is pending approval before the ‘Adjudicating Authority’; the stand of the RP that the land is in possession of the ‘Corporate Debtor’ and is part of the land where the factory is located; the contra rival stand by

the Appellant that the subject land is owned by Mr. Pradeep Agarwal and not by the 'Corporate Debtor'; that the land was never in possession of the 'Corporate Debtor' the Application filed by the RP on 25.10.2019 before the Adjudicating Authority seeking to restrain the 'Operational Creditor' from initiating any action against the 'Corporate Debtor' with respect to the mortgaged land; the Affidavit filed by the Appellant herein before the Adjudicating Authority that the subject mortgaged land was never in possession of the 'Corporate Debtor', *and is not as asset of the 'Corporate Debtor' and is an unoccupied vacant land and only shares a common access path with the Khapoli Plant of the 'Corporate Debtor'* and does not form part of the 'total plant area' of the 'Corporate Debtor'; the valuation reports relied upon by the Appellant that the land is an 'open land' and finally the Order dated 02.02.2021 by the Adjudicating Authority approving the settlement between the Promotor and the RP/'Corporate Debtor' thereby rendering these Applications as infructuous.

**14.** At this juncture, the jurisdiction of NCLT & NCLAT in the framework of IBC needs to be examined on the touchstone of the ratio of the Hon'ble Supreme Court in '**Arun Kumar Jagatramka' Vs. 'Jindal Steel and Power Limited', (2021) 7 SCC 474**, wherein the Hon'ble Apex Court has observed as follows:

*"95. ....However, we do take this opportunity to offer a note of caution for NCLT and NCLAT, functioning as the adjudicatory authority and appellate authority under the IBC respectively, from judicially interfering in the framework envisaged under the IBC. As we have noted earlier in the judgment, the IBC was introduced in order to overhaul the insolvency and bankruptcy regime in India. As such, it is a carefully considered and well thought out piece of legislation which sought to shed away the practices of the past.*

*The legislature has also been working hard to ensure that the efficacy of this legislation remains robust by constantly amending it based on its experience. Consequently, the need for judicial intervention or innovation from NCLT and NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC.....”*

**15.** Having regard to the peculiar facts of this attendant case, the ratio of the Hon’ble Supreme Court in the aforementioned Judgements the fact that the Resolution was already approved vide Impugned Order dated 19.10.2020 and almost two years have passed and specifically that there are contrary stands taken by both parties with respect to the possession and the ownership of the subject land and also taking into consideration the Order of the Adjudicating Authority dated 02.02.2021 taking on record the terms of settlement between Mr. Pradeep Agarwal and the Resolution Applicant regarding the subject land, we find it a fit case to grant liberty to the Appellant to proceed in accordance with law in an appropriate forum.

**16.** For all the aforementioned reasons, this Appeal is partly allowed to the extent indicated above.

**[Justice Anant Bijay Singh]**  
**Member (Judicial)**

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

**NEW DELHI**  
**14<sup>th</sup> September, 2022**  
*Himanshu*