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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
BEFORE

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

\+ **W.P.(C) 3293/2023 & CM APPL 12815/2023**

Between: -

VINEET SARAF
H-21, MAHARANI BAGH
NEW DELHI- 110065 .....PETITIONER

(Through: Mr. Jayant Mehta, Senior Advocate alongwith Mr. Anirudh Wadhwa, Mr. Keshav Gulati, Mr. Shashwat Awasthi, Mr. Kanishk Garg, Mr. Debarshi Chakraborty & Anu Srivastava, Advocates.)

AND

RURAL ELECTRIFICATION CORPORATION LTD.
THROUGH ITS HEAD OF DEPARTMENT (FINANCE-RECOVERY)
HAVING ITS REGISTERED OFFICE AT:
CORE- 4, SCOPE COMPLEX,
7, LODHI ROAD, GCO COMPLEX,
PRAGATI VIHAR, NEW DELHI-110003
ALSO THROUGH ITS NOMINATED COUNSEL:
MS. RAAVI BIRBAL
313, LAWYERS CHAMBERS
DELHI HIGH COURT, NEW DELHI .....RESPONDENT

(Through: Mr. Sudhir Makkar, Senior Advocate alongwith Mr. Karan Batura, Mr. Jayant Chawla, Ms. Saumya Gupta & Ms. Shweta Singh, Advocates.)

% Pronounced on: 21.07.2023

J U D G M E N T

1. The petitioner has filed the instant writ petition seeking quashing of the impugned Demand Notice dated 09.12.2022 issued by

the respondent i.e., Rural Electrification Corporation Limited(hereinafter '**REC Ltd.**') under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (hereinafter **'Rules, 2019')** invoking the personal guarantees of the petitioner for the purported total outstanding debt of Rs. 1211,91,94,259 (hereinafter '**impugned demand notice**').

2. As per the facts of the case, the petitioner stood as a personal guarantor for a loan obtained by one FACOR Power Ltd. (hereinafter '**FPL**') for a sum of Rs.517.90 crores from the respondent i.e, REC Ltd. The loan agreement was dated 22.05.2009 (amended on 29.10.2010, 28.06.2013 and 12.11.2014). The deed of personal guarantee was executed on 24.08.2009 (amended and restated on 29.10.2010, 21.06.2013 and 22.01.2015).

3. The aforesaid loan, other than being secured by the petitioner in the capacity of a personal guarantor, was also *inter alia* secured by a corporate guarantee on behalf of one Ferro Alloys Corporation Ltd. (hereinafter '**FACOR**').

4. The respondent is a Maharatna Company under the Ministry of Power and is a 'State' within the definition of Article 12 of the Constitution of India.

5. On account of the default being committed by FPL in repaying the loan, the respondent in May, 2017 initiated Corporate Insolvency Resolution Process (hereinafter '**CIRP**') in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 (hereinafter **'IBC'**), against FACOR, which culminated in a Resolution Plan being

submitted by one Sterlite Power Transmission Limited (hereinafter **'SPTL'**) dated 13.11.2019.

6. Thereafter, the said Resolution Plan was also approved by National Company Law Tribunal (NCLT), Cuttack on 30.01.2020. The operative part of the order dated 30.01.2020 passed by the NCLT, Cuttack reads as under:-

> *"19. The Resolution Plan submitted by M/s Sterlite Power Transmission Limited (S.PTL) i.e. Resolution Applicant, approved by 95.15 % of voting share in 31st Committee of Creditors Meeting dated 13.11.2019 is APPROVED, as per Section 31 (1) of the Insolvency and Bankruptcy Code, 2016. Accordingly, the same shall be binding on the Corporate Debtor and its employees, members, all creditors including Central and State Government and local authorities, guarantors and other stakeholders."*

7. The order passed by the NCLT, Cuttack on 30.01.2020 approving the Resolution Plan was carried in an appeal before the National Company Law Appellate Tribunal (NCLAT) by the promoters of FPL.

8. *Vide* final judgment dated 25.11.2020, the NCLAT dismissed the appeal against the NCLT order dated 30.01.2020. Paragraph nos. 51-55 of the said judgment dated 25.11.2020 are reproduced as under:-

> *"51. Based on the above discussion, it is clear that the Appellant abstained from voting but participated in the Resolution Process. The Appellant was fully aware of the developments from Resolution Process from up to the approval of the Resolution Plan before the Adjudicating Authority but never raised any objection. The Appellant has directly filed the Appeal before this Appellate Tribunal after withholding of material information from this Tribunal. Therefore, the Appellant of Appeal No. 462 of 2020 is not entitled for any relief in view of the Law laid down by the Hon'ble Supreme Court in(1994) 1 S.C.C. Page 1, wherein it is observed that;*
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> ***"One who comes to the Court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property-***

> ***grabbers, tax-evaders, bank-loan dodgers and other unscrupulous persons from all walks of life find the Court process a convenient liver to retained the illegal gains indefinitely. We have no hesitation to say that a person, who's Case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of litigation."***

52. It is pertinent to mention that FPL is a subsidiary of the Corporate Debtor, and Appellant belongs to the erstwhile promoter group of the Corporate Debtor. In a similar case, the shareholders of FACL/ Corporate Debtor had challenged the Approved Resolution Plan before this Appellate Tribunal in Company Appeal (AT) (Insolvency) No.207 and 208 of 2019 raising identical grounds, which was dismissed. It is not open to the Appellants to prefer a separate appeal on similar grounds being raised in Company Appeal (AT) (Ins.) No.207 & 208 of 2019. It is not open for a Party to contend that certain points had not been urged and the effect of the Judgment can be collaterally challenged.

53. In Case of ***Anil Kumar Neotia v. Union of India, (1988) 2 SCC 587 at page 600*** *Hon'ble Supreme Court has held that:*

> *"17. Furthermore, we are of the opinion that the Law as declared by this Court in Doypack Systems Pvt. Ltd. [(1988) 2 SCC 299] is binding on the petitioners and this question is no longer res integrain view of Article 141 of the Constitution. See the observations of this Court in Shenoy and Co. v. CTO [(1985) 2 SCC 512 : AIR 1985SC 621: (1985) 3 SCR 659] where this Court observed that the Judgment of this Court in Hansa Corporation case [State of Karnataka v. Hansa Corporation, (1980) 4 SCC 697 : (1981) 1 SCR823 : AIR 1981 SC 463] is binding on all concerned whether they were parties to the Judgment or not. This Court further observed that to contend that the conclusion therein applied only to the parties before this Court was to destroy the efficacy and integrity of the Judgment and to make the mandate of Article 141 illusory.*
>
> *18. In that view of the matter this question is no longer open for agitation by the petitioners. It is also no longer open to the petitioners to contend that certain points had not been urged and the effect of the Judgment cannot be collaterally challenged. --------*
> *Thus it is clear that the binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided.*

> *54. The legal position is well settled that an approved Resolution Plan can deal with the related party claim and extinguish the same which shall ensure that the Successful Resolution Applicant can take over the Corporate Debtor on a clean slate. The related Parties are being kept out to ensure continuity of operation of both FACL and FPL following the provisions of the Code. We also do not find any substance based on which it can be inferred that the Resolution Plan is not in conformity with the provisions of Code as provided under Sec 30(2) of the Insolvency and Bankruptcy Code, 2016.*
> *55. Based on the above discussion, we are of the considered opinion that there are no reasons for interference in the Order passed by the Adjudicating Authority and both the Appeals are without merit, hence dismissed. No order as to Costs."*

9. The matter was thereafter carried before the Hon'ble Supreme Court in Civil Appeal No. 5991-5992 of 2021, however, the same was also dismissed in terms of the order dated 27.09.2021 which reads as under:-

> *"We have heard learned Senior Counsel for the parties for quite some time.*
>
> *We are unable to persuade ourselves to interfere in the judgments impugned dated 12.03.2020 in Civil Appeals @ Diary No. 2669/2021 and dated 25.11.2020 in Civil Appeal No.5129/2021 passed by the National Company Law Appellate Tribunal, New Delhi.*
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> *Consequently, the Civil Appeals stand dismissed.*
>
> *Pending application(s), if any, shall stand disposed of."*

10. Mr. Jayant Mehta, learned senior counsel assisted by Mr. Anirudh Wadhwa, Mr. Keshav Gulati, Mr. Shashwat Awasthi and Mr. Kanishk Garg, advocates appearing on behalf of the petitioner submitted that the issuance of the impugned demand notice was clearly an indication of the respondent's intention to approach the adjudicating authority under Section 95 of the IBC in relation to, what they term, a non-existent debt. The impugned demand notice was therefore without jurisdiction.

11. He also submitted that as on date, there exists no debt as against FPL that the respondent can recover, and therefore, there arises no question of the petitioner being in the position of a personal guarantor.

12. It is also submitted on behalf of the petitioner that in terms of the Resolution Plan dated 13.11.2019 of FACOR, the respondent had agreed to irrevocably transfer, assign and convey its entire debt given to FPL and all rights, title and interest thereon to FACOR, including all benefits, interest and claims thereunder, the recoveries in relation to such debt, and the rights to make claims pursuant to such debt, forever along with all rights thereto absolutely and forever.

13. The assignment of loan was then carried out by and through the Assignment Agreement dated 21.09.2020 (hereinafter **'said Assignment Agreement'**). Clauses 2.1.1, 7 and 8.2 of the said Assignment Agreement has been pressed into service. The said clauses are reproduced as under:-

> *"2.1.1 In consideration of the insolvency resolution of the Assignee and the Upfront Payment and Total Consideration payable to the Financial Creditors (including the Assignor) in accordance with the Resolution Plan, and subject to compliance and performance of the other obligations under the Resolution Plan, and upon the terms and conditions set forth herein and in the relevant Transaction Documents, the Assignor as the true, legal and beneficial owner of the Loans, m the ordinary course of its business, hereby, from the Effective Date, unconditionally and irrevocably sells, assigns, transfers and releases to and unto the Assignee all the Loans and all the rights (including proprietary rights), title, and benefits, interest and claims thereunder save and except the Excluded Assets and the recoveries on relation to the Loans and the right to make claims pursuant to the Loans forever, TO HOLD the same absolutely TO THE END AND INTENT THAT the Assignee shall hereafter be deemed to be the full and absolute legal owner, and the only person legally entitled to the Loans or any pan thereof, and to recover and receive all Amounts Due (except the Excluded Assets), including the right to file a suit or application or institute such other recovery or resolution proceedings and take such other action as may be required for the*

purpose of recovery of the loans, in its own name and right and as an assignee, and not as a representative or agent of the Assignor and to exercise all other rights of the Assignor in relation thereto

...

*7. **EFFECTIVE DATE OF AGREEMENT***

*Notwithstanding anything contrary contained herein, this Agreement shall be effective on the date on which its respective portions of Upfront Payment and Total Consideration in accordance with the terms of Resolution Plan arc received by the Assignor **("Effective Date").** With effect from the Effective Date. all economic benefits pertaining to the Loans as of such date, including all realisations and recoveries. if any, made on and after said date shall be for the benefit of the Assignee and shall be transferred and passed on to the Assignee.*

.....

8.2 ENTIRE AGREEMENT

This agreement supersedes all discussions and agreements (whether oral or written. including all correspondence) prior to the date of this Agreement among the parties with respect to the subject matter of this agreement."

14. According to the learned senior counsel for the petitioner, on the assignment of the loan i.e., the underlying principal debt, the respondent ceased to be a creditor of FPL, and as a result of it, no debt whatsoever was due from FPL to the respondent. It is, therefore, their case that since the underlying principal debt no longer vests with the creditor i.e., the respondent, they cannot invoke the guarantee.

15. It is also submitted on behalf of the petitioner that the guarantee is a secondary obligation securing the performance of a primary obligation, namely, the principal debt, i.e., the loan. It is thus, their case that since the primary debt was assigned by the respondent, there is no secondary debt, which they claim is inextricably linked to the primary debt that the respondent can attempt to realise.

16. It is also submitted on behalf of the petitioner that, independently and additionally, it is the respondent's own

understanding that upon transfer of shares held/controlled by the promoters, they would stand discharged of their personal guarantees (‘**Exit Option**’). The shares have admittedly been transferred by the promoters under the Share Purchase Agreement dated 03.08.2022 (hereinafter ‘**said Share Purchase Agreement’**), therefore, it is their case that the transfer of shares independently discharges the personal guarantee of the petitioner.

17. While placing reliance on different provisions of the Indian Contract Act, 1872 (hereinafter ‘**ICA**’), it is submitted on behalf of the petitioner that the obligation of the personal guarantor is coextensive to the obligation of the borrower. When there exists no loan at all, there can be no contract of guarantee in law. If the Resolution Plan contains any contrary condition to the legal position, the same would not create or vest in the respondent i.e., REC Ltd. a legal right in law to recover any amount from the petitioner as there is no enforceable legal right in favour of the petitioner. It is thus their case that the Resolution Plan—firstly, cannot provide for terms that are contrary to substantive law; and secondly, in the case that it does, the same remains unenforceable.

18. It is also submitted on behalf of the petitioner that any other recourse i.e., to allow the respondent to recover the debt from the petitioner would lead to unjust and irrational consequences. It is further submitted on behalf of the petitioner that REC’s formulation would mean that notwithstanding the said Assignment Agreement, the very same loan can be recovered not only by FACOR but also by the respondent i.e., REC Ltd. and it would mean that the loan is being recovered twice. It would therefore be arbitrary, and shall amount to

unjust enrichment. It is their submission that the same would be violative of Article 14 of the Constitution.

19. Learned senior counsel appearing on behalf of the petitioner has taken this court through various clauses of the said Assignment Agreement and other relevant documents to indicate that if the impugned action of the respondent is allowed to continue, the same would have drastic consequences, immediately upon submission of an application before the NCLT as against the petitioner.

20. It is highlighted that once the application under Section 95 of the IBC is filed, the interim moratorium would immediately commence under Section 96 of the IBC and the appointment of Resolution Professional would take place under Section 97 of the IBC.

21. It is also submitted on behalf of the petitioner that it is only the Resolution Professional who determines whether the application is complete and examines the merits of the same for the first time under Section 99 of the IBC and it is only after the filing of the report under Section 99 that the Adjudicating Authority may reject the application under Section 100 of the IBC.

22. It is further submitted on behalf of the petitioner that non-interference in the demand notice will expose the petitioner to a wholly frivolous proceeding under Part III of the IBC where, the petitioner has to defend the application under Section 95 of the IBC and not the impugned demand notice.

23. Reliance has been placed on behalf of the petitioner on a decision of the Division Bench of the High Court of Gujarat at Ahmedabad in the case of ***Prashant Shashi Ruia v. State Bank of***

India*[1]. A reference is also made to the follow up decision dated 11.03.2022 passed by the Debts Recovery Tribunal-I at Ahmedabad in the case titled as ***State Bank of India and others. v. Prashant Ruia and Anr.[2] in pursuance to the decision of the Division Bench of the High Court of Gujarat at Ahmedabad in the case of ***Prashant Shashi Ruia*** *(supra).*

24. Mr. Sudhir Makkar, learned senior counsel assisted by Mr. Karan Batura, Mr. Jayant Chawla, Ms. Saumya Gupta and Ms. Shweta Singh appearing on behalf of the respondent opposed the submissions made on behalf of the petitioner. It is their submission that the instant writ petition is not maintainable as there exists an alternate efficacious remedy available to the petitioner—it being to agitate their concerns before the NCLT.

25. It is submitted on behalf of the respondent that the petitioner by invoking the extraordinary writ jurisdiction of this court under Article 226 of the Constitution of India cannot scuttle the rights of the respondent to invoke proceedings under the provisions of the IBC.

26. He has also submitted that the impugned demand notice is a statutory notice which has been issued consequent upon the petitioner committing defaults of fulfilling his commitments as categorically mentioned in the Resolution Plan dated 13.11.2019.

27. It is further submitted on behalf of the respondent that once the application has been filed before the NCLT, then in terms of Section 97 of the IBC, the NCLT will firstly direct the Insolvency and Bankruptcy Board of India (‘**IBBI**’), within seven days of filing of

[1]MANU/GJ/2177/2021.
[2] O.A. No. 650/2018, I.A. 106/2022

such application, to nominate a Resolution Professional for the insolvency resolution process and thereafter, the Board will nominate a Resolution Professional within ten days of receiving the direction issued by the NCLT.

28. Thereafter, after examining the application referred to Section 95 of the IBC, the Resolution Professional shall within ten days of his appointment, submit a report to the NCLT recommending the approval or rejection of the application.

29. However, where the application has been filed under Section 95 of the IBC, the Resolution Professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor by furnishing—(a) evidence of electronic transfer of the unpaid amount from the bank account of the debtor; (b) evidence of encashment of a cheque issued by the debtor; or (c) a signed acknowledgment by the creditor accepting receipt of dues.

30. After examining the submissions of the debtor, the Resolution Professional is mandated to submit its final report to the NCLT who thereafter passes the final order of admission or rejection of the application. It is thus stated that there are sufficient safeguards provided under the IBC. The learned senior counsel for the respondent therefore submits that the debtor, at appropriate stages, will get ample opportunity to present, represent and defend his case before the passing of any final order(s).

31. On merits, it is submitted that personal guarantees were specifically kept outside the Resolution Plan dated 13.11.2019.

32. Reliance has been placed by learned senior counsel for the respondent on Clause 3(c)(iv)(g) of the Resolution Plan, the same is reproduced as under:-

> *"(g) FACOR Power Limited ('FPL") – Upon Implementation of the Resolution Plan, as an integral part of this Resolution Plan, REC shall on Closing Date:*
>
> *(i) Release its charge on the shares held by the Company in FPL;*
>
> *(ii) Transfer, assign and convey its entire debt given to FPL and all rights, title and interest thereto to the Company; and*
>
> *(iii) Invoke and enforce or cause the invocation and enforcement of, as the case may be, the pledge on FPL's shares that are pledged for the benefit of REC and shall/shall cause transfer of the same to the Company.*
>
> *(iv) In lieu of the personal guarantee provided by existing promoters (and the irrelative/controlled entities) of the Company for debt of FPL, require each of the existing promoters and their relatives, controlled entities and Affiliates ('Existing Promoter Group"), to transfer shares held by them in FPL to the Company. It is clarified that such transfer is subject to concurrence of the relevant shareholders and REC and hence non transfer of shares held by Existing Promoter Group as sought for, shall not impact the effectiveness or implementation of the Resolution Plan.*
>
> ***It is clarified that the personal guarantee and third party collateral given to Financial Creditors to secure the debt of the Company and FPL shall continue with such respective Financial Creditors and such Financial Creditors shall have full right to enforce such securities even after plan Effective Date.***
>
> *The terms and conditions of the Resolution Plan including the insolvency resolution of the Company and the Total Consideration payable to the Financial Creditors is due, adequate and sufficient consideration for the obligations of REC in respect of FPL and for the transfer of the shares of FPL to the Company, as provided in this sub-clause (iv)(g)."*
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> *[Emphasis supplied]*

33. Reliance has also been placed on behalf of the respondent on Clause 3(c)(xi) of the said Resolution Plan dated 13.11.2019, which is reproduced as under:-

> *"(xi) Save and except the transfer of shares of FPL pledged for the benefit of REC to the Company, as contemplated in Section*

> *3(c)(iv)(g) and Annexure 2,* ***the Resolution Plan shall in no way affect the validity and enforceability of (A) the personal guarantees executed by the person in the promoter group; (B) the corporate guarantees executed by third parties; and (C)any other security created by a third party, as of the insolvency commencement date of the company, for securing the debt of the Company and the Financial Creditors shall be entitled to take all steps and remedies and recourse available to them in Applicable Law for the non-recovery of the uncovered financial debt(i.e., the total dues of the of the Financial Creditors less the aggregate of (i) the Upfront Amount; and (ii) Total Consideration received by such Financial Creditors as part of the Resolution Plan) from such guarantors and/or third party security providers, under their respective security documents****."*
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> *[Emphasis supplied]*

34. It is thus stated on behalf of the respondent, that the personal guarantee and the third part collateral given to Financial Creditors to secure the debt of 'the Company' and FPL continued and such financial creditors had full right to enforce such securities even after Plan Effective Date for the recovery of the unrecovered financial debt.

35. It is further submitted that the Resolution Plan did not affect the validity and enforceability of the personal guarantees executed by the persons in the promoter group; the corporate guarantees executed by the third parties; and any other security created by a third party, as of the insolvency commencement date of 'the Company', for securing the debt of 'the Company' and the financial creditors were entitled to take all steps and remedies and recourse available to them under the applicable law for non-recovery of the uncovered financial debt.

36. It is clarified that the unrecovered financial debt would mean the total dues of the financial creditors less the aggregate of (i) the 'Upfront Amount'; and (ii) total consideration received by such financial creditors as part of the Resolution Plan.

37. It is further clarified that the total claim filed by the respondent during the CIRP of FACOR was Rs.740.86 crores (principal amount being Rs. 510.98 crores) and the amount realized by the respondent from the Resolution Plan is Rs.301.99 crores and the unrecovered financial debt as on the closing date i.e., 21.09.2020 is Rs.208.99 crores.

38. It is also submitted on behalf of the respondent that the petitioner has failed to comply with its obligation as mentioned in Clause 3(c)(iv)(g) as on the date of the execution of the assignment i.e. the closing date, the personal guarantee and the third party collateral given to financial creditors to secure the debt of 'the Company' and FPL continued with such respective financial creditors and such financial creditors shall have full right to enforce such securities even after Plan Effective Date.

39. While referring to Clause 1 of the said Assignment Agreement, which defines 'Excluded Assets', it is submitted that the debt of FPL along with the underlying securities was assigned to FACOR, save and except the 'Excluded Assets', which includes all personal guarantees provided by any individual for guaranteeing the 'Loans' including the petitioner herein.

40. It is also submitted that the said Share Purchase Agreement is not in terms of the approved Resolution Plan but is an independent commercial transaction and according to the respondent, the Resolution Plan cannot be reinterpreted before this court in view of applicability of the doctrine of merger.

41. It is thus stated that once the Resolution Plan has attained finality after the pronouncement of the Hon'ble Supreme Court,

therefore, at this stage, it would be misinterpretation of the terms and conditions of the Resolution Plan to exclude the liabilities of the personal guarantees which have been specifically excluded by the terms of the Resolution Plan.

42. Reliance has been placed on behalf of the respondent, on a decision of the Hon'ble Supreme Court in the case of ***Lalit Kumar Jain v. Union of India & Ors***.[3], to submit that the release or discharge of a principal borrower from the debt owned by it to its creditor, by an involuntary process, i.e., by operation of law, or due to liquidation or insolvency process, does not absolve the surety/guarantor of his/her liability which arises out of an independent contract. Paragraph no. 125 of the said judgment has been specifically pressed into service.

43. Learned senior counsel appearing on behalf of the respondent has placed reliance on a decision of the Division Bench of the High Court of Gujarat at Ahmedabad, which has also been cited by the learned senior counsel appearing on behalf of the petitioner, in the case of ***Prashant Shashi Ruia*** *(supra),* to submit that the Division Bench in this case did not interfere with the action initiated by the bank and rather left it to the Tribunal to apply its mind and take a final decision.

44. Reliance has also been placed on behalf of the respondent on a decision of the Hon'ble Supreme Court in the case of ***Phoenix ARC Private Limited v. Vishwa Bharati Vidya Mandir and Ors.***[4]**,** to submit that any petition having the effect of delaying the recovery proceedings of debt, normally, should not be entertained under Article 226 of the Constitution of India.

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[3] (2021) 9 SCC 321.
[4] (2022) 5 SCC 345.

45. In rejoinder submissions, learned senior counsel appearing on behalf of the petitioner has distinguished the decisions relied upon by the respondent, and it has been submitted that *pari materia* clauses were under consideration of the Division Bench of the High Court of Gujarat at Ahmedabad, wherein, it has been held that the recovery under the personal guarantees had come to an end upon the assignment of the principal debt.

46. The decision in the case of ***Lalit Kumar Jain*** *(supra)* has been distinguished while submitting that in the said case the Hon'ble Supreme Court primarily was adjudicated upon the *vires* and validity of a notification, whereby, the provisions of Part III of the IBC were made applicable to the personal guarantors and to corporate debtors. The observations, if any, by the Hon'ble Supreme Court were, therefore, entirely in the context of a guarantor claiming discharge solely on the ground of the principal borrower being discharged. They submit that the decision in the case of ***Lalit Kumar Jain*** *(supra)*, did not deal with the present factual situation of a contractual assignment of the debt by the lender, the creditor having been left with no loan, and therefore not being able to invoke the guarantee.

47. It is submitted that in the instant case, the petitioner's guarantees were for FPL's debt and not that for the erstwhile corporate debtor i.e., FACOR. Thus, learned senior counsel for the petitioner submits, that when a principal borrower is the corporate debtor and faces insolvency proceedings, the principal debt stands extinguished once the Resolution Plan is approved and in the present dispute, the debt has never been extinguished, it still persists.

48. Reliance has also been placed on behalf of the petitioner on a decision of the High Court of Bombay in the case of ***Shantilal Ambalal Mehta v. M.A. Rangaswamy***[5]**,** to submit that the existence of an alternative efficacious remedy is not a bar to entertain a writ petition under Article 226 of the Constitution of India. It has also been submitted that the High Court may exercise its writ jurisdiction despite the availability of an alternative efficacious remedy if the actions, orders or proceedings complained of, are wholly without jurisdiction or arbitrary.

49. Reliance has also been placed on behalf of the petitioner on the decisions of the Hon'ble Supreme Court in the cases of ***Godrej Sara Lee Ltd. v. Excise and Taxation Officer-cum-Assessing Authority and Ors.***[6]***, Radha Krishan Industries v. State of Himachal Pradesh And Ors***.[7] and ***Zonal Manager, Central Bank of India v. Devi Ispat Limited and Ors***.[8]

50. It is also submitted that the demand notice can be quashed despite the availability of an alternative efficacious remedy if the same is found to be without jurisdiction and to support the said contention, reliance has been placed on a decision of this court in the case of ***Bhushan Power and Steel Ltd. v. Union of India, Through its Secretary Ministry of Finance and Ors.***[9], a decision of the High Court of Bombay in the case of ***Murli Industries Limited, Through its Dy. Ex. Director v. Assistant Commissioner of Income Tax and***

[5] 1977 SCC OnLine Bom 69.
[6] 2023 SCC OnLine SC 95.
[7] (2021) 6 Supreme Court Cases 771.
[8] (2010) 11 SCC 186.
[9] 2022 SCC OnLine Del 2337.

Ors.[10] and a decision of the High Court of Allahabad in the case of ***Covestro (India) Pvt. Ltd. v. State of U.P. and Anr***.[11]

51. It is submitted that the NCLT has limited jurisdiction while approving the Resolution Plan, and therefore, the aspects highlighted in the instant case would not be adjudicated therein. To support the said contention, reliance has been placed on a decision of the Hon'ble Supreme Court in the case of ***Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta***.[12]

52. I have heard the submissions made by learned senior counsel appearing on behalf of the parties and perused the record.

53. This court must first examine the nature of relief sought by the petitioner.

54. The petitioner primarily seeks a writ of prohibition, preventing the respondent from approaching the concerned NCLT under the provisions of the IBC. An ancillary relief is also sought for, to quash the impugned demand notice.

55. A concise origin of the writ of prohibition can be found in **De Smith's Judicial Review,** 7th Ed., paragraph no. 15-017, which reads as under:

> *"Prohibition is one of the oldest writs known to the law. From the first its primary function seems to have been to limit the jurisdiction of the ecclesiastical courts. The examples given by Glanvill show that it would issue at the suggestion of a subject, and the prohibitory clause recites that the suits in question "ad coronam et dignitatem meam pertinent". It later came to be used as a weapon by the common law courts in their conflicts with the Courts of Chancery and Admiralty.*

[10] 2021 SCC OnLine Bom 6187.
[11] 2023 SCC OnLine All 41.
[12] (2020) 8 SCC 531

> *The early history of the writ and its verbal identification with the rights of the Crown help to explain the extravagant language in which later lawyers were wont to describe its qualities. Thus, in Warner v Suckerman [(1615) 3 Bulst. 119; see also Skin. 626.] Coke J., holding that it would issue to the courts of the County Palatine of Lancaster, said: "It is breve regium and jus coronae, and if this writ shall be denied in such cases, this would be in laesionem, exhereditationem, et derogationem coronae."*
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> *The matter was expressed more soberly in another case: "The King is the indifferent arbitrator in all jurisdictions, as well spiritual and temporal, and [it] is a right of his Crown to ...declare their bounds" by prohibitions. [Doctor James's Case (1621) Hobart 17; 80 ER 168].*
>
> *Disobedience to a prohibition was conceived of as a contempt of the Crown. Since it was "the proper power and honour of the King's Bench to limit the jurisdiction of all other courts the writ usually issued out of that court; but it could also be awarded by the Chancery and the Common Pleas.*

56. In **Halsbury's Laws of England**, 5th Ed., Vol. 61A, para. 111, a prohibition order is explained in the following words:

> *"A prohibiting order is an order issuing out of the High Court and directed to an inferior court or tribunal or public authority or a body susceptible to judicial review which forbids that court or tribunal or authority or body to act in excess of its jurisdiction or contrary to law."*

57. **Sir Michael Supperstone, James Goudie QC, and Sir Paul Walker's Judicial Review**, 4th Ed., at page 561, in a lucid manner explains prohibition. It states as under:

> *"**PROHIBITING ORDERS***
>
> ***The early form: prohibition***
>
> ***16.4-16.4.1** In its original form the writ of prohibition was used primarily to limit the jurisdiction of the ecclesiastical courts. It would issue on the application of a subject. It increasingly came to be used by the common law courts to limit the jurisdiction of the Chancery and Admiralty courts. By the 17th century it too was established as one of the most common and effective means of supervising local administration which was largely unsupervised by central government.*
>
> ***The modern form: the prohibiting order***

> ***16.4.2*** *The modern prohibiting order is a coercive remedy granted by the High Court and directed to an inferior court, tribunal, public authority or any other body or persons who are susceptible to judicial review which forbids it to act in excess of its statutory or other public law powers, or forbids it from abusing those powers. It is therefore a negative order intended to preclude future unlawful action or decisions, or to preclude future actions to implement existing decisions. For that reason a prohibiting order may be granted with a quashing order to avoid the implementation of an unlawful decision. An order will be granted where the public body affected has misdirected itself or is otherwise acting under some misapprehension as to the law or as to its lawful powers. An order will not be granted unless something remains to be done that the court can prohibit."*

58. In ***S. Govinda Menon v. Union of India***[13]**,** the Hon'ble Supreme Court explained the jurisdiction for the writ of jurisdiction. In paragraph no. 5 the Hon'ble Supreme Court stated as under:

> *"**The jurisdiction for grant of a writ of prohibition is primarily supervisory and the object of that writ is to restrain courts or inferior tribunals from exercising a jurisdiction which they do not possess at all or else to prevent them from exceeding the limits of their jurisdiction. In other words, the object is to confine courts or tribunals of inferior or limited jurisdiction within their bounds. It is well-settled that the writ of prohibition lies not only for excess of jurisdiction or for absence of jurisdiction but the writ also lies in a case of departure from the rules of natural Justice** (See Halsbury's Laws of England, 3rd Edn; Vol. 11, p. 114). It was held for instance by the Court of Appeal in The King v. North 1927 (1) K.B. 491 that as the order of the judge of the consistory court of July 24, 1925 was made without giving the vicar an opportunity of being heard in his defence, the order was made in violation of the principles of natural justice and was therefore an order made without jurisdiction and the writ of prohibition ought to issue. **But the writ does not lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. It is also well-established that a writ of prohibition cannot be issued to a court or an inferior tribunal for an error of law unless the error makes it go outside its jurisdiction (See Regina v. Comptroller-General of Patents and Designs 1953 (2)***

[13] AIR 1967 SC 1274.

> ***W.L.R. 760, 765 and Parisienne Basket Shoes Proprietary Ltd. v. Whyte 59 C.L.R. 369.***"
>
> *[Emphasis supplied]*

59. An important finding of the Hon'ble Supreme Court in ***S. Govinda Menon*** *(supra)*, relating to the distinction between want of jurisdiction and the manner in which it is exercised, is particularly relevant for the present dispute. It reads as under:

> "***A clear distinction must therefore be maintained between want of jurisdiction and the manner in which it is exercised. If there is want of jurisdiction then the matter is coram non judice and a writ of prohibition will lie to the court or inferior tribunal forbidding it to continue proceedings therein in excess of its jurisdiction.***"
>
> *[Emphasis supplied]*

60. The Hon'ble Supreme Court, in a seven-judge Bench decision, in the case of ***Hari Vishnu Kamath v. Syed Ahmad Ishaque &Ors.***[14]**,** explicated upon the writ of prohibition. The material part of the judgement is reproduced as under:

> "***15.*** *... When an inferior court takes up for hearing a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move the superior court for a writ of prohibition, and on that, an order will issue forbidding the inferior court from continuing the proceedings..*"

61. A writ of prohibition can therefore be issued, when a petitioner has made out a case for want of jurisdiction. However, in cases where jurisdictional challenges can be agitated before an alternate forum, circumspection must be observed before a writ of prohibition can be granted.

62. Indeed, the authorities do not treat the existence of an alternate remedy as a bar to grant the writ of prohibition. In the landmark case

[14] AIR 1955 SC 233.

of ***Whirlpool Corpn. v. Registrar of Trade Marks***[15] as well, the Hon'ble Supreme Court declared that in cases where proceedings are wholly without jurisdiction, an alternate remedy does not bar relief. The material part of the judgement is reproduced as under:

> **"15.** *Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or* ***where the order or proceedings are wholly without jurisdiction*** *or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."*
>
> *[Emphasis supplied]*

63. Similarly, the Hon'ble Supreme Court in the case of ***Radha Krishnan Industries*** *(supra)*, after considering a catena of earlier pronouncements, summarized the exceptions to the rule of alternate remedy in the following words:

> *"27.3. Exceptions to the rule of alternate remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c)* ***the order or proceedings are wholly without jurisdiction****; or (d) the vires of a legislation is challenged.*
>
> *27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.*
>
> *27.5.* ***When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort***

[15] (1998) 8 SCC 1.

> ***must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.***"
>
> *[Emphasis supplied]*

64. The observations of the Bombay High Court in the case of ***Shantilal Ambalal Mehta v. MA Rangaswamy***[16] also resonate the aforesaid principle. The material part of the judgement is reproduced as under:

> *"50. The question is whether it can be said that by insertion of cl. (3) in art. 226 the mere existence of another remedy for seeking redress which the petitioner prays for in his petition, the jurisdiction of the High Court to grant relief is taken away. It is important to note that even in respect of cases falling under sub-cls. (b) and (c) of cl. (1), the writs which the High Court is entitled to issue are the same which it cap issue for the purposes of sub-cl. (a). One of the writs which can be issued even in a case which falls within cls. (b) and (c) is a writ of prohibition. In a case where proceedings are being taken against a person entirely without jurisdiction, can it be said that it was intended while introducing cl. (3) in art. 226 that he must go the entire proceeding when it is possible for him to show on the face of the proceeding at the threshold that it is entirely unauthorised and illegal."*

65. Despite the existence of an alternate remedy not being a bar to grant the writ of prohibition, it is a valid consideration that needs to be given its due weightage while entertaining a petition praying for a writ of prohibition.

66. The Hon'ble Supreme Court in the case of ***Thirumala Tirupathi Devasthanam & Anr. v. Thallappakka Anathacharyulu & Anr.***[17] ruled that cogent and specific reasons would be required, on the part of the petitioner, in order to prevent a forum from deciding upon

[16] 1977SCC OnLine Bom69
[17] (2003) 8 SCC 134.

its own jurisdiction. The material part of the pronouncement reads as under:

> *"On the basis of the authorities it is clear' that the Supreme Court and the High Court have power to issue writs, including a writ of prohibition. A writ of prohibition is normally issued only when the inferior. Court or Tribunal (a) proceeds to act' without or in excess of jurisdiction, (b) proceeds to act in violation of rules of natural justice, (c) proceeds to act under law which is itself ultra vires or unconstitutional, or (d) proceeds to act in contravention of fundamental right. The principal which govern exercise of such power must be strictly observed.* ***A Writ of Prohibition must be issued only in rarest of rare cases. Judicial disciplines of the highest order has to be exercised whilst issuing such writs. It must be remembered that the writ jurisdiction is original jurisdiction distinct from appellate jurisdiction.*** *An appeal cannot be allowed to be disguised in the form of a writ. In other words, this power cannot be allowed to be used "as a cloak of an appeal disguise".* ***Lax use of such a power would impair the dignity and integrity of the subordinate Court and could also lead to chaotic consequence. It would undermine the confidence of the subordinate Court.***
>
> *... In other words the High Court should not usurp the jurisdiction of the civil Court to decide these questions. In the impugned Judgment no reason, much less a cogent or strong reason, has been given as to why civil Court could not be allowed to decide these questions. The impugned judgment does not state that the civil Court had either proceeded to act without or in excess of jurisdiction or that it had acted in violation of rules of natural justice or that it had proceeded to act under law which was ultra vires or unconstitutional or proceeded to act in contravention of fundamental rights. The impugned judgment does not indicate as to why the High Court did not consider it expedient to allow the civil Court to decide on questions of maintainability of the suit or its own jurisdiction.* ***The impugned judgment does not indicate why the civil Court be not allowed to decide whether the suit was barred by virtue of Section 14 of the said Act or on principal of res judicata/estoppel. To be remembered that no fundamental right is being violated when a Court of competent jurisdiction is deciding rightly or wrongly matters before it.*** *"*
>
> *[Emphasis supplied]*

67. Further in ***Isha Beevi v. Tax Recovery Officer***[18]**,** the Hon'ble Supreme Court examined the issuance of prohibition and certiorari when an alternative remedy is available to the petitioner. In paragraph no. 5 the Hon'ble Supreme Court stated as under:

> "5. *We may point out that the reliefs claimed in the Writ Petitions were Writs of Certiorari, and Mandamus and Prohibition.* ***It is clear to us, after perusal of those so called "orders" sought to be quashed that they were only notices of commencement of recovery proceedings by attachment of certain properties****.* ***Final orders could only be passed after the appellants have had their opportunities to object under Rule 11 of the 2nd Schedule of the 1961 Act because the notices purport to be only preliminary notices under Rule 48 of the 2nd Schedule to the 1961 Act. These proceedings could only be quashed even at this stage, if they were entirely without jurisdiction.*** *Otherwise, a prayer for quashing proceedings would, obviously, be premature. No occasion for the issue of a writ of Mandamus can arise unless the applicants show non-compliance with some mandatory provision and seek to get that provision enforced because some obligation towards them is not carried out by the authority alleged to be flouting the law.* ***The grievance of the appellants, however, is that the tax recovery officer had no jurisdiction whatsoever to start tax recovery proceedings against them. They have, therefore, asked for writs of prohibition.*** ***The existence of an alternative remedy is not generally a bar to the issuance of such a writ or order. But, in order to substantiate a right to obtain a writ of prohibition from a High Court or from this Court, an applicant has to demonstrate total absence of jurisdiction to proceed on the part of the officer or authority complained against. It is not enough if a wrong section of provision of law is cited in a notice or order if the power to proceed is actually there under another provision***."

68. Similarly in ***State of UP v. Nooh***[19]**,** the Hon'ble Supreme Court noted, in the context of the writ of certiorari, the modern-day terminology being 'quashing order', as follow:

> *"11. On the authorities referred to above it appears to us that there may conceivably be cases — and the instant case is in point — where the error, irregularity or illegality touching jurisdiction or procedure committed by an inferior court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its*

[18] 1975 AIR 2135
[19] (1958) SCR 595.

decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior court or tribunal of first instance ***acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play the superior court may****, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity for reasons aforementioned. This would be so all the more if the tribunals holding the original trial and the tribunals hearing the appeal or revision were merely departmental tribunals composed of persons belonging to the departmental hierarchy without adequate legal training and background and whose glaring lapses occasionally come to our notice. The superior court will ordinarily decline to interfere by issuing certiorari and all we say is that in a proper case of the kind mentioned above it has the power to do so and may and should exercise it. We say no more than that."*

[Emphasis supplied]

69. Undeniably, the principle of ***Nooh*** *(supra)*, has application in the instant case, not merely because the petitioner prays for the impugned demand notice to be quashed, but also because the writs of certiorari and prohibition are complementary in nature, having a common ground of 'lack of jurisdiction'.

70. It is also of significance to consider that the standard a petitioner needs to meet becomes even stricter when an alternate remedy is provided through a statutorily established forum, specifically designed to address the kind of disputes the petitioner aims to bring before a writ court. It is in this context that the pronouncement of the Hon'ble Supreme Court in the case of ***Phoenix ARC*** *(supra)*, needs to be appreciated. The material part of the judgement reads as under:

> *"21. Applying the law laid down by this Court in Mathew K.C.7 to the facts on hand, we are of the opinion that filing of the writ petitions by the borrowers before the High Court under Article 226 of the Constitution of India is an abuse of process of the court. The writ petitions have been filed against the proposed action to be taken under Section 13(4). As observed hereinabove, even assuming that the communication dated 13-8-2015 was a notice under Section 13(4), in that case also,* ***in view of the statutory, efficacious remedy available by way of appeal under Section 17 of the SARFAESI Act, the High Court ought not to have entertained the writ petitions****. ... Filing of the writ petition by the borrowers before the High Court is nothing but an abuse of process of court. It appears that the High Court has initially granted an ex parte ad interim order mechanically and without assigning any reasons. The High Court ought to have appreciated that by passing such an interim order, the rights of the secured creditor to recover the amount due and payable have been seriously prejudiced. The secured creditor and/or its assignor have a right to recover the amount due and payable to it from the borrowers. The stay granted by the High Court would have serious adverse impact on the financial health of the secured creditor/assignor.* ***Therefore, the High Court should have been extremely careful and circumspect in exercising its discretion while granting stay in such matters. In these circumstances, the proceedings before the High Court deserve to be dismissed.***
>
> *[Emphasis supplied]*

71. It must be noted that the observation of the Hon'ble Supreme Court in ***Phoenix ARC*** *(supra)*, are not restricted to the examination of the stay granted by the High Court in the said case, but also relate to the question of entertaining a petition where an alternate statutory remedy is available. Paragraph no. 14 of the judgement is reproduced as under:

> *"14. Applying the law laid down by this Court in the aforesaid decisions,* ***it is required to be considered whether, in the facts and circumstances of the case, the High Court is justified in entertaining the writ petitions against the communication dated 13-8-2015*** *and to pass the ex parte ad interim order virtually stalling/restricting the proceedings under the SARFAESI Act by the creditor."*
>
> *[Emphasis supplied]*

72. In ***United Bank of India v. Satyawati Tandon***[20] relied upon in ***Phoenix ARC*** *(supra)*, the Hon'ble Supreme Court in further detail explained the position of law in relation to entertaining a petition where a statutorily provided alternate remedy exists. The material part of the pronouncement reads as under:

> *'"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person.* ***Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.***
>
> *44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.*
>
> ***45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision,***

[20] (2010) 8 SCC 110.

> ***etc. and the particular legislation contains a detailed mechanism for redressal of his grievance***.
>
> *[Emphasis supplied]*

73. Indeed, there are sound reasons for not entertaining a petition before a writ court, where the relief being prayed for can be sought from a statutorily established forum. If the writ courts routinely grant reliefs—which could have been sought from an alternate forum established by way a statute—the court, in effect, obviates the will of the Parliament. It would be a disservice to the legislature and to the laws passed by it, to not give the requisite regard to its intention of dealing with a category of disputes through a specific procedure and specialised forums.

74. On similar lines, the Court of Appeal in ***Regina v. Panel on Take-Overs & Mergers, Ex parte Guinness Plc.***[21] noted the following:

> *"The rationale for this self-imposed fetter upon the exercise of the court's jurisdiction is twofold.* ***First, the point usually arises in the context of statutory schemes and if Parliament directly or indirectly has provided for an appeals procedure, it is not for the court to usurp the functions of the appellate body****. Second, the public interest normally dictates that if the judicial review jurisdiction is to be exercised, it should be exercised very speedily and, given the constraints imposed by limited judicial resources, this necessarily involves limiting the number of cases in which leave to apply should be given."*
>
> *[Emphasis supplied]*

75. From the analysis above, it can be concluded that the existence of an alternate remedy does not act as a bar to entertain a petition praying for a writ of prohibition. In cases where an alternate remedy is available to the petitioner, there is a higher threshold that needs to be met, it being of a total and absolute lack of jurisdiction, in order for a

[21] (1989) 2 WLR 863.

writ court to grant relief. The existence of a statutorily prescribed alternate remedy, where a specialized forum is competent to decide upon its own jurisdiction, the burden upon a petitioner is further compounded. In such a scenario, the petitioner needs to convince the court, not merely that the proceedings or actions being taken are wholly without jurisdiction but also why the alternate forum must be deprived of an opportunity to decide upon its own jurisdiction.

76. This court must now examine as to whether the case presented by the petitioner qualifies and meets the aforementioned condition.

77. The petitioner contends that the respondent must be prevented from approaching the concerned NCLT under Section 95 of the IBC, and the impugned demand notice must be quashed as there is no 'debt' the petitioner owes to the respondent.

78. The impugned demand notice is issued under Rule 7 of the Rules, 2019. Rule 7 is reproduced as under:

> *"7. Application by creditor.— (1) A demand notice under clause (b) of sub-section (4) of section 95 shall be served on the guarantor demanding payment of the amount of default, in Form B.*
>
> *(2) The application under sub-section (1) of section 95 shall be submitted in Form C, along with a fee of two thousand rupees.*
>
> *(3) The creditor shall serve forthwith a copy of the application referred to in sub-rule (2) to the guarantor and the corporate debtor for whom the guarantor is a personal guarantor.*
>
> *(4) In case of a joint application, the creditors may nominate one amongst themselves to act on behalf of all the creditors."*

79. The impugned demand notice records the following particulars of the debt:

PARTICULARS OF DEBT

1.	*Total outstanding debt (including any interest or penalties)*	Rs.1211,91,94,259/-
2.	*Amount of debt in default*	Rs.1211,91,94,259/-
3.	*Date when the debt was due*	21.09.2020 (closing date on which the resolution plan of FACOR was implemented)

80. It may be seen that Rule 7 of Rules, 2019 is a requirement mandated by Section 95(4)(b) of the IBC. Section 95 of the IBC reads as under:

> *95. Application by creditor to initiate insolvency resolution process.—(1) A creditor may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application.*
>
> *(2) A creditor may apply under sub-section (1) in relation to any partnership debt owed to him for initiating an insolvency resolution process against—*
>
> *(a) any one or more partners of the firm; or*
>
> *(b) the firm.*
>
> *(3) Where an application has been made against one partner in a firm, any other application against another partner in the same firm shall be presented in or transferred to the Adjudicating Authority in which the first mentioned application is pending for adjudication and such Adjudicating Authority may give such directions for consolidating the proceedings under the applications as it thinks just.*
>
> *(4) An application under sub-section (1) shall be accompanied with details and documents relating to—*
>
> *(a) the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application;*
>
> ***(b) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand; and***

> *(c) relevant evidence of such default or non-repayment of debt.*
>
> *(5) The creditor shall also provide a copy of the application made under sub-section (1) to the debtor.*
>
> *(6) The application referred to in sub-section (1) shall be in such form and manner and accompanied by such fee as may be prescribed.*
>
> *(7) The details and documents required to be submitted under sub-section (4) shall be such as may be specified.*

81. It is therefore clear that Section 95(4)(b) of the IBC mandates the existence of a 'debt'.

82. It is the case of the petitioner that the consequence of the respondent assigning the entire debts to FACOR whilst excluding the personal guarantees, under the terms of the Resolution Plan and the said Assignment Agreement, is that the respondent can no longer invoke the guarantee furnished by the petitioner.

83. The petitioner, in support of its contention, relies upon ***Prashant Shashi Ruia*** *(supra)*. This court is, however, not inclined to rely upon the case of ***Prashant Shashi Ruia*** *(supra)* directly, as the learned senior counsel for the respondent points out, in the said case, the High Court of Gujarat dismissed the petition, and did not grant the relief prayed for by the petitioner.

84. Since the observation on the merits of the dispute in the case of ***Prashant Shashi Ruia*** *(supra)*, were held by the High Court of Gujarat to be *prima facie*, this court does not consider it fit to place reliance on the same. This court cannot then, automatically rely upon the said decision. Paragraph no. 97 of ***Prashant Shashi Ruia*** *(supra)* is reproduced as under:

> *"97. We clarify that any observation on merits direct or indirect shall be construed as absolutely prima facie in nature and those*

shall not be construed as an expression of any final opinion on the issue as regards the jurisdiction of the Tribunal or the pivotal issue of assignment of debt and its effects."

85. In ***Hutchens v. Deauville Investments Pvt. Ltd***.[22], relied upon by the petitioner, the High Court of Australia observed as under:

"As we followed the argument, it was suggested that, by such a transaction, ***Hutchens' liability as a guarantor could be transformed into an independent liability to a different creditor from the creditor to whom the guaranteed debt remained owing. That suggestion would seem to lie ill with the basic principle that the debt owed by a guarantor, upon default by the principal debtor, is and remains the same debt as that owing by the principal debtor. Put differently, it would seem to be simply impossible, as a matter of basic principle, to assign the benefit of a guarantee or the security for it (as distinct from the property secured) while retaining the benefit of the guaranteed debt and thereby to convert the one debt owing by both principal debtor and guarantor to the one creditor into two debts, one owing by the principal debtor to the creditor and the other owing by the guarantor to the assignee. If it were otherwise, the position would seem to be that, by assigning the benefit of a guarantee and the guarantor's security and retaining the benefit of a principal debtor's indebtedness and the principal debtor's security, a creditor could effectively divorce the guarantor's liability from that of the principal debtor and effectively deprive the guarantor of the rights which flowed from his position as such including (where available) his rights of subrogation.*** *In that regard, the case of a purported assignment of the debt of a guarantor while retaining the benefit of the guaranteed debt is, subject to one qualification, analogous to that to which Jacobs J.A. referred in International Leasing Corp. Ltd v. Aiken [1967] 2 N.S.W.R. 427 at 439:*

> *"**If the debt is assigned but the guarantee is not assigned then the right in the original creditor to recover under the guarantee must at least be suspended so long as the debt is assigned. There cannot be two persons entitled to recover the amount of the same debt, one from the principal debtor, and so long as the principal debtor was in default, another from the surety. Let it be assumed otherwise and suppose that the original creditor, the assignor of the principal debt, could show that it was***

[22] (1986) 68 A. L.R. 367.

> ***overdue and thereupon sued the surety. Let it be assumed that the surety paid. Then, the assignee sues the principal debtor. He must be entitled to succeed unless there are some special circumstances of estoppel in the particular case, a factor which I place to one side. The assignee under an absolute assignment could not be deprived of his right to recover from the debtor because the assignor had recovered from the surety****."*
>
> *[Emphasis supplied]*

86. At the threshold, it must be considered whether the dictum of ***Hutchens*** *(supra)* is constrained by the peculiar facts of the case or is a general pronouncement on the rights of the surety. In this context, it would be apposite to consider a few judgements of the Australian courts that explain the effect of ***Hutchens*** *(supra)*.

87. In ***Mark Sensing (Aust.) Pvt. Ltd. v. Flammea***[23]**,** the Supreme Court of Victoria Court of Appeal in paragraph no. 21 stated as under:

> *"[21] I return to the appellants' principal argument. It is unnecessary to cite authority for the proposition that the benefit of a contract of guarantee is assignable as a legal chose in action. It is a question of construction of the assignment of the principal debt whether the benefit of a guarantee such as the present, and not merely the principal debt, was intended to be assigned to the assignee. 3 Wherever the words of assignment provide expressly for the assignment of the guarantee in respect of a debt, the position is clear. If, however, there has been no express assignment of the guarantee, the words used may nonetheless be construed as sufficiently broad to extend to related securities, if the assignee is able to show that the express assignment of the principal contract has impliedly carried with it the benefit of the guarantee; Consolidated Trust Co Ltd v Naylor; Farrow Mortgage Services Pty Ltd v Hogg and Cathie.* ***But if the creditor simply assigns the benefit of the principal contract and the words of the assignment are limited to that transaction, the benefit of the guarantee securing it will not follow the assignment; International Leasing Corp. (Vic.) Ltd v Aiken. In this situation, neither the assignor nor the assignee is able to enforce the guarantee; International Leasing Corp. (Vic.) Ltd v Aiken; Hutchens v Deauville Investments Pty Ltd.****"*

[23] (2003) VSCA 41.

[Emphasis supplied]

88. Further in ***Langbein v. Mottershead Investments Pvt. Ltd.***[24] the Federal Court of Australia in paragraph no. 40 explained the *ratio* of ***Hutchens***:

> *"[40**] It is also to be observed that it is impossible, as a matter of basic principle, to assign the benefit of a guarantee while retaining the benefit of the guarantee debt and thereby to convert the one debt owing by both principal debtor and guarantor to the one creditor into two debts, one owing by the principal debtor to the creditor and the other owing by the guarantor to the assignee: Hutchens v Deauville Investments Pty Ltd [1986] HCA 85**; 68 ALR 367 at 373 per Gibbs CJ, Mason, Wilson, Brennan and Deane JJ citing International Leasing Corp Ltd v Aiken [1967] 2 NSWR 427 at 439 per Jacobs JA There could thus not logically have been any intention not to assign the warranty."*
>
> *[Emphasis supplied]*

89. In ***Adelaide Bank Ltd. v. Property Builders Pvt. Ltd.***[25], the Supreme Court of New South Wales in paragraph no. 64-65 considered the pronouncement in ***Hutchens*** in the following light:

> *"[64] The letter of 21 August does not prove that there has been an assignment of the guarantee. That assignment must be proved otherwise than by the letter merely giving notice of the assignment. The documents do not support the assignment of the guarantee. Although, as I have noted, cl 6.6 of the Deed of Guarantee contemplates that the lender may assign the guarantee and that the guarantor's obligations are not thereby changed, I do not think the presence of that clause alone is sufficient to infer that on any assignment of the debt the guarantee was itself assigned along with the debt: Cf International Leasing at 451 per Asprey JA, and see the criticism of Asprey JA's statement in Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd [1976] 1 NSWLR 5 at 12 and by O'Donovan and Phillips, **The Modern Contract of Guarantee, 3rd ed (1996) LBC at 509. The better view is that the presence of the clause allowing for assignment of the guarantee is not of itself sufficient to infer that the guarantee was assigned with the debt.**"*

[24] (2020) FCA 1790.
[25] (2009) NSWSC 849.

> *[65] But in any event, the assignment of the debt was not, as I have held, effective because no notice in writing was given to the debtor as s 12 required.* ***A guarantee cannot be assigned without the benefit of the principal obligation because otherwise "a creditor could effectively divorce the guarantor's liability from that of the principal debtor": Hutchens v Deauville Investments Pty Ltd (1986) 68 ALR 367 at 373.****"*
>
> *[Emphasis supplied]*

90. Similarly, in ***Property Builders Pvt. Ltd. v. Adelaide Bank Ltd.***[26]**,** the Supreme Court of New South Wales Court of Appeal, further extended the pronouncement in ***Hutchens*** *(supra)* and observed as under:

> ***[50] In these circumstances there was, in my opinion, no basis upon which Adelaide Bank was entitled to sue Mr Phontos on the guarantee. In Hutchens v Deauville Investments Pty Ltd [1986] HCA 85 ; (1986) 68 ALR 367 the holder of a guarantee sought to sue a surety in circumstances where it had assigned the principal debt. The High Court stated it was not entitled to do so. The court cited with approval a passage from the judgment of Jacobs J in International Leasing Corporation Ltd v Aiken [1967] 2 NSWR 427 at 439 to the following effect:***
>
> ***If the debt is assigned but the guarantee is not assigned then the right in the original creditor to recover under the guarantee must at least be suspended so long as the debt is assigned. There cannot be two persons entitled to recover the amount of the same debt, one from the principal debtor, and so long as the principal debtor was in default, another from the surety.***
>
> ***[51] The position is the same when the assignee of the principal debt seeks to sue on a guarantee which has not been assigned to it.***
>
> *[Emphasis supplied]*

91. In the authoritative textbook of the **Law of Guarantees by Geraldine Andrews QC and Richard Millet QC**, 6th Ed., the following is stated at paragraph no. 7-031:

[26] (2011) NSWCA 266.

"If the contract of suretyship is a guarantee, the assignee of the guarantee or other security must also be the assignee of the underlying debt. In Hutchens v Deaville Investments Pty Ltd (1986) 68 A. L.R. 367, the Australian High Court held that the debt owed by a guarantor on default of the principal is the same debt as is owed by the principal. ***Accordingly, a creditor cannot assign the benefit of a guarantee or other security for the principal debt whilst at the same time purporting to retain the benefit of the guaranteed debt, thus converting one debt into two, one of which is owed by the guarantor to the assignee and the other by the principal debtor to the assignor.*** *"*

[Emphasis supplied]

92. On similar lines, **The Modern Contract of Guarantee by O' Donovan and Philips,** 4th Ed., at paragraph no. 6-113 and 6-114 noted as under:

"Where the principal transaction is assigned without the benefit of the guarantee, so it is likely that the assignor cannot enforce the guarantee. ***The High Court of Australia in Hutchens v Deauville Investments Pty referred with approval to comments by Jacobs JA in International Leasing Corp (Vic) Ltd y Aiken [(1986) 68 ALR 367] outlining the incongruous result which would occur if the position were otherwise:***

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

For similar reasons, in Hutchens v. Deauville Investments Ptv. Ltd. it was held that a guarantee (or the security for it) cannot be assigned without the benefit of the principal transaction.

[Emphasis supplied]

93. Further, Guest on **The Law of Assignment by AG Guest, 1st Ed.,** at paragraph no.1-25 culls out the following from ***Hutchens*** *(supra)*:

> *"Where the benefit of the guarantee is assigned, but not the benefit of the principal debt, it has been held [Hutchens v. Deauville Investments Ptv Ltd. (1986) 68 ALR 367, 373] that the assignee cannot enforce the guarantee: there cannot be two persons entitled to enforce the guarantee: there cannot be two persons entitled to enforce the same debt. For the same reason, where the benefit of the principal debt is assigned, but not the benefit of the guarantee, it may be the that the assignor cannot enforce the guarantee. [International Leasing Corp. Ltd. v. Aiken (1967) 2 NSWR 427, 439]"*

94. It is, therefore, the case that the judgement of ***Hutchens*** *(supra)* is not restricted to the particular facts of the case, but rather is a pronouncement on the general law of surety.

95. The declaration of ***Hutchens*** *(supra)* that an assignment of the underlying principal debt with an exclusion of guarantee, results into the assignor being unable to invoke the guarantee, seems to rest upon two independent grounds.

96. Firstly, that the assignment, by splitting the debt, adversely affects the rights of the surety. An assignment of this kind, when analysed through this lens, may possibly undermine a variety of different benefits that a surety is entitled to under the Indian Contract Act, 1872 (hereinafter **'ICA'**). For instance, in the present case, the right of subrogation, may be seen to have become illusory. If at all in the present case, the assignor is allowed to enforce the guarantee, and the guarantor subsequently pays the entire debt, the guarantor could not, then, meaningfully make a claim for subrogation, as the principal debtor still owes the debt to the assignee.

97. The nuance of this finding in ***Hutchens*** *(supra)*, must be carefully considered. In the context of subrogation, it is not that the guarantor's right gets compromised when the claim for subrogation arises, that is, upon the fulfillment of the entire debt, but the right is trampled upon when the creditor voluntarily acts in a manner, including entering into of an agreement or arrangement, that results into a situation where the surety cannot exercise his rights. On similar terms, the assignment may also constitute an act by the creditor that has impaired the eventual remedy of the surety.

98. The material provisions from ICA read as under:

> ***126. "Contract of guarantee", "surety", "principal debtor" and "creditor".***—*A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.*
>
> ***127. Consideration for guarantee***.—*Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.*
>
> ***133. Discharge of surety by variance in terms of contract***.—*Any variance, made without the surety's consent, in the terms of the contract between the principal and the creditor, discharges the surety as to transactions subsequent to the variance.*
>
> ***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.*
>
> ***135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.***—*A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.*

> ***136. Surety not discharged when agreement made with third person to give time to principal debtor***.—*Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.*
>
> ***137. Creditor's forbearance to sue does not discharge surety***.—*Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.*
>
> ***138.Release of one co-surety does not discharge others.***—*Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.*
>
> ***139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy.***—*If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.*

99. Importantly, however, it may be seen that a guarantor may waive these beneficial rights that he is so entitled to under the ICA. The general principle of the law allowing beneficial provisions to be waived off by the consent of the beneficiary is equally applicable in the context of the surety's rights under the ICA. The surety may waive his rights either through express and specific terms in the contract of guarantee itself, or through a subsequent agreement between the guarantor and the creditor to that effect.

100. In ***HR Basavaraj v. Canara Bank***[27] the Hon'ble Supreme Court dealt with the issue of waiver of rights under Section 130 of the ICA. Paragraph no. 14 of the said judgement reads as under:

> *"14. An examination of the agreement executed between the appellant Basavaraj (since deceased) and the Bank would clearly*

[27] (2010) 12 SCC 458.

show it to be one of a continuing guarantee. Section 129 of The Indian Contract Act, 1872 (hereinafter referred to as "the Act") defines a continuing guarantee as "A guarantee which extends to a series of transactions is called a "continuing guarantee". Section 130 of the Act says that "A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor." A reading of the agreement clearly shows that the guarantee was to continue to all future transactions except when the guarantor disclaimed from his liability through a written statement. The deed also clearly mentions that while between the guarantor and borrower, the guarantor is only a surety; yet between the bank and the guarantor, the surety is the principal debtor and his liability would be co-extensive to that of the borrower. ***Accordingly, the guarantor himself waived off his rights under Chapter VIII of the Act which is conferred on a surety. This Court is in respectful agreement with the decision of Karnataka High Court in the case of T. Raju Shetty v. Bank of Baroda [AIR 1992 KARNATAKA 108] whereby the High Court held that in surety agreements, the surety can waive his rights available to him under the various provisions of Chapter VIII of the Act. It is in line with long established precedents that anyone has a right to waive the advantages offered by law provided they have been made for the sole benefit of an individual in his private capacity and does not infringe upon the public rights or public policies. This can be inferred from a reading of the Halsbury's Laws of England, Vol 8, 3rd Edn. at page 143 which reads as follows:***

As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it is shown that such an agreement is in the circumstances of the particular case contrary to public policy. *"*

This principle was reiterated in Lachoo Mal v. Radhey Shyam."

[Emphasis supplied]

101. The relevant terms of the amended deed of guarantee dated 22.01.2015 entered into between the petitioner and respondent read as under:

"17. The liability of the Guarantor under this Guarantee shall not be affected by:

(i) any renewal, variation, determination or increase relating to

any accommodation of credit given to the Borrower on the part of the Lender;

(ii) any renewal, modification, release or abstaining from the perfection or enforcement of any security or guarantee on the part of the Lender with regard to any security or guarantee now or hereafter held from the Borrower or any other person, including any signatory to this Guarantee, in respect of the indebtedness;

(iii) the granting of time or of any indulgence to or the compounding with the Borrower or any other person or guarantor on the part of the Lender; and/ or

(iv) the doing or the omitting to do anything on the part of the Lender that but for this provision might operate to exonerate or discharge the Guarantor from any of his obligations under this Guarantee;

(v) any change in the constitution or winding up of the Borrower or any absorption, merger or amalgamation of the Borrower with any other company, Corporation or concern; or

(vi) any change in the management of the Borrower or take over the management of the Borrower by Central or State Government or any other authority; or

(vii) Acquisition or nationalization of the Borrower and/ or any of its undertaking(s) pursuant to any law; or;

(viii) any change in the constitution of the Lender;

(ix} any dispute between Borrower and the Lender regarding the amount due;

(x) insolvency or death of the Guarantor(s).”

102. In light of the above analysis, the concerned NCLT must carefully scrutinize the deed of guarantee, if at all required.

103. The second ground upon which the finding in ***Hutchens*** *(supra)* seems to rest upon is that the assignment has the effect of fundamentally transforming the contract of guarantee, in a manner such, that it could no longer be meaningfully termed as a ‘guarantee’. The contract of guarantee which is for the debt of the principal debtor,

becomes a liability to pay irrespective of the debt of the principal debtor as also, despite the absence of the debt of the principal debtor being owed to the creditor. It also leads to a situation where, for the same underlying debt, two entities, that is, the assignor and the assignee can stake claim, thereby bifurcating and replicating the original debt.

104. Whereas under a contract of guarantee, the guarantor promises to pay the debt that the principal debtor owes to the creditor, after the assignment of the principal debt with a specific exclusion of a guarantee, the assignee may recover an amount forming part of the original debt from the principal debtor; and the assignor may make liable the guarantor, for the same amount, again forming part of the original debt.

105. For instance, if '*x*' is the amount of debt that is left unrecovered, after the assignment takes place, the assignee can lay a claim on the principal debtor for an amount '*x*' as the same has been assigned to it; and simultaneously the assignor may claim the amount '*x*' from the surety. In effect, the amount '*x*' is being recovered twice from two different individuals/entities, making the original debt '*x*' become more than what it initially was. It is thus that the original debt gets split into two separate and disjointed debts.

106. It is this that ***Hutchens*** *(supra)* concludes, lies ill of the basic principle of guarantee—in which the guarantor secures the debt of the principal debtor. He does not, then, undertake a promise to pay an amount *simpliciter*, if at all such a promise could be enforceable in law.

107. The second ground of ***Hutchens*** *(supra)* seems to be fundamentally different from the previous ground involving the beneficial rights of the surety being compromised. There may in fact be some degree of overlap between them, but the distinction needs to be carefully scrutinized. This ground, may possibly not be amenable to the doctrine of waiving off, as it does not merely affect the rights of the surety, but also relates to the broader questions of the statutory requirement of a contract of guarantee—whether they have been materially altered; whether at the time the 'guarantee' was invoked, it still remained a guarantee in law, are the questions that the concerned NCLT, if it thinks fit, may delve into.

108. It would also be of aid to refer to **The Modern Contract of Guarantee** *(supra)*. While discussing assignment of guarantees, the author at page 601 states the following:

> *"**A guarantee or the security for it cannot be assigned without the benefit of the principal obligation, because otherwise "a creditor could effectively divorce the guarantor's liability from that of the principal debtor" [Hutchens v. Deauville Investments Pvt. Ltd. (1986) 68 ALR 367]. However, the guarantee can be enforced by an assignee of the creditor's rights under the principal contract if the benefit of it is expressly or impliedly assigned along with the principal contract to which the it relates.***
>
> *It is a question of construction whether the benefit of the guarantee was intended to be assigned to the assignee. In the absence of an express assignment of the guarantee together with the principal contract, the assignee must show that the express assignment of the principal contract has impliedly carried with it the benefit of the guarantee. A number of general points can be made about this question of construction.*
>
> ***Where the creditor simply assigns the benefit of the principal contract and the words of the assignment are limited to that transaction, the benefit of the guarantee securing it will not follow the assignment. The assignee of the principal transaction is, therefore, unable to enforce the guarantee. An example of***

> ***this situation is to be found in International Leasing Corp (Vic) Ltd v Aiken, where the guarantee of a chattel lease was held not to be impliedly assigned by an assignment of the lease itself when the words of assignment were expressly limited to the lease, the goods which were the subject matter of the lease, and the moneys due thereunder. At the same time, the creditor's right to enforce the (unassigned) guarantee is said to be "suspended" so long as the underlying debt is assigned to another***."

[Emphasis supplied]

109. The concerned NCLT must carefully examine the law on assignment, contract of surety, and the applicability of ***Hutchens*** *(supra)* if at all found applicable in the present factual scenario.

110. Having considered the ruling in ***Hutchins*** *(supra)*, this court, at this stage, finds it appropriate to deal with the arguments of the learned senior counsel for the respondent relating to the present issue.

111. There are broadly three submissions of the respondent that are relevant to the above-mentioned issue, firstly, while relying upon the decision of ***Lalit Kumar Jain*** *(supra)*, that the discharge or release of the principal debtor does not absolve the surety/guarantor of his liability; secondly, that the respondent is only seeking to recover the part of the debt that was left unrecovered after the CIRP of FACOR was concluded; and thirdly, that since the personal guarantees were specifically excluded from the Resolution Plan and the said Assignment Agreement, the terms of the Resolution Plan cannot be altered.

112. This court must first consider the decision of ***Lalit Kumar Jain*** *(supra)*, specifically paragraph no. 125, upon which the learned senior counsel for the respondent has laid great stress. The material part of the pronouncement reads as under:

*"**122. It is therefore, clear that the sanction of a resolution plan an finality imparted to it by Section 31 <u>does not per se operate</u> 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 a 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)"

XXX

> ***125. <u>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.</u>***"
>
> *[Emphasis supplied]*

113. The pronouncement by the Hon'ble Supreme Court is binding on this court. The discharge or release of a principal debtor by an operation of law, it being an involuntary process, cannot lead to a discharge of the surety or guarantor.

114. Paragraph no. 125 of ***Lalit Kumar Jain*** *(supra)*, is certainly the conclusion reached by the Hon'ble Supreme Court. However, each word in the pronouncement needs to be considered and given due weightage. Hon'ble Supreme Court in ***Lalit Kumar Jain*** *(supra)*, while explaining the effect of a Resolution Plan, has stated that it does not "*ipso facto*" lead to a discharge of a personal guarantor of a corporate debtor.

115. This finding needs to be read in the context of what was previously stated in paragraph no.122, it being that the sanction of a Resolution Plan and the finality imparted to it by Section 31 of the IBC "does not per se operate as a discharge of the guarantor's liability".

116. Further, the precise issue raised before the Hon'ble Supreme Court in ***Lalit Kumar Jain*** *(supra)*, should also be considered. The Hon'ble Supreme Court in paragraph no. 115 succinctly summarised the contentions of the petitioners therein which reads as under:

> *"115. The other question which parties had urged before this Court was that the impugned notification, by applying the Code to personal guarantors only, takes away the protection afforded by law; reference was made to Sections 128, 133 and 140 of the Contract Act, 1872;* ***the petitioners submitted that once a resolution plan is accepted, the corporate debtor is discharged of liability. As a consequence, the guarantor whose liability is co-extensive with the principal debtor i.e. the corporate debtor, too is discharged of all liabilities.*** *It was urged therefore, that the impugned notification which has the effect of allowing proceedings before NCLT by applying provisions of Part III of the Code, deprives the guarantor of their valuable substantive rights."*
>
> *[Emphasis supplied]*

117. It is thus clear that the specific issue considered by the Hon'ble Supreme Court in the case of ***Lalit Kumar Jain*** *(supra)*, was—whether the approval of a resolution, which leads to a discharge or release of a corporate debtor can, in and itself, lead to a discharge of the personal guarantor.

118. In the instant case, the petitioner's claim is not based on the mere passing of the Resolution Plan of FACOR, but rather is concerned with the effect that the terms of the Resolution Plan have in law. It is their case, that the Resolution Plan is valid in law, its terms need to be adhered to, however, the effect of the terms of the Resolution Plan is that the respondent cannot enforce the guarantee given to it by the petitioner.

119. This court is, therefore, of the opinion that the pronouncement of ***Lalit Kumar Jain*** *(supra)* shall have no application in the facts of the present case.

120. The second submission of the respondent—that the respondent is only seeking to recover the part of the debt that was left

unrecovered after the CIRP of FACOR was concluded—now deserves attention.

121. This submission is made by the learned senior counsel in order to impress upon this court that the debt which the principal debtor owed to the creditor after the said Assignment Agreement has not transformed into two debts but the debt still remains one. It is their case that they merely want to recover the unrecovered debt.

122. This court finds that this submission does not, in actuality, relate to the claim being made in ***Hutchens*** *(supra)*. Indeed, it is the case that the respondent intends to recover what was left unrecovered after the CIRP of FACOR concluded, however, after the underlying debt was assigned. The assignee is entitled to recover the unrecovered amount as well.

123. It is noteworthy to mention that the principal debt persists and has never been extinguished. It is, therefore, the case that the assignee can recover the unrecovered part of the debt from FPL i.e., the principal borrower, and the respondent, in the instant petition, is also attempting to recover the unrecovered part of the debt. It is in this context that the finding on the bifurcation of the underlying debt has been in ***Hutchens*** *(supra)*.

124. This court is, therefore, unable to accept this argument of the respondent.

125. The third argument, and the most vehemently argued submission of the respondent must now be considered by this court. It is their contention that since the personal guarantees were specifically excluded from the Resolution Plan and the said Assignment

Agreement, the respondent can proceed to enforce the guarantee given by the petitioner to the creditor. The terms of the Resolution Plan cannot be altered after they have attained finality.

126. In order to appreciate the submission, the specific clauses of the Resolution Plan and the said Assignment Agreement are reproduced as under:

1. **Clause 3(c)(iv)(g) of the Resolution Plan reads as under:**

"(g) FACOR Power Limited ("FPL") - Upon implementation of the Resolution Plan, as an integral part of this Resolution Plan, REC shall on Closing Date:

i. Release its charge on the shares held by the Company in FPL;

ii. Transfer, assign and convey its entire debt given to FPL and all rights, title and interest thereto to the Company; and

iii. Invoke and enforce or cause the invocation and enforcement of, as the case may be, the pledge on FPL's shares that are pledged for the benefit of REC and shall/shall cause transfer of the same to the Company.

iv. In lieu of the personal guarantee provided by existing promoters (and their relatives/controlled entities) of the Company for debt of FPL, require each of the existing promoters and their relatives, controlled entities and Affiliates ("Existing Promoter Group"), to transfer shares held by them in FPL to the Company. It is clarified that such transfer is subject to concurrence of the relevant shareholders and REC and hence non transfer of shares held by Existing Promoter Group as sought for, shall not impact the effectiveness or implementation of the Resolution Plan.

It is clarified that the personal guarantee and third-party collateral given to Financial Creditors to secure the debt of the Company and FPL shall continue with such respective Financial Creditors and such Financial Creditors shall have full right to enforce such securities even after Plan Effective Date

The terms and conditions of the Resolution Plan including the insolvency resolution of the Company and the Total Consideration payable to the Financial Creditors is due, adequate and sufficient consideration for the obligations of REC in respect of FPL and for the transfer of the shares of FPL to the Company, as provided in this subclause (iv)(g)."

[Emphasis supplied]

2. **Clause 3(c)(xi) of the Resolution Plan reads as under:**

(xi) Save and except the transfer of shares of FPL pledged for the benefit of REC to the Company, as contemplated in Section 3(c)(iv)(g) and Annexure 2, ***the Resolution Plan shall in no way affect the validity and enforceability of (A) the personal guarantees executed by the persons in the promoter group; (B) the corporate guarantees executed by third parties; and (C) any other security created by a third party, as of the insolvency commencement date of the Company, for securing the debt of the Company*** *and the Financial Creditors shall be entitled to take all steps and remedies and recourse available to them in Applicable Law for the non recovery of the uncovered financial debt (i.e., the total dues of the Financial Creditors less the aggregate of (i) the Upfront Amount; and (ii) Total Consideration received by such Financial Creditors as part of the Resolution Plan) from such guarantors and/ or third party security providers, under their respective security documents.*

[Emphasis supplied]

3. **Recital C of the said Assignment Agreement reads as under:**

"(C) Upon implementation of the Resolution Plan on the Closing Date the Assignor is required to transfer, assign and convey the entire financial assistance viz. the Loans provide by the Assignor to the Borrower, disbursed under the aforesaid Financing Documents together will all its rights, title and interest in the Financing Documents and any underlying Security Interest, ***save and except the Excluded Assets, in favour of the Assignee. The Parties have agreed to assign and accept the same on the terms and conditions stated herein below****."*

[Emphasis supplied]

4. **Clause 1 of the said Assignment Agreement that defines 'Excluded Assets' reads as under:**

> *"(g) Excluded Assets means: (i) all third-party Security Interest created to secure the Loans including the pledge of shares of the Borrower which has been released or invoked; and {ii**) all personal guarantees provided by an individual for guaranteeing the loans**."*
>
> *[Emphasis supplied]*

127. It must be noted that the petitioner has not disputed the fact of there being an exclusion of personal guarantee. Indeed, it is this fact that forms the basis of their case, and their reliance on ***Hutchens** (supra)*. The contention of the petitioner is not that the Resolution Plan and the said Assignment Agreement needs to be re-written so as to include the personal guarantee, but rather it is, that the legal effect of the underlying debt being assigned while retaining the personal guarantee, is that the creditor i.e., the respondent herein, cannot enforce the guarantee.

128. To that end, this court finds that a mere fact of there being an exclusion of personal guarantees, and them being specifically kept out, does not, in actual terms, deal with grounds in ***Hutchens** (supra)*.

129. There is some amount of dispute as to the exact import of Clause 3(c)(xi) of the Resolution Plan. While the respondent contends that the clause is applicable, the petitioner submits that it is applicable only for the guarantees furnished to secure the loan of 'the Company', which *Annexure 1* of the Resolution Plan defines as being FACOR. It is, therefore, the case of the petitioner, that since the guarantee which the petitioner had furnished to the respondent was to secure the loan of FPL, the said clause has no application.

130. However, the clarificatory sub-paragraph of Clause 3(c)(g)(xi) which was reproduced above does provide a 'clarification' that the personal guarantee given to the financial creditors, including the respondent herein, to secure the debt of FPL, shall continue with such respective financial creditors, and they shall have the full right to enforce such securities even after the Plan Effective Date.

131. Indeed, there are issues relating to the interpretation of contracts that arise, however, this court does not consider it appropriate to deal with these contractual private law questions in this writ petition.

132. The pronouncement of the Hon'ble Supreme Court in the case of ***Kerala SEB v. Kurien***[28] that the interpretation and implementation of a clause in a contract normally cannot be the subject-matter of a writ petition, still holds the field. The judgements of the Hon'ble Supreme Court in the case of ***ABL International v. Export Credit Guarantee Corporation of India***[29]**,** subsequently relied upon in ***Joshi Technologies v. Union of India***[30]**,** have expounded that the violation of Article 14 of the Constitution of India is a ground to entertain a petition in the field of contract law.

133. Recently, the Hon'ble Supreme Court in the case of ***MP Power Management Company Ltd. v. M/s. Sky Power Southeast Solar India Pvt. Ltd.***[31]**,** noted the following in the context of a violation of Article 14 of the Constitution of India in the realm of contract law:

> "*While the concept of an arbitrary action or inaction cannot be cribbed or confined to any immutable mantra, and must be laid bare, with reference to the facts of each case, it cannot be a mere allegation of breach of contract that would suffice. What must be*

[28] (2000) 6 SCC 293.
[29] (2004) 3 SCC 553.
[30] (2015) 7 SCC 728.
[31] (2023) 2 SCC 703.

> *involved in the case must be action/inaction, which must be palpably unreasonable or absolutely irrational and bereft of any principle. An action, which is completely malafide, can hardly be described as a fair action and may, depending on the facts, amount to arbitrary action.*"

134. Similarly, this court in ***IDBI Bank Ltd. v. Power Finance Copn. Ltd.***[32]***,*** as under*:*

> ***34.*** *Considering the contention of the petitioner that respondent no. 1 has acted in an arbitrary and unfair manner and their right under Article 14 of the Constitution of India has been violated, it must be considered, that arbitrariness needs to be adjudged from the lens of the Constitution and with elements of public law.* ***Every act of breach of contract by a subsidiary, undertaking, instrumentality or functionary of the State, cannot be assailed before a writ court. What the criteria of arbitrariness require in order to bring a case within the parameters of Article 226 of the Constitution of India is, either a conduct that is especially reckless, attributable to the special powers/privileges accorded to the State and its functionaries, the abuse of which is alleged, but for it to being a 'State', such arbitrariness and high-handedness could not have been exercised; or that, it is a case of discriminatory practices being conducted on the part of the State.***
>
> ***35.*** ***This court cannot countenance the argument that, whereas, otherwise, a dispute owing to its private law origins ought to have been agitated before a civil court, merely because the entity so breaching the contract is a State or its functionary, the case is to be considered under Article 226 of the Constitution of India. Arbitrariness, under Article 14 of the Constitution of India needs to be pleaded in exclusion to claims of pure breach of contract. In the present petition, the petitioner has not been able to persuade this court that the breach so alleged on the part of respondents is of such a nature that it may be considered arbitrary and deserves to be entertained under the writ jurisdiction of this court alone****."*
>
> *[Emphasis supplied]*

135. In the instant case, this court is unable to accept the argument of the learned senior counsel for the petitioner that their rights under Article 14 of the Constitution of India have been violated.

[32] 2023 SCC OnLine Del 2909.

136. The respondent in this case, has merely issued a demand notice in order to comply with the statutory requirement of Section 95 of the IBC. This notice was issued by the respondent in order to enable them to agitate before the NCLT that there is a debt that the petitioner owes to the respondent.

137. There is nothing that the respondent has done, that can be elevated to the level of arbitrariness.

138. The respondent has not, in the instant case, done an act that can be especially attributable to the privileges that are enjoyed by virtue of it being a 'State', as defined under Article 12 of the Constitution of India. Even if it is assumed that the respondent is acting under a mis-interpretation of the law, this, in and of itself, cannot be a ground to claim a violation of Article 14 of the Constitution of India. Indeed, if this were the sole test, every act of a 'State' would be assailed before a writ court as being under a misconceived interpretation of the law.

139. This court is, therefore, of the opinion, that in the present case, no right of the petitioner under Article 14 of the Constitution of India has been violated. It is, therefore not warranted to delve into, what the true import of specific clauses of contracts is.

140. It is for this reason that the other claim of the petitioner, relating to the exercise of the Exit Option, by the execution of the said Share Purchase Agreement is not being entertained. This claim, this court finds, is fundamentally based upon the interpretation of Clause 3(c)(iv)(g)(iv) of the Resolution Plan, however, there is a significant disagreement as to what the meaning and import of Clause 3(c)(iv)(g)(iv) of the Resolution Plan is.

141. The material part of the Resolution Plan relating to this claim reads as under:

> *(g) FACOR Power Limited ("FPL") - Upon implementation of the Resolution Plan, as an integral part of this Resolution Plan, REC shall on Closing Date:*
>
> *...*
> *iv. In lieu of the personal guarantee provided by existing promoters (and their relatives/controlled entities) of the Company for debt of FPL, require each of the existing promoters and their relatives, controlled entities and Affiliates ("Existing Promoter Group"), to transfer shares held by them in FPL to the Company. It is clarified that such transfer is subject to concurrence of th relevant shareholders and REC and hence non transfer of shares held by Existing Promoter Group as sought for, shall not impact the effectiveness or implementation of the Resolution Plan."*

142. While the petitioner, *inter alia*, contends that the terms have been duly complied with as Clause 3(c)(iv)(g)(iv) is not to be qualified with a condition that the share transfer needs to be without consideration and also that the 'Closing Date' requirement of Clause 3(c)(iv)(g) is not intended to constrain the effect of, as also provide a deadline for, the option under Clause 3(c)(iv)(g)(iv); the respondent, *inter alia*, submits that the correct interpretation of the clause would reveal that the share transfer must take place without consideration and the requirement of 'Closing Date' is a general requirement of Clause 3(c)(iv)(g) which needs to be met by every sub-clause falling within Clause 3(c)(iv)(g), including Clause 3(c)(iv)(g)(iv).

143. In light of the analysis above, this court does not consider it fit to delve into these issues.

144. However, this court finds it appropriate to discuss the law relating to the reservation of right of creditor to proceed against the surety. What the learned senior counsel for the respondent has hinted

towards, in their submissions before this court, is that there is an express reservation by the respondent of their rights as creditor to proceed against the surety.

145. At the outset, it must be stated, that similar to the discussion relating to ***Hutchens*** *(supra)*, the concerned NCLT must first decide whether there is, in fact, a reservation of rights clause in the Resolution Plan and the said Assignment Agreement, both in its factual and legal sense.

146. A reservation of rights clause, inserted in the deed releasing or discharging the principal borrower, entered into by the creditor and the principal borrower, intends to preserve the right of the creditor to proceed against the surety. Notably, neither the Resolution Plan nor the said Assignment Agreement have been entered into by the principal borrower i.e., FPL.

147. The rationale for allowing such a reservation in the release deed between the principal borrower and the creditor has been noted in an early judgement of the Kings Bench in ***Cole v. Lynn***[33]**,**

> *"In delivering his judgment, Parke B. laid it down clearly that a proviso such as that with which we have to deal not only rebuts what would otherwise be implied, namely, the release of the surety as against the creditor, but also prevents the rights of the surety against the debtor, that is, the right to indemnity, being impaired, for, as Parke B. points out,* ***the consent of the debtor that the creditor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him, the debtor****."*
>
> *[Emphasis supplied]*

148. Even in the case of an express reservation of rights by the creditor to proceed against the surety, a fine distinction must be drawn

[33] (1942) 1 KB 142.

between a covenant not to sue and an absolute release. A reservation clause is compatible with the former while being incompatible with the latter. The reason being that the reservation of rights clause becomes overridden by the release of the principal borrower.

149. In this regard, the Privy Council in one of its earlier judgements in the case of ***Commercial Bank of Tasmania v. Jones***[34] later relied upon in ***Mahant Singh v. U Ba Yi***[35]**,** noted the following:

> "***Their Lordships concur in that judgment. It may be taken as settled law that where there is an absolute release of the principal debtor, the remedy against the surety is gone because the debt is extinguished, and where such actual release is given no right can be reserved because the debt is satisfied, and no right of recourse remains when the debt is gone. Language importing an absolute release may be construed as a covenant by the creditor not to sue the principal debtor, when that intention appears, leaving such debtor open to any claims of relief at the instance of his sureties. But a covenant not to sue the principal debtor, is a partial discharge only, and, although expressly stipulated, is ineffectual, if the discharge given is in reality absolute.*** *In this case, the acceptance of Marshall as full debtor, in room and stead of Wakeham, which constituted a complete novation of the debt, necessarily operated as an absolute release of Wakeham, and it is therefore in vain to contend that such novation merely amounted to a covenant not to sue the debtor for whom the respondent was surety.*"
>
> *[Emphasis supplied]*

150. It seems to be the case that under the law of the United Kingdom, the distinction between a covenant not to sue and an absolute release has been blurred by subsequent decisions. In this context **O' Donovan and Phillips' The Modern Contract of Guarantee** *(supra)* at paragraph no. 6-071 noted as under:

> *"While this principle has never been specifically overruled, later decisions have sought to circumvent it, by construing the*

[34] (1893) AC 313.
[35] (1939) AC 601.

> *agreement between the creditor and debtor not as an unconditional release but as a covenant not to sue. This has been done even though the agreement was worded as a "release", provided that the document also contained a clause reserving the creditor's rights against the guarantor. The "reservation of rights" clause was thus treated as having a dual purpose. It converted what otherwise appeared to be an unconditional release into a covenant not to sue and, once that conclusion was reached, it was also held to preserve the creditor's rights against the guarantor. Given the rejection of the historical distinction between the effect of a release and covenant not to sue in Watts v. Aldington [The Times, 16 December 1993] any agreement between creditor and debtor- whether worded as a covenant not to sue or as a release which contains a clause preserving rights against the guarantor is effective for that purpose.*

151. However, in India, the pronouncement of the Privy Council in ***Mahant Singh*** *(supra)*, holds the ground, and has not been departed from. In ***Mahant Singh*** *(supra)*, the Privy Council laid down the distinction between a covenant not to sue and an absolute release. The material parts of the judgement may be liberally reproduced as under:

> *"**8**. Where an absolute release is given there is no room for any reservation of remedies against the surety. See Webb v. Hewitt (1857) 3 K & J 438 and Commercial Bank of Tasmania v. Jones [1893] A.C. 313.*
>
> *XXXX*
>
> ***13.** In England an undertaking by the creditor not to sue the principal debtor, or a binding agreement to give him time, does not operate as a discharge of the surety provided it is a condition of the undertaking or agreement that the rights of the creditor to sue or receive the money from the surety are reserved. See Bateson v. Gosling (1871) L.R. 7 C.P. 9 and Oriental Financial Corporation v. Overend, Gurney, & Co. (1871) L.R. 7 Ch. App. 142, 153.*
>
> *14. Similarly, a failure to sue the principal debtor until recovery is barred by the statute of limitations does not operate as a discharge of the surety in England. See Carter v. White.(1883) 25 Ch. D. 666.*
>
> *XXXX*

> ***15.*** *The same view prevails in most of the High Courts in India. See Sankana Kalana v. Virupakshapa Ganeshapa (1883) I.L.R. 7 Bom. 146; Krishto Kishori Chowdhrain v. Radha Romun Munshi (1885) I.L.R. 12 Cal. 330 ; Subramania Aiyar v. Gopala Aiyar (1909) I.L.R. 33 Mad. 308 and also Dil Muhammad v. Sain Das [1927] A.I.R. Lah. 396.*
>
> ***16.*** *It is true that the first two cases were decided in reliance upon the provisions of Section 137 of the Indian Contract Act which enacts that:*
>
> *Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.*
>
> ***17.*** *But the two later cases base their reasoning also on the broader ground adopted by English law, and hold Section 137 to be merely declaratory of the law and to be enacted only to allay any doubts as to whether the same principles were applicable in India. With these decisions of the other High Courts in India may be contrasted the case of Ranjit Singh v. Naubat (1902) I.L.R. 24 All. 504 which decides that, in spite of the provisions of Section 137, the creditor's right against the surety is not preserved unless he sues the principal debtor within the period of limitation. Such a decision is inconsistent with the views held by the Courts in England and the majority of the Courts in India. In this conflict, their Lordships prefer the reasoning of the majority. In any case those decisions deal rather with the question whether the debt was absolutely released, than with the question whether an agreement not to sue or to give time with a reservation of right against the surety, operated as a discharge to him.*

152. Similarly, the distinction between a covenant not to sue and an absolute release was further maintained in ***Radha Thiagarajan v. South Indian Bank Ltd. & Ors.***[36] The decision in ***Mahant Singh*** *(supra)* was further relied upon by this court in ***Ram Bahadur Thakur and Co. v. Sabu Jain Ltd.***[37]

153. This court is, therefore, of the opinion that in the absence of a categorical pronouncement by the Hon'ble Supreme Court departing

[36] MANU/KE/0057/1984.
[37] 1979 SCC OnLine Del 114.

from the position in ***Mahant Singh*** *(supra)*, the distinction between a covenant not to sue and an absolute release needs to be maintained.

154. From the analysis above, it can be concluded that a reservation of rights clause is incompatible with an absolute release of a principal debtor.

155. It needs to be seen whether the reservation of rights clause can modify the effect that the application of ***Hutchens*** *(supra)* may have. Preliminarily, it may be observed that the principles operate in different fields. While a reservation of rights clause is a private agreement between the parties, ***Hutchens*** *(supra)* on the other hand, seems to be concerned with the legal compliance to the form and substance of a contract of guarantee.

156. The concerned NCLT, if at all it thinks fit, may carefully delve into this aspect of the case.

157. After having considered the relevant issues and pronouncements, this court must now revert to the fundamental issue in this case—whether the petitioner has established that the impugned demand notice was wholly without jurisdiction and the respondent must therefore be prevented from approaching the concerned NCLT under the provisions of the IBC.

158. Even after considering a plethora of caselaw on this issue, this court must note that the only significant pronouncement of law, cited by the petitioner, which is by the courts of India, is the case of ***Prashant Shashi Ruia*** *(supra).* In the said case, as had been noted above, the High Court of Gujarat, after having considered all the

issues therein, decided to dismiss the writ petition and allowed the Debt Recovery Tribunal to continue with its proceedings.

159. Indeed, it may be the case that ***Hutchens*** *(supra)*, may be applicable in the Indian context, however, unless there is a pronouncement to that effect, a writ of prohibition on grounds of total want of jurisdiction cannot be granted. It is for this reason that the judgement of ***Bhushan Power*** *(supra)* relied upon by the petitioner, does not have application in the instant case. In ***Bhushan Power*** *(supra)* as noted in paragraph no. 14, this court found the matter therein to be covered by a pronouncement of the Hon'ble Supreme Court in ***Ghanshyam Mishra & Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Company Ltd***.[38]

160. In a petition praying for a writ of prohibition, where a petitioner is to demonstrate the absence of jurisdiction, this court does not consider it fit, to develop, if at all this is a case for that to take place, an area of private contractual law, and then to use that development in order to establish a want of jurisdiction on the part of the respondent.

161. It is not the case that the reliefs prayed for cannot be granted by the concerned NCLT. The petitioner's claim of the guarantor getting a right to be heard at a belated stage, is not sufficient to entertain the present petition. The legislature, in its wisdom, thought it fit to give the right of hearing at belated stage. Indeed, if in the present case the petition is entertained, it would subvert the procedure laid down under the IBC. The respondent in turn would be denied the opportunity to present their case before the concerned NCLT.

[38] 2021 SCC OnLine SC 313.

162. This court is, therefore, of the opinion that the present writ petition deserves to be dismissed. Ordered accordingly. Pending application also stands dismissed.

163. The concerned NCLT may make a decision upon the submissions advanced by the petitioner and the respondent on its own merits.

164. All observations on the merits of the case shall be considered as *prima facie* and the competent court/Tribunal is at liberty to deal with the issues on merits.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

JULY 21, 2023