NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 266 of 2023

[Arising out of Order dated 06.01.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Indore Bench in IA/190/(MP)2021 in CP(IB) No. 09 of 2020]

In the matter of:

SVA Family Welfare Trust & Anr. **...Appellants**

Vs.

Ujaas Energy Ltd. & Ors. **...Respondents**

For Appellant:	**Mr. Krishnendu Datta, Sr. Advocate with Mr. Himanshu Satija, Mr. Rajat Sinha, Ms. Neha Agarwal, Ms. Kushali Palreeha, Mr. Harsh Saxena, Advocates.**
For Respondents:	**Mr. Awanish Kumar, Mr. Prashant Kumar, Advocates for R-4/CoC** **Mr. Anish Agarwal, Mr. Immanud, Mr. Rohit Dubey, Advocates for R1&2** **Mr. Brijesh Kumar Tamer, Mr. Prateek Kushwaha, Mr. Vinay Singh Bist, Advocates for R-3/BoB**

J U D G M E N T
(21st August, 2023)

Ashok Bhushan, J.

1. This Appeal has been filed against the order dated 06.01.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Indore Bench, Court No.1, by which order IA/190(MP)2021 filed by the Resolution Professional for approval of the Resolution Plan has been rejected. The Appellant who was Successful Resolution Applicant aggrieved by the order rejecting his Resolution Plan has come up in this Appeal.

2. Brief facts of the case necessary to be noticed for deciding this Appeal are:

2.1. Corporate Insolvency Resolution Process (CIRP) was initiated against Corporate Debtor- 'M/s. Ujaas Energy Limited' vide order dated 17.09.2020. In pursuance of publication of Form-G, Appellant submitted its Resolution Plan. There were multiple rounds of discussions and deliberations with regard to Final Resolution Plan dated 05.07.2021 read with addendum dated 03.08.2021 submitted by the Appellant which was placed before the Committee of Creditors (CoC) in its 18th CoC meeting. Resolution Plan of the Appellant was approved by the CoC by 78.04% vote shares on 30.08.2021. The Letter of Intent was issued to the Appellant on 31.08.2021 and thereafter on 16.09.2021, Resolution Professional filed an I.A No. 190 of 2021 before the Adjudicating Authority for approval of the Resolution Plan. Bank of Baroda, one of the members of the CoC holding 5.83% voting share, had filed an Affidavit objecting to the Resolution Plan on the basis that it provided for extinguishment of rights under personal guarantees. The Adjudicating Authority vide impugned order dated 06.01.2023 rejected I.A No.190 of 2021. Adjudicating Authority took the view that CoC cannot extinguish right of the particular secured creditor to proceed against the personal guarantor of the Corporate Debtor, hence, the plan contravenes the provision of Section 30(2)(e) of the Code. It was also noticed that the Bank of Baroda has already filed Section 95 against the personal guarantor before the Adjudicating Authority. Aggrieved by the said order, this Appeal has been filed.

3. We have heard Shri Krishnendu Datta, Learned Senior Counsel for the Appellant, Shri Anish Agarwal, Learned Counsel for Respondent Nos.1 & 2, Shri Brijesh Kumar Tamer, Learned Counsel for Respondent No.3 and Shri Awanish Kumar, Learned Counsel for Respondent No.4.

4. Learned Counsel for the Appellant submits that the Successful Resolution Applicant has submitted Resolution Plan which proposed the payment of INR 74,81,75,744/- against the liquidation value of INR 43,08,09,000/-. Learned Counsel for the Appellant submitted that as per paragraph 6.11 of the plan, the Appellant has proposed INR 45,00,00,000/- towards the value of Corporate Debtor and INR 23,81,75,744/- towards release of personal guarantees. The personal guarantees is to be extinguished after paying due compensation to the Financial Creditors. The CoC with its vote share of 78.04% has approved the plan and the Adjudicating Authority committed error in rejecting the Resolution Plan on objection of dissenting Financial Creditor- Bank of Baroda having merely 5.83% voting share. The personal guarantees are security interest under the Code and all security interest can be dealt with in a Resolution Plan. Counsel further submits that the commercial wisdom of the CoC have to be given paramount importance and the Adjudicating Authority ought not to have been interfered with commercial wisdom of the CoC at the instance of a dissenting Financial Creditor. With regard to proceedings under Section 95 initiated by Bank of Baroda, it is submitted that the said proceedings were initiated after approval of the plan and letter of intent was issued in favour of the Appellant on

31.08.2021. Section 95 proceedings were initiated on or after 02.09.2021 which is an afterthought.

5. Learned Counsel for the CoC has also supported the submissions of the Appellant and submits that when CoC has approved the Resolution Plan with majority vote of 78.04%, the plan could not have been interfered with by the Adjudicating Authority. It is submitted that there is no bar in the Code to release personal guarantees.

6. Learned Counsel appearing for the Bank of Baroda has supported the impugned order passed by the Adjudicating Authority and submits that the plan could not have contained any provision by which personal guarantees given in favour of the Bank of Baroda could have been extinguished. Bank of Baroda is fully entitled to proceed to realise its dues from the personal guarantors since the payment under the plan does not liquidate the dues of the Bank of Baroda.

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

8. The Adjudicating Authority in the impugned order has also noticed the fact that out of the amount proposed in the Resolution Plan, Rs.45,00,00,000/- is towards the value of the Corporate Debtor and Rs.23,81,75,744/- is towards the release of personal guarantees. The Adjudicating Authority, however, accepted the objection of the Bank of Baroda that CoC cannot extinguish the right of the particular secured creditor to proceed against the personal guarantor of the Corporate Debtor. In

paragraphs 11 & 12 of the impugned order, Adjudicating Authority has given following reasoning for rejecting the Application filed for the approval of the Resolution Plan:

> *"11. In our considered opinion the CoC can take any commercial decision relating to insolvency of the corporate debtor only, the CoC cannot extinguish right of the particular secured creditor to proceed against the personal guarantor of the corporate debtor under the garb of its commercial wisdom. Such provision in the resolution plan is not only prejudicial to the right of such secured creditor but also against the provisions of law. Hence we cannot approve such resolution plan as it contravenes the provision of section 30(2)(e) of the Code.*
>
> *12. In view of the above, we are of the considered opinion that such resolution plan can not be approved and deserves to be rejected as the CoC by majority votes can not enforce its decision for extinguishment of the right of the dissenting creditor to proceed against the personal guarantor. It is also noted that the Bank of Baroda has already filed an application against the personal guarantors which is pending before the Adjudicating Authority."*

9. The only question which arises for consideration in this Appeal is as to whether in a Resolution Plan can there be a clause which proposes to extinguish security interest of a Financial Creditor by way of personal

guarantee of the Directors of the Corporate Debtor which was given for obtaining financial assistance from the Financial Creditor.

10. Before we proceed to consider the rival submissions of the Counsel for the parties, we need to notice certain provisions of the Code and the Regulations.

11. Section 3(31) of the IBC defines 'security interest' which is as follows:-

> *"**3. Definitions. –**……. **(31)** "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:*
>
> *Provided that security interest shall not include a performance guarantee"*

12. There can be no dispute that Bank of Baroda has security interest as per guarantee agreements dated 16.09.2011 and 04.03.2014 executed by personal guarantors in favour of the Bank of Baroda.

13. Regulation 37 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("Regulations 2016" for short) deals with 'Resolution Plan' which provides as follows:-

*"**37. Resolution plan.**- A resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following: -*

(a) transfer of all or part of the assets of the corporate debtor to one or more persons;

(b) sale of all or part of the assets whether subject to any security interest or not;

[(ba) restructuring of the corporate debtor, by way of merger, amalgamation and demerger;]

(c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;

[(ca)cancellation or delisting of any shares of the corporate debtor, if applicable;]

(d) satisfaction or modification of any security interest;

(e) curing or waiving of any breach of the terms of any debt due from the corporate debtor;

(f) reduction in the amount payable to the creditors;

(g) extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;

(h) amendment of the constitutional documents of the corporate debtor;

(i) issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;

(j) change in portfolio of goods or services produced or rendered by the corporate debtor;

(k) change in technology used by the corporate debtor; and
(l) obtaining necessary approvals from the Central and State Governments and other authorities.]"

14. Learned Counsel for the Appellant has placed reliance on the judgment of the Hon'ble Supreme Court in ***"Vijay Kumar Jain vs. Standard Chartered Bank and Ors.- (2019) 20 SCC 455"***. While considering the provisions of the Code and the Regulations 2016, the Hon'ble Supreme Court noticed that the members of the erstwhile Board of Directors, who are often guarantors, are vitally interested in a Resolution Plan as such Resolution Plan then binds them. It was further observed that such plan may scale down the debt of the principal debtor, resulting in scaling down the debt of the guarantor as well. In paragraphs 19.3 and 19.4, following has been observed:-

"19.3. Even assuming that the Notes on Clause 24 may be read as being a one-way street by which erstwhile members of the Board of Directors are only to provide information, we find that Section 31(1) of the Code would make it clear that such members of the erstwhile Board of Directors, who are often guarantors, are vitally interested in a resolution plan as such resolution plan then binds them. Such plan may scale down the debt of the principal debtor, resulting in scaling down the debt of the guarantor as well, or it may not. The resolution plan may also scale down certain debts and not others, leaving guarantors of the latter kind of debts exposed for the entire amount of the debt.

19.4. The Regulations also make it clear that these persons are vitally interested in resolution plans as they affect them. Thus, Under Regulation 36 of the CIRP Regulations, the information memorandum that is given to each member of the CoC and to any potential resolution applicant, will contain details of guarantees that have

been given in relation to the debts of the corporate debtor (see Regulation 36(2)(f) of the CIRP Regulations). Also, Under Regulation 37(d) of the CIRP Regulations, a resolution plan may provide for satisfaction or modification of any security interest. Security interest is defined by Section 3(31) of the Code as follows:

> *"3. Definitions.--In this Code, unless the context otherwise requires,--*
>
> *xxx xxx xxx*
>
> *(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee;"*

15. The Hon'ble Supreme Court again in ***"Lalit Kumar Jain v. Union of India- (2021) 9 SCC 321"*** had occasion to consider the provisions of the Code as well as the law pertaining to personal guarantor and the consequence of

approval of the Resolution Plan on the rights of the personal guarantors. In the said judgment, the Hon'ble Supreme Court held that sanction of a resolution plan does not ***per se*** operate as a discharge of the guarantor's liability. It was held that approval of a resolution plan does not ***ipso facto*** discharge a personal guarantor. The above observations have been made by the Hon'ble Supreme Court in paragraphs 122 to 125:-

> *"122. It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In Maharashtra State Electricity Board (supra) 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 68(2020) 8 SCC 531 creditor can realize the same from the guarantor in view of the language of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act. This court observed as follows:*
>
> > *"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 de- mand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obliga- tion 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 Indian Contract Act, the lia- bility 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 Indian Contract Act 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 pro- ceedings in the case of a company) does not absolve the surety of his liability (see Jagannath Ganeshram Agarwala v. Shivnarayan Bhagirath [AIR 1940 Bom 247; see also In re

Fitzgeorge Ex parte Robson [(1905) 1 KB 462]).”

109. This legal position was noticed and approved later in Industrial Finance Corpn. of India Ltd. v. Cannanore Spg. & Wvg. Mills Ltd. 69An earlier decision of three judges, Punjab National Bank v. State of U.P pertains to the issues regarding a guarantor and the principal debtor. The court observed as follows:

“1.The appellant had, after Respondent 4's management was taken over by U.P. State Textile Corporation Ltd. (Respondent 3) under the Industries (Development and Regulation) Act, advanced some money to the said Respondent 4. In respect of the advance so made, Respondents 1, 2 and 3 executed deeds of guarantee undertaking to 69(2002) 5 SCC 54 70(2002) 5 SCC 80 pay the amount due to the bank as guarantors in the event of the principal borrower being unable to pay the same.

2. Subsequently, Respondent 3 which had taken over the management of Respondent 4 became sick and proceedings were initiated under the Sick Textile Undertakings (Nationalisation) Act, 1974 (for short ‘the Act’). The appellant filed suit for recovery against the guarantors and the principal debtor of the amount claimed by it.

3. The following preliminary issue was, on the pleadings of the parties, framed:

'Whether the claim of the plaintiff is not maintainable in view of the provisions of Act 57 of 1974 as alleged in para 25 of the written statement of Defendant 2?'

4. The trial court as well as the High Court, both came to the conclusion that in view of the provisions of Section 29 of the Act, the suit of the appellant was not maintainable.

5. We have gone through the provisions of the said Act and in our opinion the decision of the courts below is not correct. Section 5 of the said Act provides for the owner to be liable for certain prior liabilities and Section 29 states that the said Act will have an overriding effect over all other enactments. This Act only deals with the liabilities of a company which is nationalized and there is no provision therein which in any way affects the liability of a guarantor who is bound by the deed of guarantee executed by it. The High Court has referred to a decision of this Court in Maharashtra SEB v. Official Liquidator, High Court, Ernakulam [(1982) 3 SCC 358 : AIR 1982 SC 1497] where 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 in this case that in view of the unequivocal guarantee such liability of the guarantor continues and the creditor can realize the same from the guarantor in view of the language

of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act.

6. In our opinion, the principle of the aforesaid decision of this Court is equally applicable in the present case. The right of the appellant to recover money from Respondents 1, 2 and 3 who stood guarantors arises out of the terms of the deed of guarantee which are not in any way superseded or brought to a naught merely because the appellant may not be able to recover money from the principal borrower. It may here be added that even as a result of the Nationalisation Act the liability of the principal borrower does not come to an end. It is only the mode of recovery which is referred to in the said Act."

124. In Kaupthing Singer and Friedlander Ltd. (supra) the UK Supreme Court re- viewed a large number of previous authorities on the concept of double proof, i.e. re- covery from guarantors in the context of insolvency proceedings. The court held that:

"11. The function of the rule is not to prevent a double proof of the same debt against two separate estates (that is what insolvency practitioners call "double dip"). The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. It is for that reason sometimes called the rule against double

dividend. In the simplest case of suretyship (where the surety has neither given nor been provided with security, and has an unlimited liability) there is a triangle of rights and liabilities between the principal debtor (PD), the surety (S) and the creditor (C). PD has the primary obligation to C and a secondary obligation to indemnify S if and so far as S discharges PD's liability, but if PD is insolvent S may not enforce that right in competition with C. S has an obligation to C to answer for PD's liability, and the secondary right of obtaining an indemnity from PD. C can (after due notice) proceed against either or both of PD and S. If both PD and S are in insolvent liquidation, C can prove against each for 100p in the pound but may not recover more than 100p in the pound in all."

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

16. The use of expressions *'per se'* and *'ipso facto'* clearly indicate that by approval of the Resolution Plan, personal guarantors are not *per se* and *ipso facto* discharge from its obligation which may arise of the guarantee given to the Financial Creditor. The use of above expressions conversely indicates that there may be situations and circumstances, for example, relevant clauses in the Resolution Plan by which personal guarantors may be discharged. The judgment of the Hon'ble Supreme Court in Lalit Kumar's case cannot be read to mean as laying down law that personal guarantee never can be discharged in a Resolution Plan.

17. Shri Brijesh Kumar Tamer, Learned Counsel for the Bank of Baroda submits that the Moratorium is not applicable on personal guarantor and their assets cannot be part of the CIRP. Judgment which has been relied by Shri Brijesh Kumar Tamer is "***State Bank of India vs. V. Ramakrishnan and Anr- (2018) 17 SCC 394"***. The Hon'ble Supreme Court in paragraphs 25, 26, 26.1 of the said judgment, following was held:-

> *"25. Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape*

payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the Respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him.

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

26.1. Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority

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

18. There can be no dispute that Moratorium under Section 14 is not applicable on the personal guarantors. Non-applicability of the Moratorium on personal guarantor is with different object and purpose. Personal guarantors are liable along with the principal borrower and can be proceeded with for recovery of dues by the Financial Creditor but the question as to whether personal guarantee given to the Financial Creditor can be extinguished in a Resolution Plan is a question which is a separate question and was not under consideration by the Hon'ble Supreme Court in "***State Bank of India vs. V. Ramakrishnan and Anr"*** (supra).

19. Learned Counsel for the Bank of Baroda has also placed reliance on the judgment of this Tribunal in ***"Nitin Chandrakant Naik and Anr. vs. Sanidhya Industries LLP and Ors.- 2021 SCC OnLine NCLAT 302"***.

Reliance has been placed in paragraphs 21 and 24 of the said judgment which are to the following effect:-

> *"21. The Hon'ble Supreme Court observed that Section 31 is one more factor in favour of the fact that a personal guarantor is required to pay for debts due without any moratorium applying to save him. What is clear is that Section 31 does not absolve the personal guarantor from liability. But then the Respondents are trying to rely on para 22 of the judgment of the Hon'ble Supreme Court to say that in the Resolution Plan itself there can be provision to move against personal guarantor. We do not agree with these submissions. It appears Resolution Plan can have jurisdiction as to right of payment to be received from Personal Guarantor. To us, it does not appear that the Judgment lays down that in the Resolution Plan of the Corporate Debtor itself provision could be made to consume property of Personal Guarantor without recourse to appropriate proceedings which were, earlier as per Acts then applicable (and now without recourse to Part III of IBC). Before Part-III was enforced against personal guarantors of the Corporate Debtor, the provisions under which one could move against the personal guarantors are as mentioned by the Hon'ble Supreme Court in para 15 of the judgment in the matter of "State Bank of India v. V. Ramakrishnan". After coming into force of Part-III, now one would have to proceed as per Chapter 111 of Part-III of IBC. If the arguments of the Respondents were to be accepted, there would have been no need of the earlier*

provision being maintained. After Part-III is enforced there would be no need of Part-III if properties of the Personal Guarantors could be simply included in the Resolution Plan and disposed directing them to sign the transfer deed as is being done in the present matter.

xxx xxx xxx

24. Going back to the judgment in the matter of "State Bank of India v. V. Ramakrishnan", if Moratorium under Section 14 of the IBC during CIRP did not apply to Personal Guarantors of the Corporate Debtor, personal properties of the Corporate Debtor cannot be realised by sale/transfer etc. in the CIRP of the Corporate Debtor without resorting to proceeding before appropriate authority/Court under the existing enactment before portion of Part-III has been applied to the Personal Guarantors of Corporate Debtor. Now, after portion of Part-III has been applied to Personal. Guarantors of Corporate Debtor, one would have to resort to those provisions under IBC if Personal Guarantors of Corporate Debtor are to be proceeded against. In Resolution Plan of Corporate Debtor provision relating to right of Financial Creditor to proceed against Personal Guarantor can be there, but enforcement of such right has to be as per provisions of law as discussed."

20. What has been laid down by this Tribunal in the above case is that in the Resolution Plan, property of the personal guarantor cannot be consumed without recourse to appropriate proceedings. The present is not a case where any property of the personal guarantors are being consumed and dealt with

in the Resolution Plan. The present is a case where Financial Creditors have decided to relinquish personal guarantees given to secure the financial assistance granted to the Corporate Debtor by the Financial Creditors on payment of a particular value in the Resolution Plan. Judgment of this Tribunal in ***"Nitin Chandrakant Naik"*** (supra) also does not help the Counsel for the Bank of Baroda in the present case.

21. Learned Counsel for the Appellant has relied on the judgment of the Hon'ble Supreme Court in ***"Karad Urban Cooperative Bank Limited vs. Swwapnil Bhingardevay and Ors.- (2020) 9 SCC 729"***. In the said judgment, the Hon'ble Supreme Court after referring to its judgments in ***"K. Sashidhar v. Indian Overseas Bank- (2019) 12 SCC 150"*** and ***"Essar Steel (India) Ltd. Committee of Creditors v. Satish Kumar Gupta- (2020) 8 SCC 531"*** laid down following in paragraph 14:-

> *"14. The principles laid down in the aforesaid decisions, make one thing very clear. If all the factors that need to be taken into account for determining whether or not the corporate debtor can be kept running as a going concern have been placed before the Committee of Creditors and CoC has taken a conscious decision to approve the resolution plan, then the adjudicating authority will have to switch over to the hands off mode. It is not the case of the corporate debtor or its promoter/Director or anyone else that some of the factors which are crucial for taking a decision regarding the viability and feasibility, were not placed before CoC or the resolution professional. The only basis for the*

corporate debtor to raise the issue of viability and feasibility is that the ownership and possession of the ethanol plant and machinery is the subject-matter of another dispute and that the resolution plan does not take care of the contingency where the said plant and machinery may not eventually be available to the successful resolution applicant."

22. Present is a case where it has been categorically pleaded that the issue of release of personal guarantees was deliberated by the CoC in 13th, 14th and 15th CoC meetings. In 13th CoC meeting held on 29.05.2021 while considering the Resolution Plan, under Agenda Item No.14, objection of Counsel for Union Bank of India was noticed. The issue of release of personal guarantee was very much in the discussion before the CoC which is clear from the minutes of 14th CoC meeting held on 16.06.2021, which minutes record following while deliberating the plan of the Appellant:-

"The CoC requested Mr. Mundra to consider segregating amount allocated towards payment to Financial creditors between that payable against personal guarantees and collateral security on the one hand and against fund based liabilities on the other; which will facilitate a better comparison. Mr. Mundra told the CoC that such segregation may be difficult but assured to give the matter a serious consideration."

23. The present is a case where CoC consciously considered the clauses in the plan for relinquishing the personal guarantees of the Financial Creditors and as noticed above for a consideration offered by the Successful Resolution

Applicant for release of the personal guarantee passed the Resolution Plan accepting the clause in the plan for release of the personal guarantee.

24. Learned Counsel for the Bank of Baroda has also placed reliance on the judgment of the Hon'ble Supreme Court in ***"M.K. Rajagopalan vs. Dr. Periasamy Palani Gounder and Anr.- 2023 SCC OnLine SC 574"*** in which judgment the Hon'ble Supreme Court has upheld the order of the Appellate Tribunal holding that the Resolution Plan is in contravention of the provision of law. The Hon'ble Supreme Court in paragraphs 184 and 189 laid down following:-

> *"184. In the given set of facts and circumstances of this case, in our view, the Appellate Tribunal has rightly held the resolution plan being in contravention of the provisions of law for the time being in force. Observations and findings of the Appellate Tribunal in paragraphs 106 to 112 of the impugned order dated 17.02.2022 (reproduced hereinabove in paragraph 19.4.2.) deserve to be and are approved.*
>
> *xxx xxx xxx*
>
> *189. As noticed hereinbefore, commercial wisdom of CoC is given such a status of primacy that the same is considered rather a matter nonjusticiable in any adjudicatory process, be it by the Adjudicating Authority or even by this Court. However, the commercial wisdom of CoC means a considered decision taken by CoC with reference to the commercial interests and the interest of revival of the corporate debtor and maximization of value of its assets. This wisdom is not a matter of rhetoric but is*

denoting a well-considered decision by the protagonist of CIRP ie., CoC. As observed by this Court in K. Sashidhar (supra), the financial creditors forming CoC act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. This Court also observed in K. Sashidhar that there is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. These observations read with the observations in Essar Steel (supra) with reference to the reasons stated in the report of Bankruptcy Law Reforms Committee of November 2015, make it clear that commercial wisdom of CoC is assigned primacy in CIRP for it represents collective business decision, which is arrived at after thorough examination of the proposed resolution plan and assessment made with involvement of experts by the body of persons who are most vitally interested in rapid and efficient decision making. It follows as a necessary corollary that to be worth its name, the commercial wisdom of CoC would come into existence and operation only when all the relevant information is available before it and is duly deliberated upon by all its members, who have direct and substantial interest in the survival of corporate debtor and in the entire CIRP.

25. The present is not a case where issue pertaining to the release of the personal guarantee was not before the CoC and was not deliberated. As noticed above, there was a specific clause in the Resolution Plan pertaining to release of the personal guarantee which clause was deliberated. Even the objection raised by the Union Bank of India that personal guarantee cannot be released was noticed. It is useful to extract the objection as recorded in the minutes of 13th CoC meeting held on 29.05.2021 where following was recorded:-

> *"Mr. Mihir Kumar of Union Bank of India referred to the recent Supreme Court judgment in the matter of Lalit Kumar Jain versus Union of India & Ors. and told the CoC that in his opinion, the judgment lays down that in the case of a resolution plan being approved by the Adjudicating authority, personal guarantees given in relation to loans given by financial creditors can be invoked and no provision can be made in a resolution plan for waiver of these personal guarantees. The CoC requested the RP to obtain a legal opinion from JMVD Legal in the matter."*

26. We, thus, are of the view that there is no error in the consideration of the CoC of the Resolution Plan and the commercial wisdom of the CoC by approving the Resolution Plan has to be given due weightage.

27. We may also refer to recent judgment of this Tribunal in Company Appeal (AT) (Ins.) No.517 & 518 of 2023- ***"Edelweiss Asset Reconstruction Company Ltd. vs. Mr. Anuj Jain, Resolution Professional of Ballarpur***

Industries Ltd. & Ors." decided on 04.07.2023. In the above case, the Financial Creditor of the Corporate Debtor aggrieved by the approval of the Resolution Plan has filed the Appeal. The grievance of the Appellant was that Appellant has security interest in land of the Corporate Debtor which was proposed to be sold in the Resolution Plan. The submission of the Appellant was negated by this Tribunal and it was held that such security interest by the Corporate Debtor could have been very well dealt in the Resolution Plan. In paragraphs 29 to 32 of the judgment, following was held:-

> *29. From the facts of the present case, it is clearly noticeable that security interest of the Appellant was part of the CIRP process since the Appellant has filed its claim on 05.02.2020 in Form 'C' and its claim although was rejected as Financial Creditor but was accepted as 'Other Creditor' with notional value of Re.1. The Resolution Professional has communicated to the Appellant on 19.10.2020 that since no default has been committed by the Principal Borrower against its claim of Rs.133 Crore and odd, nominal value of Re.1 only is admitted. It is also noticeable that the Appellant at no point of time challenged the admission of its claim by Resolution Professional as 'Other Creditor'. The main distinguishing feature of present case with that of* ***"Jaypee Kensington"*** *is that in* ***"Jaypee Kensington"*** *security interest of the Lender of that case was not part of the CIPR process but in the present case same was part of the CIRP process.*

30. When any asset including security interest in the asset is part of the CIRP process, there is no constraint or prohibition in I&B Code or Regulations to deal with the said asset including a security interest. The observation of the Hon'ble Supreme Court in ***"Jaypee Kensington"*** *was observation in the facts of that case. In the aforesaid background the Hon'ble Supreme Court held that security created in the land could not have been annulled in the manner suggested in the plan. The plan in the aforesaid case in Clause 23 of Schedule 3 provided that the mortgaged land shall continue to be vested in the Corporate Debtor free of any mortgage or charge or encumbrance.*

31. As noted above, in the present case, the Appellant filed its claim and their claim came to be dealt with in the Resolution Plan. In the ***Jaypee Kensington's case*** *Lenders were outside the CIRP. In Para 259.1, as noted above following was held by the Hon'ble Supreme Court:*

> *"This bank appears right in its contention that when the security in question was not even taken up as a part of the resolution process, it could not have been extinguished on the ipse dixit of the resolution applicant."*

32. Thus, basis of the judgment is when security interest is not part of the CIRP it could not have been extinguished. As noted above, in the present case, claim was filed by the Appellant

and Appellant was part of the CIRP process, hence, their security interest can very well be dealt with in the resolution plan. The scheme as delineated by Regulation 37 of CIRP Regulations, 2016 fully support our view."

28. The above judgment fully supports the submissions of the Appellant that security interest of dissenting Financial Creditor by virtue of personal guarantee of the ex-director of the Corporate Debtor could have been very well dealt in the Resolution Plan. It is further relevant to notice that each Financial Creditor has personal guarantee in their favour to secure the loan extended by them. All Financial Creditors has assented for relinquishment of such security except Bank of Baroda which had only 5.83% vote share. The decision of the CoC to accept the value for relinquishment of personal guarantee was a commercial decision of the CoC which cannot be allowed to be impugned at the instance of dissenting Financial Creditor.

29. In view of the foregoing discussions, we are of the view that the Adjudicating Authority committed error in rejecting the Application for approval of the Resolution Plan on the ground that plan could not have contained a provision for extinguishment of personal guarantee of the personal guarantors. Plan allocates a plan value for extinguishment of personal guarantee which has been accepted by the Financial Creditors by a vote share of 78.04%. We, thus, are of the view that the order of the Adjudicating Authority dated 06.01.2023 is unsustainable. In result, we allow the Appeal and set aside the order dated 06.01.2023 passed by the

Adjudicating Authority. We hold that the Resolution Plan submitted by the Appellant did not contravene any of the provisions of Section 30(2)(e) of the Code. The Adjudicating Authority shall proceed to pass a fresh order in IA 190 of 2021 praying for approval of the Resolution Plan along with necessary directions. Adjudicating Authority shall endeavour to pass fresh order on IA 190 of 2021 within a period of three months from the date when copy of this order is produced before it.

30. Appeal is allowed accordingly.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

New Delhi
Anjali