NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.627 of 2023

[Arising out of order dated 17.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in IA. 580/2023 in CP. No.1123/MB-IV/2020]

IN THE MATTER OF:

Vistra ITCL (India) Limited
A company having its registered office at the IL&FS
Financial Centre, Plot No. C-22, G Block, 3rd floor
Bandra Kurla Complex, Bandra (East), Mumbai -400 051.

...Appellant

Vs.

1. Bhrugesh Amin
Resolution Professional of
Radius Infraholdings Private Limited
with office at BDO Restructuring Advisory LLP,
Raheja Titanium, Floor 6, Western Express Highway,
Geetanjali Railway Colony, Ramnagar,
Goregaon, Mumbai- 400 063

2. Suraksha Asset Reconstruction Limited
ITI House, 36, Dr. R.K Shirodhkar Road,
Parel - East, Mumbai -400 012.

3. YES Bank Limited
YES Bank House, Off Western Express Highway,
Vakola, Santacruz East,
Mumbai, Maharashtra 400055**.**

...Respondents

Present:

For Appellant: **Mr. Abhijeet Sinha, Mr. Pranaya Goyal, Mr. Dharav Shah, Mr. Shubam Saini, Mr. Shubham Saini, Advocates.**

For Respondent: **Mr. Krishnendu Datta, Sr. Advocate with Mr. Anuj Tiwari, Mr. Rahul Guupta and Ms. Aroshi Pal, Advocates for R-1.**

Mr. Sumant Batra, Mr. Sagar Bansal, Ms. Ruchi Aggarwal and Mr. Shivam Shorewala, Advocates for R-2.

Mr. Amar Dave, Mr. Malak Bhatt and Mr. Siddharth Kumar, Advocates for R-3.

Cont'd.../

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against order dated 17.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in IA. 580/2023 filed by the Appellant challenging the rejection of its claim by the Resolution Professional. The Adjudicating Authority by the impugned order has rejected IA. 580/2023, aggrieved by which order, this Appeal has been filed. Brief facts of the case necessary to be noticed for deciding this Appeal are:

(i) The Appellant, one Aaditri Constructions Private Ltd. (Company) and Radius & Developers Builders LLP executed a Debenture Trust Deed (DTD) in relation to 3,95,00,000 secured optionally convertible debentures having face value of Rs.100/- each aggregating to Rs.395 Crores.

(ii) An Agreement dated 29.03.2019 was executed between the Appellant - Debenture Trustee and Radius Infra Holdings Private Ltd. (Corporate Debtor) and the Promoters – Mr. Sanjay Chhabria and Mrs. Ritu Chhabria to provide additional securities to secure the debentures and to pay the entire secured consideration under the Debenture Trust Deed.

(iii) A notice dated 28.07.2021 was issued by the Debenture Trustee to the Company calling upon the company to pay the entire amount and forthwith redeem the debentures on account of occurrence of various events of defaults. Company having failed to redeem debentures, Appellant issued notice dated 21.01.2022 to the Corporate Debtor calling upon the Corporate Debtor to forthwith pay the entire amount due and payable under the Agreement.

(iv) An application under Section 7 was filed by the Yes Bank (Respondent No.3 herein) claiming to be the Financial Creditor of the Corporate Debtor, on which application an order dated 09.05.2022 was passed by the Adjudicating Authority initiating insolvency resolution process against the Corporate Debtor and Respondent No.1 – Mr. Bhrugesh Amin was appointed as Interim Resolution Professional (IRP).

(v) In the CIRP of the Corporate Debtor, the Appellant filed its claim in Form 'C' (for submission of claim by Financial Creditors) dated 26.05.2022 claiming Rs.1061,34,67,062/- outstanding as on 09.05.2022.

(vi) Respondent No.1 issued an email dated 01.06.2022 requesting the Appellant to provide a copy of deed of guarantee to substantiate its claim. In response to which email, Appellant on 10.06.2022 wrote to Respondent No.1 stating the guarantee was provided by the Corporate Debtor vide the Agreement dated 29.03.2019. On 22.06.2022, the

Resolution Professional send an email to the Appellant informing the rejection of claim of the Appellant.

(vii) Appellant filed I.A. No. 2495 of 2022 seeking declaration of the Appellant as a 'Secured Financial Creditor' of the Corporate Debtor and admission of the Appellant's claim.

(viii) The Adjudicating Authority passed an order dated 16.11.2022 directing the Resolution Professional to put the claim filed by the Appellant before the CoC and observed that the CoC may take appropriate decision as per law. The Application was allowed and disposed of to the above extent by order of the Adjudicating Authority dated 16.11.2022.

(ix) In its 7th meeting dated 27.12.2022, the CoC considered the claim of the Appellant as Secured Creditor and view of Yes Bank and Suraksha Asset Reconstruction Ltd. was noted that prima facie they assented with the view of the Resolution Professional for rejecting the claim of the Appellant.

(x) The Resolution Professional vide email dated 20.01.2023 communicated to the Appellant that the CoC have dissented on the resolution to treat the claim of Appellant as Secured Creditors and have rejected them from being a part of the CoC.

(xi) After communication dated 20.01.2023, the Appellant filed IA. 580/2023. In the application following prayers were made:

*"**PRAYERS:***

It is therefore prayed that this Hon'ble Tribunal be pleased to:

a. *quash and set aside the decision of Respondent Nos. 2 and 3 as contained in Respondent No. 1's email dated 20th January 2023 (at Exhibit "O" hereto);*

b. *declare and admit the Applicant as a "financial creditor" of the Corporate Debtor and issue necessary directions for the re- constitution of the Committee of Creditors with the Applicant as a member thereof;*

c. *declare and admit the Applicant as a "secured financial creditor" of the Corporate Debtor and issue necessary directions for the re-constitution of the Committee of Creditors with the Applicant as a member thereof;*

d. *That pending the hearing and final disposal of the present Application, the corporate insolvency resolution process (CIRP) of the Corporate Debtor be stayed;*

e. *For ad-interim n relief in terms of prayer-clause (c) above;*

f. *For costs of the Application against the Respondents: and*

g. *For such further and other reliefs as this Hon'ble Tribunal may deem fit."*

(xii) The Respondent No.1 filed a reply to the IA. 580/2023 submitting the Appellant's claim has rightly been rejected and application deserve to be rejected.

(xiii) The Adjudicating Authority after hearing both the parties by the impugned order dated 17.03.2023 rejected IA. 580/2023. The Adjudicating Authority after noticing the recitals in the Agreement took view that obligation of the Corporate Debtor was limited to the extent of RIHPL security, mortgage on RIHPL project. No mortgage was created on the RIHPL project. Aggrieved by the order rejecting the IA filed by the Appellant, this Appeal has been filed.

2. We have heard Shri Abhijeet Sinha, learned counsel appearing for the Appellant, Shri Krishnendu Datta, learned senior counsel appearing for the Resolution Professional, Shri Sumant Batra, learned counsel for Respondent No.2 and Shri Amar Dave, learned counsel for Respondent No.3.

3. Learned counsel for the Appellant challenging the impugned order submits NCLT failed to appreciate that the Agreement is a contract of guarantee under Section 126 of the Indian Contract Act, 1872. Learned counsel for the Appellant placed reliance on Clause 4 of the Agreement, as per which the Corporate Debtor has provided an expressed, unqualified and unconditional undertaking to pay the secured obligations. Such undertaking was in addition to the other security interests created under the Debenture Trust Deed / Transaction Documents. The Corporate Debtor as per Clause 4 expressly and unconditionally undertook to repay the secured obligations

thereby undertaking to discharge the liability of a third party i.e. the Obligators. Clause 4 of the Agreement therefore satisfied all the requisites of contract of guarantee under Section 126 of the Indian Contract Act. It is submitted that nomenclature of deed or documents are not relevant and the contents of such deeds and documents are of utmost relevance for understanding the nature such documents. It is submitted that the Adjudicating Authority committed error in holding that the Corporate Debtor's obligation under the Agreement is merely restricted to RIHPL security. The Corporate Debtor having undertaken to discharge the obligation of Obligors it has executed a guarantee in favour of the Appellant. Agreement was as per Debenture Trust Deed document dated 03.08.2018. By letter dated 21.01.2022, the Appellant has made demand to the Corporate Debtor to pay the secured obligations. Learned counsel for the Appellant to buttress his submission has referred to various clauses of the agreement and DTS which we shall refer to while considering the submissions in detail. Learned counsel for the Appellant submits that the Corporate Debtor being Guarantor within the meaning of Section 126 of the Contract Act, the Appellant is the Financial Creditor within meaning of Section 5 Sub-section (8)(i) of the I&B Code. It is further submitted that under the I&B Code there is no jurisdiction vested with the CoC to adjudicate the claim of a Financial Creditor. The order passed by the Adjudicating Authority directing the Resolution Professional to place claim of the Appellant before the CoC for consideration was ex-facie erroneous and patently illegal. The Financial Creditors i.e. Respondent No. 2 and 3 have conflicting interest with the Appellant. They could not be entrusted with any

decision regarding the admission the claim of the Appellant. The CoC has no adjudicatory power to sit over the claims of the Creditors.

4. The submission of the learned counsel for the Appellant were refuted by Shri Krishnendu Datta, learned senior counsel appearing for the Resolution Professional. Learned counsel for the Resolution Professional submits that the Agreement dated 29.03.2019 was executed for sole purpose to provide addition/further security to the Appellant, as per Clause 7.5 of the Debenture Trust Deed. An agreement to provide Additional Security cannot be read as a Deed of Guarantee. The Principal Debtor is not party to the Agreement dated 29.03.2019 and for execution of Deed of Guarantee all the three parties i.e. Principal Debtor, Guarantor and Creditor have to be party. When the Agreement dated 29.03.2019 is read it is clear that it was only for the purpose of providing additional security by the Corporate Debtor. Clause 4 of the Agreement, on which much reliance has been placed by the Appellant, cannot be read in isolation. All clauses have to be read together to find out real nature of the transaction. Corporate Debtor is not an Obligor under the Debenture Trust Deed. It is submitted that at this stage, the Appellant cannot be allowed to contend that the placing claim of Appellant before CoC for consideration was without jurisdiction as the order passed by the Adjudicating Authority directing the claim of the Appellant to be placed before CoC was never challenged by the Appellant. No mortgage was created under Agreement dated 29.03.2019 in favour of the Appellant.

5. Shri Sumant Batra, learned counsel appearing for Respondent No.2 refuting the submission of learned counsel for the Appellant submits that no contract of guarantee has been executed by the Corporate Debtor to repay the debt of the Principal Debtor. The Corporate Guarantor is defined in Debenture Trust Deed. The Agreement dated 29.03.2019 was only an Agreement to provide Additional Security which by no means can be read as a Deed of Guarantee. In the Agreement dated 29.03.2019, the Principal Borrower was not party. The debt of L&T was not cleared. The Agreement dated 29.03.2019 does not use the expression 'guarantee'. In the Deed of Guarantee all the three parties have to be party. The Agreement dated 29.03.2019 is not executed between all the three parties i.e. Principal Debtor, Creditor and Guarantor. The remedy under the Agreement dated 29.03.2019 is of enforcement of security which cannot be termed as Deed of Guarantee.

6. Shri Amar Dave, learned counsel appearing for the Respondent No.3 also supported the impugned order and submitted that the Adjudicating Authority has rightly rejected the claim filed by the Appellant. The Resolution Professional has rightly rejected the claim of the Appellant as Financial Creditor. The additional security under the Agreement was subject to settling the existing dues with the existing creditor i.e. L&T Finance Ltd. It is admitted fact that the Corporate Debtor did not settle with L&T Finance Ltd, hence, charge over the Versova Land was never released by L&T Finance Limited and no charge was created in favour of the Appellant. The Clauses of any agreement ought to be read holistically and cannot be read in isolation. It is submitted that the intention of the parties is to be gathered from the language

of the instrument. Even if for argument sake it is accepted that Appellant is a security holder, a security holder does not have any right to be admitted as a Secured Financial Creditor in the CoC. No financial debt is owed by the Corporate Debtor of the Appellant. Appellant has no charge over the Versova Land. Appellant is not a secured creditor and the Appeal deserve to be dismissed.

7. We have considered the submissions of learned counsel for the parties and perused the record.

8. The Agreement dated 29.03.2019 executed between the Appellant and the Corporate Debtor is the basis of claim which was filed by the Appellant in Form 'C' before the Resolution Professional. The Agreement dated 29.03.2019 is being claimed as guarantee executed by the Corporate Debtor in favour of the Appellant to fulfil the obligations of the borrower. The submission of the Appellant is that the Agreement dated 29.03.2023 being a Deed of Guarantee, there shall be financial debt within the meaning of Section 5(8)(i) of the I&B Code. There can be no dispute to the preposition canvased by the Appellant. In event Agreement dated 29.03.2019 is accepted as Deed of Guarantee, there shall be financial debt by virtue of guarantee given by the Corporate Debtor and the claim of the Appellant as Financial Creditor could be admitted. The real issue to be determined in the present appeal is the nature of the Agreement dated 29.03.2019 and as to whether the said agreement can be read to be Deed of Guarantee, as contended by learned counsel for the Appellant.

9. For answering the above issue, we need to look into the Debenture Trust Deed dated 03.08.2018 as well as Agreement dated 29.03.2019. The Debenture Trust Deed was executed between the Appellant, Aaditri Constructions Private Ltd. (Company), Radius & Developers Builders LLP, Mr. Sanjay Chhabria and Mrs. Ritu Chhabria. In the Debenture Trust Deed, the Company, the Developers and the Promoters are collectively referred to as the 'Obligors'. Clause 1 contains 'Definitions and Construction' wherein expression 'Corporate Guarantee' has been defined in the following words:

> *""Corporate Guarantee" shall mean the Deed of Guarantee to be executed by the Developer in favour of the Debenture Trustee in a form and manner acceptable to the Debenture Trustee."*

10. 'Security Interest', 'Security Providers', 'Secured Obligations' and 'Security Documents' have been defined in following words:

> *""Security Interest" shall refer to any security interest created / to be created for the purposes of securing the obligations of the Company in relation to the Debentures and shall include the Mortgage, Pledge, Corporate Guarantee, Personal Guarantee or any other agreement or arrangement having the effect of conferring Security in favour of the Debenture Trustee.*
>
> *"Security Providers" shall mean the Obligors and shall also include any other person which has created or agreed to create any Security Interest for or in relation to the Debentures and "Security Provider" means each and any one of the Security Providers.*

"Secured Obligations" shall mean all present and future obligations and liabilities (whether financial, performance or otherwise, whether actual or contingent and whether owed jointly or severally or in any other capacity whatsoever) of the Obligors to the Debenture Holders including in connection with the issue and subscription of the Debentures, the Debenture Payments and the creation and maintenance of Security and all costs and expenses incurred in relation thereto under the Transaction Documents.

"Security Documents" shall mean:

(a) this Deed;

(b) Debenture Trustee Agreement;

(c) Deed(s) of Mortgage,

(d) Personal Guarantee;

(e) Corporate Guarantee;

(f) Escrow Agreements;

(g) Deed of Pledge; and

(h) such other document for creating such other Security as may be required by the Debenture Holders/Debenture Trustee from the Obligors

including any modifications/ amendments/ supplemental agreements thereto and any other agreements, deeds or documents designated as such by the Debenture Trustee."

11. 'Transaction Documents' have been defined in following words:

> *""Transaction Documents" shall mean:*
>
> *(a) the Security Documents;*
>
> *(b) the Private Placement Offer Letter;*
>
> *(c) other agreements and documents contemplated in connection with the issue of Debentures, or the transactions contemplated hereby; and*
>
> *(d) any other document identified by the Debenture Trustee as a Transaction Document."*

12. Learned counsel for the parties have referred to Clause 7.5 of the Debenture Trustee Document which is as follows:

> *"**7.5 Alternate/Further Security***
>
> *(a) In case of any Material Adverse Effect in relation to any of the Security or the title of any Security Provider to any Security is affected for any reason whatsoever or is otherwise in the opinion of the Debenture Trustee, is impaired in any manner, then, (without prejudice to the rights of the Debenture Holders to treat the same as an Event of Default), such Security shall be substituted by the Security Providers, with other security(ies) acceptable to the Debenture Trustee ("Alternate Security"), which together with the Security, shall comprise the Security in favour of the Debenture Trustee for the benefit of the Debenture Holders. Such*

Alternate Security will be identified by the Security Providers, within 7 (seven) Business Days of the occurrence of a Material Adverse Effect or the title to the Security being found defective or otherwise affected, without the requirement of any notice whatsoever, or the Debenture Trustee communicating to the Security Providers of the Security being impaired as aforesaid and the Alternate Security will be created and perfected within 15 (fifteen) Business Days thereof.

(b) If the Debenture Trustee (acting on the instructions of the Majority Debenture Holders), is of the opinion that any Security created under the Transaction Documents has become inadequate for meeting the Security Cover as defined in Clause 7.6 or is otherwise not sufficient to meet the outstanding Debenture Payments or Secured Obligations, then on such communication from the Debenture Trustee, such additional security to the satisfaction of the Debenture Trustee shall be created provided by the Security Providers within 15 (fifteen) Business Days of such communication, from the Debenture Trustee and the Security Providers shall ensure that the necessary documents to be executed in connection therewith are duly executed and registered as required by Applicable Law."

Present is a case where in exercise of Clause 7.5 (b), Debenture Trustee entered into Agreement dated 29.03.2019 for additional security.

13. Now we come to the Agreement dated 29.03.2019 to find out its real nature and content. Clause (F), (G) and (I), which are relevant to the present case are as follows:

> *"F. The Company being in need of capital for, inter-alia, undertaking the Sanctioned project and the Second Sanctioned Project and for making the payment of the DMA Deposit, approached the Investor for making an investment in the Company and by and under Debenture Trust Deed dated 3rd August 2018 ("DTD") executed between the Debenture Trustee/ Trustee (on behalf of the Debenture Holders set out therein ("Debenture Holders"), the Company, the Developer and the Promoters read with letter agreement dated 3rd August 2018, it has been agreed that the Debenture Holders shall subscribe to and the Company shall issue and allot the Debentures (as defined in the DTD), to the Debenture Holders, in accordance with the terms of the DTD. Capitalised terms used but not defined herein shall have the meaning ascribed to these terms in the DTD.*
>
> *G. One of the terms of the issuance of the Debentures is that the Debenture Payments (as defined therein) and discharge of the Secured Obligations (as defined therein) under the DTD and other Transaction Documents (which includes this*

Agreement) in respect of the Debentures shall be secured by additional security and covenants ("Additional Security"), until, inter-alia, the Debenture Trustee deems fit and proper.

I. The Parties are accordingly executing this Agreement as part of the Additional Security."

14. Clause (G), as extracted above, clearly referred to terms of issuance of the debentures that Debenture Payments and discharge of the secured obligations under the Debenture Trust Deed shall be secured **by additional security and covenants.**, until, *inter-alia*, the Debenture Trustee deems fit and proper. The Agreement was executed by the Debenture Trustee requiring additional security which can be very well done as per Clause 7.5(b) of the Debenture Trust Deed. Clause (I), as extracted above, makes it abundantly clear that parties have executed the Agreement **as part of the Additional Security**.

15. Now we come to Clause 2 of the Agreement, which is as follows:

"2. In consideration of the Debenture Holders having agreed to subscribe to the Debentures, the Promoters and RIHPL do hereby agree and covenant, as under, with the Debenture Trustee (for the benefit of the Debenture Holders) and as part of the Additional Security, to secure the Debenture Payments and Secured Obligations and perform all the terms and conditions of the Transaction Documents to the satisfaction of the Debenture Trustee and the Debenture Holders:-

(a) *All amounts to be paid to the Promoters from time to time by RIHPL by whatever name called and of whatsoever nature, whether by way of distribution of profit or its share of profit, dividends paid or payable other than in cash with respect of the Shares, cash paid, payable or otherwise distributed in respect of buy-back of, or in exchange for the Shares, return of capital, Interest or return on capital, or otherwise howsoever (hereafter collectively referred to as "RIHPL Security") shall be deposited by RIHPL in Company Escrow Account being a designated escrow bank account being escrow account no. 57500000084708 in the name and style of "AADITRI CONSTRUCTIONS PVT LTD ESCROW ACCOUNT opened with HDFC Bank, Bandra East - Kalanagar Branch ("the Account"). which will be solely operated by the Trustee and which amount will be and remain as security for due repayment and discharge of the Debenture Payments and the Secured Obligations and due performance of all the terms and conditions of the Transaction Documents to the satisfaction of the Debenture Trustee and the Debenture Holders;*

(b) *RIHPL will deposit the RIHPL Security directly in the Account;*

(c) *No change or amendment will be made by the Promoters or RIHPL to the constitution documents of the RIHPL or the operation of*

the Account, without the prior written consent of the Debenture Trustee who shall act on the instructions of the Debenture Holders;

(d) No encumbrance or charge or third party rights shall be, directly or indirectly, created by the Promoters to the Shares or the RIHPL Security:

(e) Neither the Promoters nor RIHPL will deal with or transfer the RIHPL Security in any manner whatsoever; and

(f) RIHPL and the Promoters agree and confirm that whenever the loans taken by RIHPL from L&T Finance Limited ("Lender") under the agreements dated 27th June 2018 have been repaid and the security under the deeds of mortgage executed and registered under serial Nos. BDR-1/7951/2018 has been released, the Promoters and RIHPL will create a mortgage, pledge and charge over the RIHPL Security and the RIHPL Project in favour of the Debenture Trustee and will sign, execute and register the necessary deeds, documents and writings required for this purpose."

16. Clause 2 indicate that the Corporate Debtor had agreed, as par to additional security to secure the debenture payments and secured obligations, as per the sub-clause mentioned therein. What was the security provided under the agreement was explained in Clause 2, as noted above. It is further relevant to notice that under Clause (f), RIHPL and Promoters have

agreed to create mortgage, pledge and charge over the RIHPL Security and the RIHPL Project in favour of the Debenture Trustee, whenever the loans taken by RIHPL from L&T Finance Ltd under the agreements dated 27.06.2018 have been repaid and the security under the deeds of mortgage have been executed and released. It is undisputed fact between the parties is that no mortgage could be created in favour of the Debenture Trustee as per the Agreement dated 29.03.2019.

17. Much emphasis has been laid by learned counsel for the Appellant on Clause 4 of the Agreement, which reads as follows:

> *"4. In addition to and without prejudice to what is stated in the DTD and the Transaction Documents, it is agreed between the Parties that RIHPL shall be liable to repay the Secured Obligations under the said DTD and the Transaction Documents and failure to repay the same shall result in an Event of Default."*

18. It is contended that Agreement notices the agreement between the parties that RIHPL shall be liable to repay the secured obligations under the said Debenture Trust Deed and the Transaction Documents and failure to repay the same shall result in an event of default.

19. We may also notice Clause 5 and 6, which is to the following effect:

> *"5. It is agreed between the Parties that the Debenture Trustee will release the RIHPL Security only upon the Secured Obligations being fulfilled*

to the satisfaction of the Debenture Trustee provided that no Event of Default has occurred under any of the Transaction Documents.

6. It is agreed between the Parties that upon the occurrence of an Event of Default, and without prejudice to the other rights and remedies of the Debenture Trustee, the Debenture Trustee on the instruction of the Majority Debenture Holders shall be entitled to enforce the RIHPL Security in such manner as the Debenture Trustee deems fit and shall be entitled to do all acts, deeds, matters and things necessary for this purpose."

20. As noted above, principal issue between the parties is true nature and content of Agreement dated 29.03.2019 and whether it can be read as Deed of Guarantee or not. It can be read as deed of guarantee is the prime submission advanced by learned counsel for the Appellant. We may now notice certain judgments of Hon'ble Supreme Court which has been relied by learned counsel for the Appellant in support of his submission. Hon'ble Supreme Court in ***"Prakash Roadlines Pvt. Ltd. vs. Oriental Fire & General Insurance Co. Ltd., (2000) 10 SCC 64"*** has laid down that a documents has to interpreted not by its nomenclature but what is contained in the said document. In Para 3 of judgment following has been laid down:

"3. It is a settled law that a document has to be interpreted not by its nomenclature but what is contained in the said document. A reading of the document shows that it was a deed of assignment in favour of the Insurance Company. We are, therefore, in

agreement with the view taken by the High Court. Consequently, we do not find any merit in the appeal. It is accordingly dismissed. There shall be no order as to costs."

21. Submission of the Appellant is that mere fact that the document dated 29.03.2019 is containing heading 'Agreement' is not decisive and its nomenclature is not decisive. There can be no dispute to the preposition that nomenclature is not decisive. To find out the nature of the document, we need to notice the Agreement dated 29.03.2019 in light of Debenture Trust Deed which is the genesis of Agreement dated 29.03.2019. As noted above, the Debenture Trust Deed defines the Corporate Guarantee which was to mean that the Deed of Guarantee was to be executed by the Developer in favour of the Debenture Trustee in a form and manner acceptable to the Debenture Trustee. The definition of Security Provider is also contained in the Debenture Trust Deed which mean the Obligors and shall also include any other person which has created or agreed to create any Security Interest for or in relation to the Debentures and "Security Provider" means each and any one of the Security Providers. Thus, Security Provider can also be any other person apart from Obligors and Security Document include Corporate Guarantee and such other documents for creating such other Security as may be required by the Debenture Trustee from the Obligors. Security Documents, thus, both includes Corporate Guarantee, which has already been defined and other document for creating such other security as may be required.

22. We have already noticed the relevant Clauses of Agreement dated 29.03.2019; Clause (F), (G) and (I). When the Clause in the Agreement clearly mentions that the **parties are accordingly executing this Agreement as part of the Additional Security**, the Agreement was a document for additional security which is clear from the words/expression used in the document itself. Clause 2 again uses expression **as part of the Additional Security**.

23. We also notice the judgment of Hon'ble Supreme Court in ***"State of Orissa vs. Titaghur Paper Mills Co. Ltd., 1985 (Supp) SCC 280"***, where again the same preposition which was laid down in ***Orient Paper Mills case*** has been reiterated in following words in Para 120 of the judgment:

> *"120. It is true that the nomenclature and description given to a contract is not determinative of the real nature of the document or of the transaction thereunder. These, however, have to be determined from all the terms and clauses of the document and all the rights and results flowing therefrom and not by picking and choosing certain clauses and the ultimate effect or result as the Court did in the Orient Paper Mills case."*

24. Another preposition which is well settled is that documents has to be read as whole, which principle has been reiterated by the Hon'ble Supreme Court in ***"Super Ployfabriks Ltd. vs. Comm. Of Central Excise Punjab, (2002) 11 SCC 398"***, where following has been laid down in Para 8:

> *"8. There cannot be any doubt whatsoever that a document has to be read as a whole. The purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Neither the nomenclature of the document nor any particular activity undertaken by the parties to the contract would be decisive."*

25. We, thus, have to look into the Agreement dated 29.03.2019 as a whole. Clause 4 of the Agreement which is sheet anchor of the argument of the Appellant has to be read along with other relevant clauses. Learned counsel for the Appellant has emphasised that as per Clause 4 in addition to and without prejudice to what is stated in the DTD and the Transaction Documents, RIHPL agreed to be liable to repay the Secured Obligations under the said DTD and the Transaction Documents and failure to repay the same shall result in an Event of Default. When additional security was being created and RIHPL is agreeing to give additional security by virtue of Agreement dated 29.03.2019, it has to be said that RIHPL shall be liable to pay secured obligation under the DTD. Security interest as created to repay secured obligations was to the extent of additional security created under the Agreement. There is no averment in the entire agreement that RIHPL is undertaking to guarantee to repayment of secured obligations by the Company. It is to be noted that Corporate Guarantee was already executed on 03.08.2018 on which date the Debenture Trust Deed was executed and in event the RIHPL was taking on its folds the entire lability of Principal Borrower as a Guarantor there ought to have been some indication in the Agreement.

There is not even any averment in the Agreement that the default has been committed by the Company and that it is necessary to give guarantee by the RIHPL.

26. Further Clause 6 of the Agreement clearly provide that on occurrence of any event of default, the Debenture Trustee on the instruction of the Majority Debenture Holders shall be **entitled to enforce the RIHPL Security**. Thus, in event of default security which was given by RIHPL can be enforced by the Debenture Trustee.

27. Learned counsel for the Resolution Professional has relied on judgment of this Tribunal in ***"Company Appeal (AT) (Ins.) No.463 of 2020, IL & FS Financial Services Limited vs. Mahananda Suppliers Ltd."*** decided on 22.07.2022 in which case Financial Creditor has extended loan to the Borrower and a Facility Agreement was executed. The Facility Agreement contained a security package and personal guarantee. The security being not found sufficient, on the same date an Unattested Pledge Agreement was also executed in which Mahananda Suppliers Ltd. and Sungrowth Share and Stocks Ltd. came forward to support the Borrower and all of them pledged their security which was mentioned in the Schedule appended with the Agreement. On the basis of said Unattested Pledge Agreement, the Financial Creditor filed a Section 7 application, which application came to be rejected. An appeal was filed in this Tribunal contending that all the Pledger having jointly and severally being liable to pay the dues, the amount can be recovered from the Pledgers. It was contended that Pledge Agreement is basically a

guarantee extended to the Financial Creditor on behalf of the Borrower. The Arguments have been noticed in Para 11 of the judgment, which are as follows:

> *"11. It is further submitted that in Clause 6.2 pertaining to the remedies it can enforce any or all of the security, in part or whole as mentioned in this Agreement and/or the Facility Agreement, to realize either in part or entire amount of the Borrower's Dues and/or invoke any guarantee provided under the Facility Agreement. It is sought to be argued that the Financial Creditor has exclusive right to recover the amount payable from the present Respondent by virtue of Clause 5.1(g) of the Pledge Agreement which is basically a guarantee extended to the Financial Creditor on behalf of the Borrower."*

28. This Tribunal after considering the submissions of the parties, dismissed the appeal. This Tribunal held that Pledgers by the Unattested Pledge Agreement given an option to the Financial Creditor to initiate action against the security of any of the pledgor but in no case the pledgor can be termed as a Principal Debtor. In Para 14 and 15 of the judgment following has been held:

> *"14. It is apparent from the facts of the case that when it was decided by the Financial Creditor to extend loan to the Borrower a Facility Agreement was executed in which security package was given as contained in the terms and conditions. The only personal guarantee in the Facility Agreement in that of Manoj Kumar Agarwal*

and none else but it appears that this security was not found sufficient by the Financial Creditor, therefore, on the same date an Unattested Pledge Agreement was also executed in which the present Respondent ie. Mahananda Suppliers Limited and Sungrowth Share and Stocks Limited came forward to support the Borrower ie. Adhunik Meghalaya Steels Private Limited and all of them pledged their security which has been mentioned in the Schedule appended with the Agreement and made themselves liable to pay the dues of the Financial Creditor jointly and severally, meaning thereby giving an option to the Financial Creditor to initiate action against the security of any of the pledgor but in no case the pledgor can be termed as a principal debtor for the purpose of recovery of the entire amount that too by resorting to the filing of the application under Section 7 of the Code.

15. We have minutely gone through both the agreements and other relevant material on record together with the findings recorded by the Adjudicating Authority in which we do not find any error for the purpose of interfering in it and therefore, we are of the considered opinion that the present appeal is totally without any merit and deserves to be dismissed

29. Against the above judgment dated 22.07.2022, Civil Appeal No. 7944 of 2022 was also filed by the Financial Creditor, which was not interfered by the Hon'ble Supreme Court by its order dated 18.11.2022.

30. The submission of the Appellant that the Committee of Creditors has no jurisdiction to adjudicate on the claim submitted by the Appellant

needs no consideration in the facts of the present case since fact remains that the Resolution Professional has already refused to admit the claim of the Appellant which was communicated vide email dated 22.06.2022 and after the Committee of Creditor's meeting dated 27.12.2022 again by email dated 20.01.2023. The Resolution Professional having not admitted the claim of the Appellant and communicated its rejection, it is not necessary for us to enter into the submission of the Appellant that Committee of Creditor's decision prima facie not accepting the claim of the Appellant was without jurisdiction. In any event, an application has already been filed by the Appellant before Adjudicating Authority questioning the decision. It is decision of the Adjudicating Authority which has approved the decision of the Resolution Professional rejecting the claim of the Appellant, which require scrutiny. There can be no doubt that it is the Adjudicating Authority who is entrusted with jurisdiction to adjudicate all issues which arise out of the resolution process of a Corporate Debtor. The Adjudicating Authority having already given a decision which decision has been challenged in appeal, we confine ourselves to the consideration of the issue whether the Adjudicating Authority has committed any error in rejecting the IA filed by the Appellant being IA. 580/2023.

31. When we holistically read the Agreement dated 29.03.2019 and look into the Clauses, it is clear that said Agreement was executed in reference to Clause 7.5(b) of the Debenture Trust Deed and the Agreement was only of for the purpose of creating additional security. The RIHPL being party to the Agreement dated 29.03.2019, the additional security as given under the

Agreement can be enforced as per Clause 6 of the Agreement. Giving of additional security by Agreement dated 29.03.2019 cannot be read to mean that the Corporate Debtor has given any guarantee in reference to the secured obligations of the Obligors under the Debenture Trust Deed. The Agreement dated 29.03.2019 cannot be read as guarantee within the meaning of Section 126 of the Contract Act. The claim filed by the Financial Creditor was not limited to the extent of RIHPL security but entire amount under the Debenture Trust Deed was sought to be claimed in the claim form submitted by the Appellant. We, thus, are of the view that the Resolution Professional did not commit any error in refusing to admit the claim of the Appellant. We do not find any good ground to interfere with the order of the Adjudicating Authority dismissing IA.580/2023. There is no merit in the Appeal. Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

13th December, 2023

Archana