NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 574 of 2023

[Arising out of order dated Order dated 26.04.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-V in C.P. (IB) No. 119 of 2021]

IN THE MATTER OF:

Seeta Shah,
6th Floor, Apeejay House,
Mumbai Samachar Marg, Fort Mumbai-400 023
Registered office at Shop No. A9, First Floor, (old No. 18),
Parsn Commercial Complex, No. 600, Mount Road,
Chennai-600006 **...Appellant**

Versus

ICICI Bank Limited,
ICICI Bank Tower, Near Chakli Circle, Old Padra Road,
Vadodara, Gujarat, 390 007 Registered Office at ICICI
Bank Towers, Bandra Kurla Complex, Mumbai,
Maharashtra- 400 051 **...Respondent**

Present:

For Appellants:	**Mr. Abhijeet Sinha, Sr. Advocate with Ms. Shaista Pathan, Mr. Bhavya Sethi, Mr. Tushar Bagga, Advocates.**
For Respondent:	**Mr. Krishnendu Datta, Sr. Advocate with Mr. Nitesh Jain, Mr. Prakshal Jain and Mr. Kartikeya Yadav, Advocates for R-1.**
	Ms. Pooja Mahajan, Mr. Savar Mahajan, Ms. Komal, Advocates for RP.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by a Suspended Director of the Corporate Debtor – Ushdev Enfitech Limited has been filed challenging the order dated 26.04.2023

Cont'd.../

passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-V admitting Section 7 application filed by ICICI Bank Ltd. (Respondent herein). Appellant aggrieved by the impugned order has filed this appeal. Brief facts of the case necessary to be noticed for deciding this appeal are:

(i) ICICI Bank has advanced Rs.100 Crore to Ushdev International Ltd, Principal Borrow, by way of two bilateral non-fund based facilities of INR 50 Crore each. The above two bilateral non-fund based facilities were advanced by Credit Agreement Letter dated 24.12.2014 and 14.10.2015.

(ii) A Deed of Guarantee was executed by the Corporate Debtor – Ushdev Engitech Ltd. on 10.08.2016 for securing the above credit facility extended to the Principal Borrower.

(iii) The Principal Borrower committed default and account of the Principal Borrow was declared as NPA in December, 2016.

(iv) On 16.10.2017, Corporate Guarantee of Corporate Debtor was also invoked and the Corporate Debtor was asked to make payment within 5 days.

(v) No payment having been made by the Corporate Debtor, a Section 7 application was filed by the ICICI Bank against the Corporate Debtor, who was the Corporate Guarantor, on which Company Petition (IB) 119 of 2021 was registered.

(vi) The Corporate Debtor filed its reply in the Section 7 application. Against the Principal Borrower – Ushdev International Ltd. CIRP was

initiated by order dated 14.05.2018. Revised Resolution Plan submitted by the Successful Resolution Applicant in the CIRP of the Principal Borrower was approved by the CoC which also was approved by the Adjudicating Authority on 03.02.2022.

(vii) ICICI Bank had also filed a Clarification Application before the Adjudicating Authority which application was also rejected by the Adjudicating Authority by order dated 03.02.2022.

(viii) Against the order dated 03.02.2022 passed by the Adjudicating Authority approving the Resolution Plan with respect of the Principal Borrower – Ushdev International Ltd. Company Appeal (AT) (Ins.) No.172-173 of 2022 was filed by the CoC and Company Appeal (AT) (Ins.) No. 199-200 of 2022 was filed by ICICI Bank in this Tribunal.

(ix) The above appeals challenging order dated 03.02.2022 was decided by this Tribunal by its judgment and order dated 11.03.2022. The Appeals were allowed by deleting a part of the direction of the Adjudicating Authority by which the Adjudicating Authority has directed that excluded securities are no longer enforceable.

(x) Section 7 application filed by the ICICI Bank against the Corporate Debtor was heard and admitted by order dated 26.04.2023, aggrieved by which order this Appeal has been filed.

(xi) The Adjudicating Authority after hearing the parties held that even after approval of the Resolution Plan with respect to the Principal Borrower, the security does not get discharged. Adjudicating Authority also referred to and relied on order dated 11.03.2022 passed by this Appellate Tribunal and held that the Appellate Tribunal has set

aside the direction of the Adjudicating Authority that excluded securities are subsumed under Clause 3.3 (iii) (c) (h). The Adjudicating Authority also held that Section 134 of the Contract Act has no applicability in the facts of the present case. Argument of the Corporate Debtor that application is barred by time was also repelled.

2. We have heard Shri Abhijeet Sinha, learned senior counsel with Bhavya Sethi and Ms. Shaista Pathan, Advocates for the Appellant and Shri Krishnendu Datta, learned senior counsel appearing for the Respondent No.1. Ms. Pooja Mahajan, learned counsel has appeared for the Resolution Professional.

3. Shri Abhijeet Sinha, learned counsel for the Appellant challenging the order submitted that after approval of the Resolution Plan of the Principal Borrower no debt survived so as to enable the Financial Creditor to initiate or continue any proceeding under Section 7 against the Corporate Guarantor. Under the Resolution Plan of the Principal Borrower, after payment to the Financial Creditor, the balance debt was converted into non-convertible redeemable preferential shares. Thus, the entire debt having been taken care for and dealt with in the Resolution Plan of the Principal Borrower, Section 7 application filed by the ICICI Bank was not maintainable. Learned counsel for the Appellant submits that in view of the entire debt of the Principal Borrower being discharged by the approval of the Resolution Plan, under Section 134 of the Contract Act, the Corporate Guarantor shall stand discharged. It is submitted that thus there was no debt left on which Section 7 application could have been pursued by the ICICI Bank. Appellant has also

filed an Additional Affidavit by which another ground was raised in support of the appeal namely that under Clause 33 of the Corporate Guarantee dated 10.08.2016 the liability of the Corporate Guarantor was not to exceed Rs.2,180 million and further in event the outstanding of borrower is less than aggregate of Rs.2,180 million, the guarantee will fall off. Learned counsel for the Appellant submitted that as per the Resolution Plan, the Principal Borrower has paid upfront cash payment of Rs.2,06,00,000/- Crore and preference share of a sum of Rs.273,38,49,866/- which means that residual debt of Rs.19,06,85,789/- which has been settled at 'NIL' consideration. Thus, as per Clause 33, amount payable by the Principal Borrower falls below Rs.2,180 Million or Rs.218 Crore. Hence, the Corporate Guarantee given by the Corporate Debtor – Ushdev Engitech Ltd. automatically stands terminated and unenforceable.

4. Shri Krishnendu Datta, learned senior counsel appearing for the ICICI Bank submits that the Corporate Guarantee given by the Corporate Guarantor has not extinguished by approval of the Resolution Plan in the CIRP of the Principal Borrower. It is submitted that the Adjudicating Authority while approving the Resolution Plan on 03.02.2022 has taken erroneous view that excluded securities are subsumed which view has already been set aside by this Tribunal vide its judgment and order dated 11.03.2022 in company appeal filed by the CoC as well as by the ICICI Bank. The judgment of this Tribunal dated 11.03.2022 clearly holds the field which has taken the view that excluded securities i.e. Corporate Guarantee dated 10.08.2016 still holds the ground and is enforceable. The submission of the

Appellant that by approval of the Resolution Plan the entire debt is extinguished has to be rejected in view of the decision taken by this Tribunal arising out of CIRP of the Principal Borrower. With regard to submission advanced by the Appellant on Section 134 of the Contract Act, it is submitted that Section 134 does not render any help to the Appellant in facts of the present case and the said submission was already considered and rejected by the Adjudicating Authority in Para 42 of their judgment. Coming to the submission raised by the Appellant on the basis of Clause 33 of the Guarantee, the Respondent has also filed a reply to the Additional Affidavit and submitted that the default and debt of the Principal Borrower was above INR 218 Crores as on date of invocation of guarantee. It is submitted that on 16.10.2017 debt due payable by the Principal Borrower was over 230 Crores. It is submitted that Clause 33 is not applicable. It is further submitted that Resolution Plan of the Principal Borrower does not reduce the debt of the Principal Borrower below INR 218 Crores. Under the Principal Borrower's plan, no payments have been received and debt is more than Rs.218 Crores by including the preference shares given. Thus, there is no applicability of Clause 33 and the Corporate Debtor cannot claim that it is discharged from the debt.

5. Learned counsel for the parties have also referred to and relied on various judgments of this Tribunal, High Courts and the Hon'ble Supreme Court which we shall refer to while considering the submissions in detail. Written Submissions have also been filed by both the parties.

6. The first submission of the Appellant which need consideration is the effect of approval of Resolution Plan in the CIRP of the Principal Borrower on the guarantee which was given by the Corporate Debtor to ICICI Bank dated 10.08.2016. As noted above, the Resolution Plan in the CIRP of the Principal Borrower was approved by the Adjudicating Authority on 03.02.2022. ICICI Bank, the Financial Creditor of the Principal Borrower has also filed an application for clarification before the Adjudicating Authority seeking specific clarification as to whether after approval of the plan securities including guarantee given to the Financial Creditor shall survive. The Adjudicating Authority vide its order dated 03.02.2022 had taken the view that excluded securities stand subsumed under Clause 33 (iii) (c) and (h) which observations were made by the Adjudicating Authority in Para 29 of the order dated 03.02.2022. Appeals against the order dated 03.02.2022 were filed by both the CoC and the ICICI Bank Ltd. which appeals have been allowed by the order of this Tribunal dated 11.03.2022. This Tribunal disapproved the view taken by the Adjudicating Authority that by approval of the plan excluded securities shall be subsumed. Noticing the provision of the plan, it was held by this Tribunal that clauses of the Resolution Plan itself indicated that excluded securities shall continue even after approval of the plan. This Tribunal also noticed the clauses of the Resolution Plan and the definition of the excluded securities. It is useful to notice Paras 11, 12, 13, 14, 15 and 16 of the judgment:

> *"11. Before we proceed to consider the respective submissions, it is necessary to notice certain portion of the Resolution Plan which is approved by the*

Committee of Creditors. Schedule I of the Resolution Plan deals with 'Definitions' and Clause 21 of the Schedule I deals with 'Excluded Securities' in following words:

> *"Excluded Securities shall mean the Promoter Guarantee, corporate guarantee dated 10th August, 2016 given by Ushdev Engitech Limited to ICICI Bank, and the Encumbrances created on the following immovable properties by the Promoters or third parties in favour of the Financial Creditors; (i) Basement No. 8, Apeeyjay House, Mumbai; (ii) Unit 1,2,&3 2nd floor, Old Harileela House, Mumbai; (iii) Villa no 92&94 at Lavasa; and (iv) Shop no 8,9,10 Tiara Complex, Thane (exclusively charged to Bank of Maharashtra)."*

12. Paragraph 3.3. of the Resolution Plan deals with 'Financial Creditors'. Sub-Clause 3.3.iii. (H) and (g), are relevant to the following effect:

> *"…… H. In order to implement the proposal set out in this Clause 3.3.(iii)(e), the Resolution Applicant proposes that any balance Financial Debt forming part of the Admitted Debt (Unpaid Debt), i.e. the Admitted Debt as reduced by the amounts mentioned in sub-Clauses (a),(b)(,c) and (d) above, shall stand converted into Non-Convertible Redeemable Preference Shares (New Preference Shares) of the Company being zero dividend and non-cumulative in nature at their face value. The Unpaid Debt shall be converted into the New Preference Shares as per the detailed terms set out in Schedule V simultaneously with the payment of the final tranche of INR 27 Crore (which shall be payable by the Resolution Applicant on or before the 120th day from the closing date). Subject to the Applicable Laws, the memorandum of association and the articles of association of the Company, the New Preference Shares, which shall be issued to the Financial Creditors upon conversion of the Unpaid Debt, shall not have rights to receive any dividends and/or voting rights of any nature whatsoever. The New Preference Shares shall not have any*

rights to appoint director on the board of the Corporate Debtor. The detailed terms of such New Preference Shares are set out in Schedule XII. Further, the rights and obligations of the New Preference Shares shall be governed by the memorandum of association and the articles of association of the Company as well as the agreements, if any, mas may be entered into by the Resolution Applicant and the Financial Creditors. Upon approval of the Resolution Plan by the Adjudicating Authority, the provisions of Section 43 and Section 47 of the Act (including the rules made thereunder) and other Applicable Laws, if any, shall not be applicable to the terms of New Preference Shares set out in Schedule XII."

……

(g) Security: All Encumbrances provided by the Promoters or any third party, other than the Excluded Securities, in favour of the Financial Creditors for securing the Financial Debt of the Company (hereinafter referred as the Assigned Securities), which are valued by Resolution Applicant and included as part of Resolution Plan amount, shall not be extinguished or waived under this Resolution Plan and shall be assigned to Taguda India Prvaite Limited (which entity is the Identified Affiliate), along with the payment of INR 50 crore constituting the Assigned Debt by Taguda Indai Private Limited in the manner set out in Schedule XI. The Excluded Securities shall also not be extinguished or waived under this Resolution Plan and will continue be available with the Financial Creditors in accordance with their terms, which may be exercised by the Financial Creditors at their discretion for its for its debt. All other securities or other Encumbrances provided by the Company including on the fixed assets of the Company shall be extinguished as on the Final Settlement Date. The Financial Creditors reserve the right to take any action against the Promoters."

13. Sub-Clause 3.3(v) also makes it clear that excluded securities shall continue to survive in the manner set out in this Resolution Plan. Following portion of Sub-Clause3.3 (v) is as follows:

> *"(v) …Furthermore, subject to sub-clause (vii) below, any third party (other than the Promoters) who has guaranteed or secured the obligations of the Company shall stand discharged of and not liable for any default or event of default under any loan documents or other financing agreements or financing arrangements (including any side letter, letter of comfort, letter of undertaking etc) and all rights/remedies of the creditors shall stand permanently extinguished. Notwithstanding anything stated herein, the Excluded Securities and Assigned Securities shall continue to survive, in the manner set out in the Resolution Plan. The Resolution Professional (and his representatives, advisers and agents), the Company or the Resolution Applicant shall have no liability, either present or arising in future, and all such liability shall be waived in entirety, either pursuant to a right of subrogation under law or otherwise, for any amounts or obligations paid or discharged by the Promoters or any third party pursuant to any guarantee or surety given by such Promoters or third party on or before the Closing Date to secure the obligations of the Company or to any creditor of the Company. Furthermore, it is hereby clarified that upon approval of the Resolution Plan by the Adjudicating Authority, no further consent of any creditor (Financial Creditor or otherwise) shall be required to implement the Resolution Plan."*

14. Now we may notice the Judgment of the Adjudicating Authority passed on 03.02.2022 approving the Resolution Plan. The Adjudicating Authority under the heading 'Reliefs, Concessions and Dispensations' passed following Order:

> *"With regard reliefs, concessions and waivers as sought by the Resolution Applicant, this Bench orders that the reliefs and concessions are guaranteed as per the judgment of the Hon'ble Supreme Court in Ghanshyam Mishra and Sons Vs. Edelweiss Asset Reconstruction Company Limited, where at para 95(i) it was held that once a resolution plan was approved a creditor cannot initiate proceedings for recovery of the claim which are not part of the Resolution Plan. Hence,*

all past liabilities arising out of any levies/tax dues to any government authority such as VAT, CST, Customs Excise Duty and employees, workmen, operational creditor, financial creditor etc., which are not part of the resolution plan and pertaining to the pre CIRP period, shall stand extinguished, post approval of the resolution plan.

1. The unpaid debt shall stand converted into non-convertible redeemable preference share. Hence, the excluded securities are no longer enforceable as defined under the resolution plan.

2. The approval of the Resolution Plan shall not be construed as waiver of any statutory obligations/liabilities of the Corporate Debtor and shall be dealt by the appropriate Authorizes in accordance with law. Any waiver sought in the Resolution Plan, shall be subject to approval by the Authorities concerned."

15. The Order passed by the Adjudicating Authority approving the Plan was subject to observations made in the Order i.e. subject to directions no. 1 under the heading 'Reliefs, Concessions and Dispensations'. Further in clarification Order in Paragraph 29 following observations have been made:

"Heard the counsel for the applicant and the counsel for the Respondent/RP and perused the documents. This bench is of the prima facie view that though the excluded securities as defined under the resolution plan means the promoter guarantee, Corporate guarantee issued by the Ushdev International Limited, the encumbrance created on the following immovable by the promoter of third parties, but however, these expressly declared excluded security are subsumed under clause 3.3.(iii)(c) and (h) wherein the plan proposal any balance financial debt forming part of admitted debt (unpaid debt) shall be converted into non-convertible redeemable preference share of the company being zero dividend and non-cumulative in nature at their face value. Further, the unpaid debt shall be converted into new preference share as detailed

in schedule V. When the unpaid debt is converted into preference share there is no question of any outstanding liability which is available for enforcement qua the excluded the securities as provided to the Financial Creditor. It is seen that 91.06% of the CoC have taken a commercial decision to approve the said resolution plan, hence the approval of the resolution plan ipso facto discharge the enforcement of excluded securities. When there is no debt which is realisable there is no question of any enforcement thereof. The applicant being dissenting Financial Creditor has opted to choose out of the plan but will be entitled to the rights available to the dissenting Financial Creditor as per Section 53 of the Code."

16. The view which was taken by the Adjudicating Authority both in the Order dated 03.02.2022 approving the Resolution Plan and Clarification Order was that in view of the fact that unpaid debt shall stand converted into non-convertible redeemable preference share hence the excluded securities are no longer enforceable. The Adjudicating Authority held that excluded securities are subsumed under Clause 3.3.(iii). The Adjudicating Authority obviously referred to Paragraph 3.3. (e) (H) which provided that balance Financial Debt forming part of the Admitted Debt shall stand converted into non-convertible redeemable preference shares of the company which shall be issued to the Financial Creditors upon conversion of the unpaid debt. The above provision in the Plan for conversion into nonconvertible redeemable preference shares of the balance financial debt has no bearing on specific provisions in the plan by 3.3.(iii)(g) which clearly provided that excluded securities shall not be extinguished or waived under this Resolution Plan. When the Resolution Plan itself states that excluded securities shall not be extinguished under the

Resolution Plan which is the provisions in the plan made in 3.3.(iii)(h). Further as noted in 3.3.(v) there was again clear provision that excluded securities shall continue to survive. When the plan is ready as a whole it is clear that excluded securities were to continue and no contrary intention is reflected in the plan. It is due to the above contents of the plan that Learned Counsel for the Resolution Applicant also does not dispute that the Plan never contemplated for extinguishment of excluded securities. Both the parties had argued that plan never contemplated for extinguishment of the excluded securities. The Adjudicating Authority thus committed error in making observation in issuing direction no. 1 of the Impugned Order under the heading 'Reliefs, Concessions, and Dispensations. Hence the following part of the Direction no. 1 "Hence, excluded securities are no longer enforceable as defined under the resolution plan" are deleted from the Order. The deletion of the above Direction No. 1 shall in no manner affect the approval of the Resolution Plan vide Order dated 03.02.2022. The Order dated 03.02.2022 is untouched with regard to other aspects of the Impugned Order."

7. This Tribunal clearly held that the Adjudicating Authority committed error in holding that the excluded securities shall not continue after approval of the Resolution Plan. The application which was filed by the ICICI Bank was also allowed. The observation made in Para 29 of the order of the Adjudicating Authority that approval of the Resolution Plan ipso facto discharge the enforcement of excluded securities were also set aside. The order dated

11.03.2022 as corrected on 01.04.2022, operative portion of the judgment dated 11.03.2022 is as follows:

> *"In result, Company Appeal (AT) (Ins.) No. 172-173 of 2022 are allowed by deleting the relevant part in Direction 1 of the Impugned Order under the heading 'Reliefs, Concessions and Dispensations to the extent 'hence, the excluded securities are no longer enforceable as defined under the resolution plan'. Company Appeal (AT) Ins. No. 199-200 of 2022 are also allowed by deleting the observation in paragraph 29 and paragraph 30* of the Impugned order to the effect that 'Resolution Plan ipso facto discharge the enforcement of excluded securities'. The third prayer in I.A. No. 1799/MB/C-II/2021 filed by the ICICI Bank Limited seeking conversion of dissenting vote to assenting vote to the Resolution Plan is also allowed. Parties shall bear their own costs."*

8. The judgment of this Tribunal clearly conclude that excluded securities including guarantee dated 10.08.2016 given by the Corporate Debtor to ICICI Bank shall continue and ICICI Bank can enforce the securities despite approval of Resolution Plan.

9. Learned counsel for the Respondent has also relied on judgment of this Tribunal in ***"Company Appeal (AT) (Ins.) No.975 of 2022, UV Asset Reconstruction Company Limited vs. Electrosteel Castings Limited"***. In the above case also one of the question which came for consideration was as to whether after approval of the Resolution Plan of the Principal Borrower,

securities became unenforceable or not. One of the question, Question No.9 (II) framed in the case was following:

> *"(II) Whether approval of ESL's Resolution Plan by the Adjudicating Authority led to extinguishment of entire debt of ESL and no claim would lie against Respondent as guarantor/ third party surety in respect of the financial facilities availed by the ESL?"*

10. Following was observed in Paras 50, 51 and 57:

> *"50. Law on extinguishment of claim against personal guarantor and third party on approval of Resolution Plan has been settled by Hon'ble Supreme Court in its judgment in* ***Lalit Kumar Jain vs. Union of India and Ors. – (2021) 9 SCC 321****, where the Hon'ble Supreme Court held that approval of resolution plan does not ipso facto discharge a personal guarantor (of a Corporate Debtor) of her or his liabilities under the contract of guarantee. In paragraph 126 the Hon'ble Supreme Court held following:*
>
> > *"**126.** For the foregoing reasons, it is held that the impugned notification is legal and valid. It is also held that approval of a resolution plan relating to a corporate debtor does not operate so as to discharge the liabilities of personal guarantors (to corporate debtors). The writ petitions, transferred cases and transfer petitions are accordingly dismissed in the above terms, without order on costs."*
>
> *51. There cannot be any dispute to the proposition that after the approval of the Resolution Plan, entire debt of the Corporate Debtor against the Financial Creditor stand discharged and after approval of Resolution*

Plan, Financial Creditor can have no further recourse against the Corporate Debtor. But the question as to whether debt of personal guarantor or third party which arises out of different contract shall also automatically extinguished after the approval of Resolution Plan is a question to be answered in the present case. As noted above, the law laid down by the Hon'ble Supreme Court is categorical that approval of a Resolution Plan does not ipso facto discharge a personal guarantor. We have to look into the Resolution Plan to find out as to whether approval of Resolution Plan discharge guarantor or third parties or not. The learned Senior Counsel for the Appellant has relied on Clause 3.2 of the Resolution Plan, under heading 'Proposal for Workmen and Financial Creditor'. Sub-clause (ix) of Clause 3.2 has been relied, which clearly mentions that Company shall stand discharged of any default, but on the same time it has been mentioned that any rights against any third party shall not be extinguished. It is relevant to extract following relevant part of sub-clause (ix):

> *"… Furthermore, the Company shall stand discharged of any default or event of default under any loan documents or other financing agreements or arrangements (including any side letter, letter of comfort, letter of undertaking etc.) and all rights/ remedies of the creditors shall stand permanently extinguished except any rights against any third party (including the Existing Promoter) in relation to any portion of Unsustainable Debt secured or guaranteed by third parties. Furthermore, it is hereby clarified that upon approval of the Resolution Plan by the NCLT,…."*

57. As noted above in Question (C), which was framed by the Adjudicating Authority was 'Whether the

> *approval of the Resolution Plan has led to extinguishment and effacement of the entire debt of ESL (including the liability owed by the CD)…'. Although, the Adjudicating Authority has returned the finding in paragraph 15 as noted above that "approval of Resolution Plan has led to extinguishment and effacement of the entire debt of ESL", but no finding has been returned as to the liability owed by the Corporate Debtor also stood extinguished or not. In view of our observation as above specially in view of Clause 3.2 of the Resolution Plan, which clearly contemplated that all rights/ remedies of the creditors shall stand permanently extinguished against the Company, except any rights against any third party (including the Existing Promoter) in relation to any portion of unsustainable debt secured or guaranteed by third parties. The finding of the Adjudicating Authority that approval of Resolution Plan has led to extinguishment and effacement of the entire debt of ESL has to be held to be finding qua the Corporate Debtor only. We hold that there is no finding recorded by the Adjudicating Authority in the impugned order that after approval of the Resolution Plan, it would lead to extinguishment and effacement of the entire debt of third party including the Corporate Debtor."*

11. The above judgment does support the submission advanced by learned counsel for the Respondent No.1.

12. Now we come to submission of learned counsel for the Appellant based on Section 134 of the Contract Act. Section 134 of the Contract Act deals

with discharge of surety by release or discharge of principal debtor. Sections 134 is as follows:

> ***"134. Discharge of surety by release or discharge of principal debtor:—***
>
> *The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.*

13. Learned counsel for the Appellant in support of his submission that the Principal Borrower being discharged consequent to approval of Resolution Plan, the Guarantor i.e. the Corporate Debtor shall also stand discharged, has relied on provisions of Section 128, 133, 134 and 135 of Indian Contract Act, 1872. Reliance has been placed on various judgments of different High Courts which need to be briefly noticed. Reliance has been placed on judgment of Bombay High Court in ***"Central Bank of India vs. Ali Mohammad & Anr., 1993 Mh.L.J. 1092"***. Bombay High Court, Nagpur Bench in the said judgment laid down following in Para 13:

> *"13. The above provisions make it clear that any variance in terms of contract, when creditor compounds with, gives time to satisfy loan and promises not to sue the principal debtor, creditor does any act inconsistent with the right of the surety, without surety's consent, surety is discharged."*

14. Next judgment relied by learned counsel for the Appellant is judgment of Kerala High Court in ***"Aypunni Mani vs. Devassy Kochouseph & Ors.,***

AIR 1966 Ker 203" where it was held that liability under Section 128 of the Indian Contract Act is coextensive with that of the principal debtor and if the liability of the principal debtor is scaled down, the liability of the surety is also to that extent reduced.

15. Judgment of Chancery Division in the case of ***"Perry vs National Provincial Bank of England, 1 Ch 464"*** has also been relied where it was held that if the debt is gone, then there can be no right in the Bank to sue the surety, and the security that is given must, as the result of the transaction, be exhausted.

16. Judgment of Orissa High Court in ***"Bhabani Shankar Patra vs. State Bank of India & Anr., AIR 1986 Ori 247"*** has been relied by the Appellant where it was held that by application of Section 139 of Indian Contract Act surety is discharged when creditor does any act which is inconsistent with the rights of the surety. Learned counsel for the Appellant has also placed reliance on judgment of Allahabad High Court in ***"Union Bank of India vs. Chairperson, Debt Recovery Appellate Tribunal & Ors, (2011) SCC OnLine Allahabad 2161"*** where the Allahabad High Court has held that once the liability of the principal debtor stands discharged, the liability of the surety get automatically terminated. The Allahabad High Court in the said case noticing the facts of the case where Official Liquidator made payment to the Bank, the contention of the Bank that by payment received from the Official Liquidator surety was not discharged was rejected. In Para 14 and 15 of the judgment following was laid down:

"14. This submission of Sri Kushal Kant, learned counsel for the bank cannot be accepted. The company had been wound up and the official liquidator had been ap- pointed. The official liquidator had filed Report No. 301 of 2002 before the company judge with a prayer that he may be allowed to disburse Rs. 78,16,428.42 to the bank towards full and final settlement of the claim of the bank submitted before the official liquidator. The bank had filed an application supported by an affidavit of the branch manager that the report of the official liquidator may be accepted and the official liquidator may be directed to disburse Rs. 78,16,428.42 to the bank towards full and final settlement of the claim of the bank before the official liquidator. The company judge accepted the report and passed an order that since the bank had agreed to accept the said amount towards full and final settlement of the claim, the official liquidator shall make the amount. This amount was subsequently paid by the official liquidator to the bank. It cannot, therefore, be urged by the bank that in view of section 134 of the Indian Contract Act, 1872, the surety is not discharged. The official liquidator had stepped into the shoes of the company when it was wound up. The decision in the case of United Bank of India, AIR 1988 Cal 18: [1990] 69 Comp Cas 697, relied upon by learned counsel for the bank is not applicable to the facts of the present case.

15. The second submission of learned counsel for the bank that discharge of the principal borrower by operation of the bankruptcy law will not discharge the guarantors is also without any force and needs to be

> *rejected. The bank had accepted the amount to- wards full and final settlement of its claim submitted before the company judge and the principal borrower did not stand discharged because of operation of law. The decision of the Supreme Court in Maharashtra State Electricity Board, (1982) 3 SCC 358: AIR 1982 SC 1497: [1983] 53 Comp Cas 248, therefore, does not help the petitioner-bank. On the other hand, the submission of Sri R.P Agarwal, learned counsel for the respondents that the liability of the surety gets automatically terminated when liability of principal debtor is extinguished, deserves to be accepted."*

17. Learned counsel for the Appellant has also placed reliance on judgment of the Bombay High Court in ***"Vinod S/o Chaganlal Daga vs. Sriram Chits Pvt. Ltd., (2018) 1 Mh. L.J. 575"*** where the Bombay High Court held that if suit is dismissed against the principal debtor, in view of Section 134 of the Contract Act, the sit abates against the sureties as well.

18. Another judgment relied by learned counsel for the Appellant is judgment of Hon'ble Supreme Court in the matter of ***"S. K. Gupta vs. K. P. Jain, (1979) 3 SCC 54"*** where Hon'ble Supreme Court in Para 12 of the judgment held that when the scheme is sanctioned it does not merely operate as agreement between the parties but has statutory force and is binding not only on the company but even dissenting creditors and members, as the case may be. Following was held in Para 12 of the judgment:

> *"12. Section 391 envisages a compromise or arrangement being proposed for consideration by members and/or creditors of a Company liable to be*

wound up under the Companies Act, 1956. Compromise or arrangement has to be between creditors and/or members of the Company and the Company, as the case may be. It was always open to the Company to offer a compromise to any of the creditors or enter into arrangement with each of the members. The scheme in this case is essentially a compromise between the company and its unsecured creditors. The scheme when sanctioned does not merely operate as an agreement between the parties but has statutory force and is binding not only on the company but even dissenting creditors or members, as the case may be. The effect of the sanctioned scheme is "to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity" (see J. K. (Bombay) Pvt. Ltd., v. New Kaiser-I-Hind Spg. & Wvg. Co. Ltd. & Ors. etc.(1). Further section 391(1) itself by a specific and positive provision prescribes who can move an application under it. Only the creditor or member of that company or a liquidator in the case of a company being wound up is entitled to move an application proposing a compromise or arrangement. By necessary implication any one other than those specified in the section would not be entitled to move such an application.

19. The judgment relied by learned counsel for the Appellant as noticed above were on interpretation of Section 133, 134 and 139 of the Contract Act. There can be no quarrel to the proposition laid down in the above cases

relying on the provisions of Contract Act which provides for circumstances in which surety has to be treated as discharged.

20. We in the present case are concerned with claim of discharge of a Guarantor consequent to approval of Resolution Plan under the I&B Code. There are judgments of Hon'ble Supreme Court directly covering the issue raised in this appeal. It shall be suffice to notice judgment of Hon'ble Supreme Court which has been also referred by learned counsel for the Appellant as well as learned counsel appearing for the Respondent. Judgment of Hon'ble Supreme Court in ***"Lalit Kumar Jain vs. Union of India, (2021) 9 SCC 321"*** is the judgment which considered as to whether after approval of Resolution Plan, the Guarantor shall ipso facto be treated to be discharged from the liabilities. Hon'ble Supreme Court in the above case has clearly held that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. Supreme Court in judgment of ***Lalit Kumar Jain*** has relied on its earlier judgment in ***"Maharashtra State Electricity Board, Bombay vs. High Court Ernakulan, (1982) 3 SCC 358"***. Para 7 of the judgment of ***Maharashtra SEB*** was quoted in Para 122 of the judgment in ***Lalit Kumar Jain***. In Para 122 of the judgment in ***Lalit Kumar Jain***, the Hon'ble Supreme Court laid down following:

> *"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 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)

> *"7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Contract Act, 1872, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under Section 134 of the Contract Act, 1872 by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may*

> *secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability (see Jagannath Ganeshram Agarwale v. Shivnarayan Bhagirath; see also Fitzgeorge, In re).""*

21. Hon'ble Supreme Court in ***Lalit Kumar Jain*** after referring to few other judgments held that approval of Resolution Plan does not ipso facto discharge a personal guarantor of a Corporate Debtor. In Para 125 of the judgment following was laid down:

> *"125. In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this Court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract."*

22. It is to be noted that the judgment of the Hon'ble Supreme Court in ***Lalit Kumar Jain*** has also been subsequently relied and reiterated by the Hon'ble Supreme Court. We may refer to judgment of Hon'ble Supreme Court in ***"Maitreya Doshi vs. Anand Rathi Global Finance Ltd. & Anr., 2022 SCC OnLine 1276"*** wherein in Para 36, Hon'ble Supreme Court has quoted the judgment of ***"Lalit Kumar Jain vs. Union of India" (supra)*** holding that the approval of a resolution plan in relation to a Corporate Debtor does not discharge the guarantor of the Corporate Debtor. Para 36 of the judgment is as follows:

> *"36. The proposition of law which emerges from the judgment is that a pledgor per se may not be a Financial Debtor. However, in this case, as observed above, the Appellate Authority arrived at a factual finding that Disha Holdings was a borrower. In Lalit Kumar Jain v. Union of India, this Court held that the approval of a resolution plan in relation to a Corporate Debtor does not discharge the guarantor of the Corporate Debtor. On a parity of reasoning, the approval of a resolution in respect of one borrower cannot certainly discharge a co-borrower."*

23. In recent judgment of Hon'ble Supreme Court in ***"Ajay Kumar Radheyshyam Goenka vs. Tourism Finance Corporation India Ltd, (2023) 10 SCC 545, 2023 SCC OnLine SC 266"*** where question arose for consideration as to whether for approval of Resolution Plan by virtue of Section 31 process Section 138 of NI Act cannot be continued. The Court in the above case relied on judgment of Hon'ble Supreme Court in ***"Lalit Kumar Jain vs. Union of India" (supra)*** to held that approval of Resolution Plan per se does not per se operate as a discharge of the guarantor's liability. In Para 80, 81 and 82 following was held:

> *"**Argument that as the debt stood extinguished by virtue of Section 31 of the Code, the criminal proceedings under Section 138 of the NI Act cannot continue as regards the Director/ signatory***
>
> ***80.** The argument that as the debt stood extinguished by virtue of Section 31 IBC, the proceedings under Section 138 of the NI Act cannot*

continue as regards the Director/signatory, would run contrary to the line of reasoning assigned by this Court that the "Involuntary Act" of the principal debtor would not absolve the guarantors.

81. *This Court in Lalit Kumar Jain v. Union of India has held that the approval of the resolution plan per se does not operate as a discharge of guarantors' liability. That is because:*

(a) an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability.

(b) a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability.

82. *The same principle is applicable to the signatory/Director in the case of Sections 138/141 proceedings. The signatory/Director cannot take benefit of discharge obtained by the corporate debtor by operation of law under IBC."*

24. Hon'ble Supreme Court further in ***"State Bank of India vs. V. Ramakrishnan, (2018) 17 SCC 394"*** noticing Section 31 (1) of the I&B Code held that 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. In Para 25 of judgment following has been held:

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

25. The above judgments of the Hon'ble Supreme Court clearly lays down that by approval of Resolution Plan the Guarantor is not absolved from its liability to the Financial Creditors. We have also noticed above that the Resolution Plan of the Principal Borrower clearly contemplated that the guarantee in favour of the Financial Creditor shall continue and shall not be discharged. The judgment of this Tribunal dated 11.03.2022 arising out of approval of Resolution Plan of the Principal Borrower has been noticed in the preceding paragraphs of this judgment where this Tribunal has clearly held that guarantee continues even after approval of the Resolution Plan. Thus, the issue of continuance of guarantee by guarantor of the Corporate Debtor

after approval of Resolution Plan is no more open to be contested, it having been firmly settled by this Tribunal by judgment dated 11.3.2022, as noticed above. We, thus, do not find any substance in submission of learned counsel for the Appellant that after approval of Resolution Plan of the Principal Borrower, the liability of the Guarantor shall come to an end.

26. The Adjudicating Authority dealt with the submission of the Appellant on Section 134 and repelled the same in Para 42 of the judgment, which observation of the Adjudicating Authority is as follows:

> *"42. From the above discussion, the Bench is of the view that Clause 3.3 (iii)(c) of the Resolution Plan approved cannot be treated to be an independent contract. Even otherwise, Section 134 of the Contract Act, 1872 is not applicable to the facts and circumstances of the present case. Here, it is worth mentioning that Section 134 comes into picture only when a contract is modified by the Principal Borrower and the Creditor without the consent of the Guarantor. Here the change in the alleged contract by way of resolution plan is taking place by operation of law and not by act of the parties. Therefore, the provisions of Section 134 of the Contract Act are also not applicable, and the guarantee cannot be said to have been extinguished in terms of section 134 of the Contract Act simply because of the approval of the resolution plan, whereby the debt of the principle borrower is stated to have been resolved. The contention raised by the Corporate Debtor is, therefore, repelled."*

27. We fully concur with the view taken by the Adjudicating Authority in Para 42 that Section 134 is not attracted in the facts of the present case.

28. Now we come to the submission of learned counsel for *the* Appellant relying on clause 33 of the Corporate Guarantee dated 10.08.2016. Clause 33 of the Corporate Guarantee dated 10.08.2016 is as follows:

> *"Notwithstanding anything herein above stated our liability under this guarantee shall not exceed Rs.250 Million. This Guarantee will fall off in the event the outstanding of Borrower is less than or aggregate of Rs.2,180 Million out of Rs.2,500 Million (due as on date with ICICI Bank Limited under various facilities provided to the Borrower)."*

29. Although no ground was taken in the appeal by the Appellant on basis of Clause 33, however, an Additional Affidavit was filed where this ground was sought to be raised. The averments in Para 3 (ii), (iii), (iv) and (v) are as follows:

> *"(ii) I say that in the instant case the Respondent Bank has assented to the Resolution Plan on 11th March 2022 thus consenting to the distribution with respect to the Resolution Plan which was distributed in three parts, viz., Part A pertaining to Preference Shares amounting to Rs. 273,38,49,866; Part B pertaining to Cash Payment under the plan amounting to Rs. 2,06,00,000 and Part C pertaining to Debt at Nil Consideration amounting to Rs. 19,06,85,789. On adding all three part, the amount Rs. 294,51,35,655/- determines the Admitted Claim of the Respondent Bank.*

(iii) I say that as per the Resolution Plan for the Principal Borrower i.e. Ushdev International Limited the Respondent Bank is being paid upfront cash payment of Rs. 2,06,00,000/- and Preference Shares of a sum of Rs. 273,38,49,866/-.

(iv) I say that an amount of Rs. 19,06,85,789/- is Residual Debt out of the Admitted Debt which is being settled at "NIL" consideration.

(v) I say that Clause 33 of the Corporate Guarantee provides that the liability of the Corporate Guarantor shall automatically fall off if the amount payable by the Principal Borrower falls below Rs. 2,180 Million or Rs. 218 Crores. Since the amount of Rs. 19.06 Crores is the only amount which is not being paid, it becomes the only outstanding of the Principal Borrower. Since the sum of Rs. 19.06 Crores is less than the threshold limit of Rs. 218 Crores under the Corporate Guarantee, the Corporate Guarantee given by Ushdev Engitech Ltd. automatically stands terminated and unenforceable."

30. The above submission of the Appellant has been refuted by ICICI Bank by filing a reply to the Additional Affidavit. Learned counsel for the Respondent has submitted that the Appellant cannot be allowed to raise a new ground at belated stated as an afterthought. It is submitted no such ground was taken by the Appellant in the appeal nor such ground was pleaded before the Adjudicating Authority.

31. Respondent, however, without prejudice to the objection, questioning entertainability of the ground has submitted reply to the above ground. The Respondent submits that total debt of the Principal Borrower was above Rs.218 Crore as on the date of invocation of Corporate Guarantee. In Para 11, 12, 13, 14 and 15 of the reply to the Additional Affidavit following has been stated:

> *"11. It is submitted that, as on the date of invocation of the Corporate Guarantee, i.e., 16 October 2017, the debt due and payable by the principal borrower, i.e., UIL was over* ***INR 230 Crores****. This is an admitted position as the said debt amount has never been disputed by UEL, neither at the time of invocation, nor in its pleadings before the Hon'ble NCLT Mumbai. Respondent No.1 craves leave to refer and rely upon documents in support of the same, if necessary.*
>
> *12. Hence, it is submitted that when the UEL Guarantee was not challenged on the ground of Clause 33 as on the date of its invocation, it cannot be challenged now at this belated stage as an afterthought.*
>
> *13. Further, as on the date of filing of the Insolvency Application against UEL, the debt due and payable by UIL to ICICI Bank was approximately INR 295 Crores. This is also reflected in the claim form filed by ICICI Bank with the RP of UIL which has been admitted by the RP and remains undisputed and is also a part of the record before this Hon'ble Appellate Tribunal. Hence, apart from*

invocation, even as on date of filing, Clause 33 of the UEL Guarantee was not applicable.

Without prejudice, the UIL Plan does not reduce the debt of UIL below INR 218 Crores.

14. *The submission of the Appellant that the conversion of the unpaid debt of Respondent No.1 into preference shares amounts to payment of UTL's debt (which the Appellant has call ed "Part A" of the payment in the Additional Affidavit) is entirely misplaced and ought to be rejected.*

15. *It is submitted that a bare perusal of Clause 3.3(iii)(e)(H) of Schedule XII of the UIL Plan which provides the terms of the Preference Shares makes it clear that the preference shares are nothing but another form of debt. It is notable that the preference shares are non-convertible into equity and have no shareholder rights such as dividend or voting rights. Hence, it is clear that such preference shares are nothing but a mechanism and/or a distinct nomenclature used for financial liability/debt and cannot be themselves construed as payment of the unpaid debt of UIL.*

Without prejudice, no payments have been received under the UIL Plan and tile debt still remains over INR 218 Crores*."*

32. It is further submitted by the Respondent that ICICI Bank has not received any payment under Resolution Plan and total amount due and payable has not fallen below Rs.218 Crore.

33. We have perused the pleadings made by the Appellant as well as ICICI Bank on the question as raised above. From the facts brought on the record, it is clear that when Corporate Guarantee was invoked by the ICCI Bank on 16.10.2017 debt of more than Rs.218 Crore was due on the Principal Borrower. Initiation of proceeding against the Principal Borrower for admitted claim of Rs.294,51,35, 655/- itself proves that debt of the Principal Borrower was more than Rs.218 Crores. According to own case of the Appellant, upfront cash has been proposed of only Rs.2,06,00,000/- and rest amount of Rs.273,38,49,866/- was to be paid in preference shares. We, thus, are not able to accept the submission of the Appellant that the guarantee dated 10.08.2016 stood terminated and unenforceable. We, thus, also do not find any substance in this submission.

34. The Adjudicating Authority after considering all relevant aspects of the matter has admitted the Section 7 application against the Corporate Guarantor, in which we do not find any infirmity. There is no merit in the appeal. Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

2nd July, 2024

Archana