IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, CHENNAI

IBA/685/2019

Under Section 7 r/w Rule 4 of the IBC, 2016

In the matter of M/s. Jeppiaar Cements Private Limited

M/s. Indian Bank

---Financial Creditor

V/s

M/s. Jeppiaar Cements Private Limited

---Corporate Debtor

Order delivered on: 10.10.2019

Coram:

B. S.V. PRAKASH KUMAR, MEMBER (JUDICIAL)

S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)

For the Financial Creditor : *Shri. Jayesh B Dolia, Advocate*
Ms. T. Geethanjalli, Advocate
For M/s. Aiyar&Dolia

For the Corporate Debtor : *Shri. S. Shanmuga Surya, Advocate*

ORDER

Per: B. S.V. PRAKASH KUMAR, MEMBER (JUDICIAL)

Heard and Pronounced on: 26.09.2019

It is an Insolvency and Bankruptcy Application (IBA) u/s 7 of the Insolvency and Bankruptcy Code, 2016 (the **"Code"**) filed by Indian Bank **("the Creditor Bank")** for initiation of Corporate Insolvency

Resolution Process **("CIRP")** against the Corporate Debtor namely, M/s. Jeppiaar Cements Private Limited, which stood as Guarantor to the Principal Borrower M/s. Jeppiaar Power Corporation Private Limited, which failed to repay loan facility availed from this Creditor Bank, for the principal borrower as well as this Corporate Debtor failed to repay the loan amount of ₹147,89,38,608.49 remained outstanding as on 21.12.2018 despite the Bank notified it to the Corporate Debtor invoking the Corporate Guarantee provided by it.

2. Looking at this Application, it appears that this Creditor Bank provided loan facilities to the Principal Borrower as Term Loan-I (A/c.No.6178866972) by disbursing ₹91,76,98,358 on 23.11.2013 and as Term Loan-II (A/c.6485530690) by disbursing ₹42,23,07,534 on 03.12.2016, for which this Corporate Debtor provided Corporate Guarantee by entering into an Agreement of Guarantee based on the Board resolution passed by the Corporate Debtor company on 23.11.2013 for Term Loan-I and for Term Loan-II provided to the Principal Borrower. Apart from the above guarantee given by this Corporate Debtor, it has also on 07.10.2016entered into an Agreement

of Irrevocable Letter of Credit limits up to ₹25crores. As to acknowledgement of this debt, the Principal Borrower as well as the Guarantors including this Corporate Debtor on 30.09.2016 acknowledged the debt-cum-security for an amount of ₹86,82,93,218. When this loan amount was not repaid by the Principal Borrower, these loan accounts were declared as Non-Performing Assets (NPA) on 30.09.2016. Subsequent thereto, the Creditor Bank on 15.10.2018 issued Demand Notice to the Principal Borrower as well as the Corporate Guarantors to repay the dues outstanding, failing which; the Creditor Bank would proceed u/s 13(3) of SARFAESI Act against the Principal Borrower as well as the Corporate Guarantors. When no repayment has come from either the Principal Borrower/Guarantor or the Corporate Debtor, the Creditor Bank on 05.02.2019 has also filed Original Application No.182/2019 against the Principal Borrower and this Corporate Debtor before DRT-II, Chennai for recovery certificate for realization of the outstanding dues of ₹150,26,78,081 as on 05.02.2019. While this matter stood at this stage, on this Creditor having initiated Section 7 proceedings against the Principal Borrower,

this Bench admitted section 7 Petition by initiating CIRP against the Principal Borrower. For the Applicant is entitled to simultaneously initiate Section 7 proceedings against the Guarantor as section 5 (8) of the Code envisages the liability fastened upon the guarantor amounts to financial debt, this Applicant Bank, by virtue of Section 60 (3) of the Code saying that the Applicant being entitled to proceed against the Guarantor before the same NCLT Bench where CIRP initiated against the Principal Borrower, we hereby hold that this Applicant has rightly initiated this proceeding u/s 7 of the Code after invocation of Corporate Guarantee given by this Corporate Debtor through notice dated 15.10.2018 stating that Principal Borrower as well as the Corporate Guarantors are jointly and severally liable to repay the loan as agreed between them because the Principal Borrower defaulted in repaying the dues outstanding against it. Despite after invocation of guarantee, the Corporate Debtor having failed to discharge its obligation of repayment of this loan on the Principal Borrower behalf, the applicant has filed this case against the Corporate Debtor.

3. As against this Insolvency and Bankruptcy Application moved by the Creditor Bank, the learned counsel appearing on behalf of the Corporate Debtor till date has been asking adjournments on the ground that they would repay the money, this Bench has also kept giving adjournments hoping that money would come to the Bank, but whereas not even a part-payment has come to Creditor Bank, therefore this Bench is ultimately constrained to pass this order.

4. For there being no denial of existence of debt and default from the side of the Corporate Debtor save and except taking adjournments on the ground the Corporate Debtor would pay the claim amount of the Creditor Bank through OTS. As on date, no OTS sanction being in force, the Creditor Bank is free to proceed against the Guarantor in the backdrop of the facts mentioned above.

5. As against the case of the petitioner, the Corporate Debtor counsel has raised a defense stating that this petitioner shall not initiate Section 7 proceeding against the Guarantor/Corporate Debtor, when already section 7 proceeding against the principal borrower for the same debt has been admitted by this Bench by relying upon a case

decided by Honorable NCLAT in between ***Dr. Vishnu Kumar Agarwal vs. M/s Piramal Enterprises Ltd. (decided on 8.1.2019 in Company Appeal (AT) (Insolvency) No 346/2018).*** Against which, the Creditor Bank Counsel has filed stay (dated 11.02.2019) granted by the Honorable Supreme Court in the Second Appeal against the order of Honorable NCLAT, therefore the ratio decided by Honorable NCLAT in Vishnu Kumar Agarwal supra cannot be applied.

6. To start answering it, it is pertinent to go back to the covenants entered into by this Corporate Guarantor through an Agreement of Guarantee dated 07.10.2016 in favor of the Creditor Bank agreeing to discharge the liability in the event the Principal Borrower (Corporate Debtor in IBA 128/2019) failed to discharge its liability.

The Corporate Debtor/Guarantor hereby agrees,

- that it shall "jointly and severally" pay the Creditor Bank on demand all principal, interest, costs, charges and expenses which may anytime due to the Bank from the principal borrower on the accounts opened in respect of the facility down to the date of payment, agree to pay even

litigation expenses also in the event the principal borrower or any of the guarantors raise litigation,

- that this guarantee shall be continuing guarantee and shall not be considered as cancelled or in any way affected by the fact that any time the accounts may show no liability against the borrower or may even show a credit in borrower's favour but shall continue to be guarantee and remain in operation in subsequent transactions.
- that the Bank can vary the terms of the contract with the borrower accepting additional or collateral security of any kind determining, enlarging or varying any credit to the borrower or making a composition with the borrower or promising to give borrower time or not sue the borrower and to the Bank parting with any security it may hold for the guaranteed debt.
- that the guarantor shall not be discharged from its liabilities by the Bank releasing the borrower or by any act or omission of the Bank the legal consequences of which may be to discharge the borrower or by any act of the Bank which would, but for this present provision, be inconsistent with their rights as guarantor or by Banks omission to do any act which but for this present provision, the Banks duty to guarantor would have required the Bank to do. Even if any variation takes place to the contract

entered into between the principal borrower and the creditor, **the guarantor shall not be entitled to claim the benefit or legal consequence** of any variation in the terms of the contract and **to any of the rights conferred on guarantor by Sec.133, 134, 135, 139 and 141 of the Indian Contract Act, 1872.**

- that any accounts settled between the creditor bank and the borrower or the balance admitted and confirmed by them as due on the said accounts of the Bank will be conclusive and shall not be disputed or questioned by the guarantor,
- that the Bank shall be entitled to recover its entire dues on the said accounts from the properties of the guarantor upon default in payment by the borrower,
- **that all dividends, compositions or payment received by the Bank from the Borrower shall be taken and applied as payment in gross and the guarantor shall have no right to claim the benefit of any such dividends, compositions or payment until full amount of all claims of the Bank against the borrower are covered by this guarantee shall have been paid,**
- that the bank may enforce the guarantee by enforcing or realizing any of the securities pledged or mortgaged with it notwithstanding that any bills or any instruments given

by the borrower in the said accounts may be in circulation for collection and outstanding,

- that if the guarantor has or shall hereafter takes any security from the borrower in respect of their liability under this guarantee, the guarantor will not prove in the liquidation of the borrower in respect thereof to the prejudice of the Bank and such security shall stand as security and shall forthwith deposited with the Bank,
- that the Bank shall have lien on all monies standing to the creditor of guarantor and on any securities or goods in the hands of the Bank belonging to the guarantor under its control.
- **that this guarantee shall remain enforceable against the guarantor irrespective of the fact whether the contract between the borrower and its creditor is enforceable at law or not,**
- that the liabilities of the guarantor as a surety or joint and several owing to statutory provisions and co-extensive with that of the principal debtor. When default is made by the principal debtor despite demand being made by the Bank, the creditor bank becomes entitled to proceed against the guarantor and this liability of the guarantor is immediate when the guarantor refuses or does not cooperate in making payment of the dues after demand

from the Bank. Once the guarantor failed to concede to demand of the Bank, it entitles classification of the guarantor as a wilful defaulter in accordance with RBI guidelines.

7. Though all covenants the guarantor promised to the Creditor Bank have not been incorporated, but by and large, major covenants relevant to this point have been paraphrased above. Looking at those points, we can sum it up that the guarantor said that the Creditor Bank is at liberty to proceed either jointly and severally against them; that the guarantor shall not be entitled to claim the benefit or legal consequences of any variation in terms of the contract and to any rights conferred to the guarantor by any Sec.133, 134, 135, 139 and 141 of the Indian Contract Act, 1872; that it cannot withhold any security from the borrower in case the borrower company is liquidated; and all the more important is guarantor remains liable until all the claim against the principal debtor covered under this agreement is paid out.

8. Before we get into adjudicating over the remedy sought by the financial creditor and application of law over the rights and obligations of the parties, it is imperative to examine what are the

rights of the Financial Creditor and obligations upon the Corporate Debtor so that we can limit our examination to the extent relevant to the case before us.

9. We must always remind ourselves that agreement parties entered into alone decides about their rights and obligations, no other person, including court, can alter those rights and obligations.

10. When this Code as well as Contract Act permits the Creditor Bank to proceed against the Principal Borrower as well as the Guarantor, such right cannot be thwarted by looking at Section 31 of the Code saying that Resolution Plan is binding upon the Guarantor. May be it is right to the extent the amount resolved in the Resolution Plan, the Creditor cannot seek any relief against Guarantor, but whereas to the dues outstanding over and above the value recoverable from the Resolution Plan, the obligation against the guarantor having remained open and there being an agreement between the Creditor Bank and the guarantor to clear all the dues notwithstanding the paying capacity of the Principal Borrower, no prohibition being envisaged under the Code curtailing this right against the guarantor,

the statutory right and rights emanated from the agreements available to the Creditor Bank against the Guarantor cannot be foreclosed.

11. When loan facilities are provided; lenders provide loans looking at the strength of realization from the agreements entered into not only with Principal Borrower but also with Guarantors. Suppose the Guarantor is in a position to repay the dues, if the right of the creditor is construed as foreclosed on the ground of approval of Resolution Plan, the very concept of taking guarantee from the guarantor will become redundant. If this is the law, over a period of time, borrowers will avail loans by giving guarantees; thereafter there could be every possibility for the Guarantors evading discharging their obligations after approval of the resolution plan on the premise the Resolution Plan is binding upon rights against the guarantors. If such thing happens, the concept of guarantee will get denuded to a farce.

12. Whenever reading any new provision, it shall be read in conjunction with the law already in force. To read it against established proposition of law, there shall be an explicit provision

invalidating the law established by virtue of statutes in existence and the practice prevalent in the commercial parlance.

13. On careful reading of Section 31, it is pertinent to note that it is not said anywhere the right of creditor to proceed against guarantors is terminated on approval of the Resolution Plan. The purpose and object of Resolution Plan is to make the Corporate Debtor (in the case of Principal Borrower) free from past liabilities. By looking at the language of Section 31, it is apparent that none of the persons mentioned, such as Employees, Members, Government Authorities and Guarantors and other stakeholders can raise any further claim against the Corporate Debtor for the past liabilities after approval of the Resolution Plan.

14. Taking a pause from this context and look at Indian Contract Act, it is ascertainable in Section 128 that ***the liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract,*** **as to Section 140, it says that** ***where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment***

or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor, it is further percolated in Section 141 *that a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of surety ship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.*

15. If we see the interplay of the sections governing concept of guarantee, it is comprehensible that consideration for execution of guarantee is the benefit availed by the principal borrower, that the liability is coextensive, that upon discharging the liability on payment to the creditor on the principal borrower behalf, the right of subrogation will be vested with such guarantor to step into the shoes of the creditor against the principal borrower. As to mere forbearance to realize entire debt from the principal borrower, unless contrary is agreed between the parties, does not discharge the guarantor from its

liability. Normally in the template guarantee deeds of the Bankers, all kinds of clauses remain included binding the guarantors to discharge their liability by paying off, whatever that is payable by the principal borrower notwithstanding the fact that principal borrower is liquidated.

16. In this interplay, the right of the guarantor to proceed against the principal debtor/borrower is always contingent upon paying off the loan liability of the principal borrower to the creditor, but it is not vice versa. The creditor's right to proceed against the guarantor in the event of default in repaying by the principal borrower is independent of the right of subrogation subsequently vests with the guarantor under sections 140/141 of the Contract Act. Therefore it is evident that whether or not the guarantor is subsequently able to step into the shoes of the creditor, to whom the guarantor paid against the debt realizable from the principal borrower, the right of the creditor against the guarantor will remain intact until the debt liability is discharged.

17. The simple reason is, the guarantor made a direct promise to the creditor that he would pay off the debt payable by the principal

debtor in the event of default, and this promise is recognized as enforceable u/s 126-128 of the Contract Act, as to subsequently realizing the same from the principal debtor is only an incidental/contingent right emanated from paying off the debt by operation of law. This right subsequently accrues to the guarantor cannot either qualify or condition the right of the creditor to realize debt from the guarantor.

18. Now when we come to IBC, it is pertinent to note that guarantee liability is recognized as financial debt and such creditor as financial creditor. It is made clear in section 14 of the Code that prohibition is limited to corporate debtor transactions, but not against the guarantor. So, road is clear to proceed against the guarantor. One rider that appears in Section 60 (2) & (3) of the Code is CIRP against the guarantor shall be initiated before the same adjudicating authority or transferred to the Adjudicating Authority where CIRP has been initiated against the principal borrower. The Hon'ble Supreme Court in ***State Bank of India v. Ramakrishna and another (2018) 17 SSC 394*** has already laid down that moratorium imposed upon proceedings

against the Corporate Debtor u/s 14 of the Code is not extendable to the proceedings or to proceed against the guarantors of the Corporate Debtor, and same has subsequently been incorporated through an Amendment dated 06.06.2018 in section 14 of the Code which is as follows:

> *"Section 14:- Moratorium*
>
> *(1).....*
>
> *(2).....*
>
> *(3) the provisions of sub section (1) shall not apply to –*
>
> *(a) such transaction as may be notified by the Central Government in consultation with any financial regulator;*
>
> *(b) a surety in a contract of guarantee to a corporate debtor.*
>
> *(4).....*"

19. Whether all these substantial rights provided under Contract Act and IBC are to be construed as nullified upon the Resolution Plan approved u/s 31 of the Code has become binding upon the guarantors.

20. It cannot be, because the Resolution Plan is only a proposal of a third person willingness to settle the dues proportionate to the value of the Corporate Debtor. The approval of the plan cannot extinguish the right of the creditor to proceed against the guarantor. Such

extinguishment of the rights of the creditors against guarantors is not envisaged under the Code.

21. In the backdrop of the law discussed above, it is a fact that guarantor cannot subsequently proceed against the principal borrower after plan is approved because whatever proceeds realizable by the creditors from the creditors is valued and settled or agreed to be settled during Resolution Plan making the principal debtor free from past liabilities. By this process, the right of the creditor against the guarantor is not disturbed. But in the event the creditor realizes its residual dues from the guarantor, such guarantor's right to step into the shoes of the creditor to realize the same from the principal borrower/corporate debtor is foreclosed, because the guarantor cannot rake up litigation with regard to the old dues of the principal borrower/corporate debtor after Resolution plan is approved. This is how the Resolution Plan is binding upon the guarantors of the corporate debtor. This foreclosure of the right of the guarantor under u/s 31 after approval of the Plan will not have any bearing upon the right of the creditor against the guarantor. The reason is, the right of

the creditor against the guarantor is an independent right. This Adjudicating Authority has no subject matter jurisdiction to restrain the creditor from proceeding against the guarantor, which is an independent entity from the principal borrower/corporate debtor.

22. Another fallacy in this argument is, if the creditor is restrained to proceed against the guarantor until before resolution plan is approved or rejected under section 31, if the guarantor, in the meanwhile, drained out the assets of it so as to pre-empt the creditor from realizing dues of the principal borrower, what would happen to the creditor? The Creditor right to proceed against the guarantor would become an empty right without any potential to realize the creditor dues from the guarantor. Whether proceeding against the principal borrower under the section is for revival of the company or not, but the valuable right against the guarantor will become an empty vessel without any realizable value from it. If this is the attitude, then IBC, instead of a protecting the rights of creditors (they are also stakeholders) to realize their value from the corporate debtor, will become bane to the creditors.

23. The purpose of consolidation of various laws is for maximization of the value of assets of the corporate persons so as to balance the interest of all stakeholders; it does not mean that the creditors shall not realize their dues. In fact since inordinate delay was happening in rehabilitation and winding up, to curtail such delays, this code has come into existence opening a window to the creditors to determine the destiny of the corporate debtor within the frame work of the Code. This cannot be seen as an enactment solely meant for either resolution or liquidation. It all depends upon the facts of each case; moreover this Adjudicating Authority's role with regard to functioning of the Corporate Debtor is minimal. Running of the company during CIRP is within the realm of CoC in accordance with law.

24. Perhaps **Rule against Double Proof** applied in UK and other countries is misunderstood in saying that it is not possible for more than one person to make a claim on **an insolvent estate** in relation to **the same debt**.

25. The object of this Rule is to avoid allowing double dividend (distribution) over two claims on single debt on **an insolvent estate** because such double dividend leads to double payment. It is a Rule developed when common law was prevalent because in those days fairness principles were not crystallized into law. Over a period of time, judge made law has become Statutes, with regard to the principles, most of them in UK itself become part of law.

26. Instead of dilating much on English Law, if our own law is closely examined, that is Contract Law, it is discernable that all these principles are well entrenched as mandate giving no scope to mischief mongers to take advantage of a situation.

27. The principle is simple; no person is entitled to something that does not belong to him. No person will not get a right more than other side has agreed upon in an agreement, likewise no person shall be put to hardship beyond the obligation he agreed upon.

28. In Contract law, to enforce an agreement, there shall be a promisor, promise and consideration passed on or an agreement to pass on between them. Because we all live and survive on the promises

we make each other; so long as such promises are honoured, society will keep moving on. Over a period when lending has been advanced and business has become dependent upon borrowing, as we all know, concept of surety/guarantee has become more prevalent to have easy access to credit facility.

29. The great part in Guarantee Agreement is, borrower receiving consideration (monies) from the Creditor will become consideration to the guarantor to make a promise to the Creditor saying that he would be obliged to discharge the liability in the event the principal borrower defaulted in repaying it. This obligation as per section 128 of the Act is coextensive, joint and several and simultaneous to that of the liability of the Principal Borrower. The Surety can be relieved (discharged) from this obligation, as per Contract Act 1872, either on total repayment of the debt by the principal borrower, or by variation to the terms upon which he agreed to without consent of the surety, or by operation of law or on the ground of impossibility of performance of the obligation by the Principal Borrower or on the act or omission of the Creditor. In between, it is apt to notify that the

principal borrower becoming insolvent will not fall under any of the situations set out in the Contract Act for discharge of the Guarantor obligation. It has been time and again stated that the Creditor is entitled to realize the balance liability not discharged by the Principal Borrower/Guarantor as the case may be. This obligation of discharge by the surety is primary obligation. In fact this discharge obligation upon the guarantor will become right of subrogation (indemnity) only upon discharge of the payment obligation of the principal debtor by the guarantor. One more aspect that shall be remembered is the concept of guarantee is different from the concept of indemnity.

30. In the case of guarantee, guarantor assures other person that he/it will perform the promise or fulfill the obligation of third party, in case that third party defaults in fulfilling the promise to which the guarantor guaranteed. In the case of indemnity, one party promises to compensate the loss occurred to the other party, due to the act of the promisor or any other party. Unless loss is caused to the person indemnity is given, promisee cannot proceed against indemnifier. Counter indemnity is indeed a rule entitling the indemnifier to

proceed against the person by whom indemnifier sustained loss by compensating somebody else loss. The right, Guarantor has against the principal debtor to recover the payment made to the creditor, is nothing but indemnity by operation of law. To accrue this right, the precondition is Guarantor should have already paid out the liability payable by the principal borrower. He cannot proceed against the principal borrower under the contemplation that he could not realise future obligation in the event the creditor realised the debt amount from the guarantor. Yes, the surety can step into the shoes of the creditor after discharging his primary obligation against the liability of the principal borrower. One may think in hind sight what will happen to the guarantor if he has to clear the obligation on the principal borrower behalf. And by that time if nothing is left with the principal borrower, how could he realise it from the principal borrower. He knows it, when he caused the lender provide credit facility to the principal borrower because the lender takes promise of guarantee from the guarantor with a belief that he could realise his dues from the guarantor if not from the principal borrower. Nobody

has compelled the guarantor to stand as guarantor to the loan availed by the principal borrower. It is a known fact in credit market, either promoters or family members of the promoters or group companies give guarantee. They do it for their reasons, to earn money on the money borrowed. Is it that these borrowers or guarantors share the profits to the lenders? But when it comes to repayment of the loan, it will come to the mind of the guarantors that they are paying the money that is not taken by them. For which what way the lender is liable? All I say is this right of subrogation will not have any bearing, either legally or on equity, upon the primary obligation of the guarantor to discharge the obligation to pay out the loan in the event the principal debtor defaulted in repaying it.

31. Since it has been said in the Contract Act that the creditor can realise the loan amount to the extent that is not discharged by the principal borrower, the creditor has right to proceed simultaneously against all or selectively or at its choice. But the creditor will not proceed any further against any of the guarantors or if proceedings are in progress, it will stop proceedings against any of them once its

dues are realised from any of them or from all of them to the extent of its dues. In this back drop, there cannot be any chance either to the creditor or guarantor/guarantors to have two dividends for the same debt. As to initiating proceedings, the creditor can initiate either against one or against all, but once the obligation is discharged, it is obvious, creditor cannot move any further. If the guarantor discharged the obligation, the creditor cannot and will not proceed any further against the principal borrower. Of course, the creditor, who discharged the obligation, can proceed against the principal borrower. So by virtue of this right of subrogation, the guarantor can realise from the principal borrower to the extent paid to the creditor, if anything is left with the principal borrower.

32. In this scenario where is the occasion to have double dividend from the same debt. This right of coextensive obligation is at the volition of the guarantor, it is always simultaneous by virtue of statute and the agreement of guarantee, not alternative. Whether it is suit or liquidation, it has no bearing upon the right of the creditor. It is indeed well recognised in IBC that the creditor can proceed against all

simultaneously. When it is true that the creditor cannot file joint petition against the borrower as well as guarantors, it is obvious separate 7 petitions to be initiated against the borrower and the guarantor or the guarantors as the case may be. Therefore, we are not supposed to remain tied up in our perspective against the law already laid down and followed since long.

33. In **Ramakrishnan (supra),** the Honourable Supreme Court dispelled the myth of impediment to simultaneously proceeding against the guarantor by saying as below:

> *"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 Indian 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 favor of a personal guarantor having to pay for debts due without any moratorium applying to save him."

34. It is made further clear in the para above that the language of section 31 of the Code is enabling provision to proceed against the guarantors as well, not a provision curtailing the right of the creditor to proceed against the guarantor. To make it easy to decide distributions and for realization of balance from the guarantors, in section 60 (2) (3) of the Code, a facility is provided to ensure all these issues decided by the same Adjudicating Authority. Two same claims against **one insolvent** is not possible, but same claim before insolvent borrower and before insolvent guarantors is not prohibited under Rule against Double proof or under the Contract Act or under the Insolvency laws. The only rider is the creditor should not continue against any one of the obligants or against the obligant, once the obligation is fully discharged by any of the obligants. Of course, any of the obligants already discharged the

obligation jointly or severally in force, inter se obligations to be sorted out between the borrower and the guarantor or between the guarantors as per law available to the parties.

35. For the reasons afore mentioned, we don't believe that the creditor cannot initiate CIRP simultaneously against the principal borrower and the guarantor or the guarantors u/s 7 of the Code. As to the contention saying the Creditor Bank forged the guarantee deed and other papers, since this defense was never raised against the creditor at any point of time until before this case has been filed, no believable material being placed before this Bench to inquire into this bizarre allegation, we hereby reject these allegations of the Corporate Debtor as not sustainable.

36. In view of the submissions made by either side, for the Creditor Bank has proved existence of debt and default and the debt is within limitation, the Creditor Bank having filed this application u/s 7 by invoking Corporate Guarantee given by this Corporate Debtor, we are of the considered view that this Creditor Bank has proved existence of debt and default as contemplated under Section 7 of the

Code, whereby we hereby admit this Application by appointing Mr. **Umesh Garg** as Insolvency Resolution Professional (IRP) looking at the consent given by the Financial Creditor stating that this Financial Creditor would pay remuneration to the IRP and the expenditure thereto until constitution of CoC. It is also pertinent to mention that this Insolvency Professional has been appointed as IRP in this case because the same IRP has already been appointed in the case filed against Principal Borrower before this Bench.

37. Accordingly, this **IBA/685/2019** is hereby admitted with the following directions:

I. That Moratorium is hereby declared prohibiting all of the following actions, namely,

a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its

property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

II. That Supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

III. That the provisions of sub-section (1) of Section 14 of IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

IV. That the order of moratorium shall have effect from **26.09.2019** till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of IBC or passes an order for liquidation of corporate debtor under section 33 of IBC, as the case may be.

V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of IBC.

VI. That this Bench hereby appoints **Mr. Umesh Garg, as Interim Resolution Professional having Reg.No. [IBBI/IPA-001/IP-P00135/2017-18/10277], 2nd Floor, 3 Scindia House, Janapth, New Delhi-110001, E-Mail:umeshg60@gmail.com, Mobile No: +91 9818990001**to carry out the functions as mentioned under IBC. Fee payable to IRP/RP shall be in compliance with the IBBI Regulations/Circulars/Directions issued in this regard.

38. The Registry is hereby directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional by way of email.

-Sd-
(S. VIJAYARAGHAVAN)
Member (Technical)

-Sd-
(B. S.V. PRAKASH KUMAR)
Member (Judicial)

KNP/TJS