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Court No. - 39

Case :- WRIT - C No. - 26355 of 2022

Petitioner :- Narendra Singh Panwar

Respondent :- Pashchimanchal Vidyut Vitran Nigam Limited And 2 Others

Counsel for Petitioner :- Ashish Kumar Singh,Ajay Kumar Singh

Counsel for Respondent :- C.S.C.,Kartikeya Saran,Pranjal Mehrotra

Hon'ble Mrs. Sunita Agarwal,J.

Hon'ble Vipin Chandra Dixit,J.

1. Heard Sri Ashish Kumar Singh learned counsel for the petitioner, Sri Pranjal Mehrotra learned counsel for the respondent Nos.1 & 2 and learned Standing Counsel for the State respondents.

2. The present writ petition is directed against the notice of demand dated 30.06.2022 under Section 3 read with Section 5 of the U.P. Government Electrical Undertakings (Dues Recovery) Act, 1958, for recovery of electricity dues of the Company namely M/s Trimurti Concast Pvt ltd, a Company incorporated under the Companies Act, 1956. The petitioner herein is one of the two Directors of the aforesaid Company. Another Director Sri Ashok Sharma s/o Avtar Chand Sharma is also the noticee alongwith the petitioner herein, as indicated in the impugned notice itself.

3. The Company namely M/s Trimurti Concast Pvt ltd is in default of the dues of the respondent corporation and, as such, would be addressed as 'defaulter company' hereinafter.

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4. The brief facts relevant to decide the controversy at hand are that on an application/petition filed by the M/s Ram Alloys Casting Pvt ltd under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short “IB Code” 2016) and the rules framed thereunder, the defaulter company went into insolvency. At the time of filing of the present petition, insolvency resolution process with respect to the defaulter company (which may also be mentioned as the 'Corporate debtor' hereinafter) had already been commenced. By an order dated 22.3.2022, the National Company Law Tribunal (in short NCLT) had approved the resolution plan and on the application filed by the respondent no.1 Corporation namely Paschimanchal Vidyut Vitran ltd for its claim of electricity dues, it was directed by the Tribunal that since the approval of resolution plan was under consideration, the claim as prayed be considered before the approval of the resolution plan by the adjudicating authority. The claim of the applicant Corporation, thus, was to be considered along with other Operational Creditors for whom the resolution applicant had made specific provisions in the resolution plan.

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5. It is contended in the writ petition that after the order dated 22.3.2022 passed by NCLT Allahabad, the electricity connection of the Consumer Company (defaulter company) namely M/s Trimurti Concast Pvt ltd has been disconnected permanently on 30.08.2022, in continuation with the temporary disconnection made on 9.7.2019. The recovery is sought to be made by the demand notice dated 30.06.2022 issued in the name of both the Directors of the defaulter company, which is subject matter of challenge herein.

6. A copy of the demand notice had been forwarded to the

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District Magistrate, Muzzaffarnagar on 02.08.2022 in FORM-2 by the Executive Engineer, Paschimanchal Vidyut Vitran Nigam ltd (PVVNL), for making recovery of dues as arrears of land revenue.

7. It was argued by the learned counsel for the petitioner that the defaulter Company is a Corporate debtor within the meaning of IB Code, 2016 since the date of commencement of the insolvency proceedings, which is 24.12.2019. With the approval of the resolution plan and the recognition of the respondent no.1 Corporation (PVVNL) as Operational creditor, the dues of the respondent Corporation were to be settled by making specific provision in the resolution plan, at the time of issuance of the demand notice under challenge. It was urged that once the Company went into insolvency, the outstanding electricity dues towards the defaulter company being Corporate debtor could not have been recovered from its Directors. No steps can be taken for recovery of any kind of dues of the Company (Corporate debtor) by adopting any other mode under any other provision, and its Directors who are otherwise not personally liable, cannot be subjected to recovery.

8. The contention is that the Insolvency Resolution plan approved by the NCLT is binding on the Corporate debtor as also all other Stakeholders. The moratorium period under Section 14 of the IB Code' 2016 began on 24.12.2019. With the order passed by the NCLT recognizing the respondent Corporation as Operational creditor for settlement of its claim in the proceedings under the IB Code 2016, all claims against the Coporate debtor stood extinguished.

9. It was further submitted that after filing of the present writ petition, the liquidation process has been initiated under

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Section 33 of the IB Code' 2016 and the distribution of assets of the defaulter company/Corporate debtor has been made in accordance with Section 53 of the IB Code, 2016 with the approval of the resolution plan as per the payment schedule provided therein. With the passing of the order dated 22.3.2022 by the NCLT, all the liabilities of the stakeholders mentioned in the resolution plan stood permanently extinguished. The waiver and reliefs, exemptions granted by the NCLT in the order dated 22.03.2022 have been placed before us to assert that after approval of the resolution plan, a creditor is prohibited from initiating proceeding for recovery of its claims which are not part of the resolution plan and all claims except provided in the resolution plan stood permanently extinguished. It was brought before us that the resolution plan has been held to be binding on a Corporate debtor as also all other stakeholders involved and any encumbrance on the asset of the Corporate debtor prior to the approval of the resolution plan stood permanently extinguished on completion of procedural formalities as provided in the Companies Act, 2013.

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10. The submission is that the Insolvency and Bankruptcy Code, 2016 (IB Code' 2016) is a parliamentary legislation and being a subsequent legislation, by virtue of Section 238 of I.B. Code, 2016 it has an overriding effect for any inconsistent provision in any other law for the time being in force. The procedure of recovery of the electricity dues under the Electricity Act, 2003 read with the U.P. Electricity Supply Code, 2005 (framed under Section 30 of the Electricity Act, 2003) for issuance of recovery/demand under the U.P Government Electrical Undertakings (Dues Recovery) Act, 1958 would not be applicable. No recovery, as such, can be made from the petitioner who is one of the Directors of the defaulter company,

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who was recognized as Corporate debtor under IB Code, 2016. With the distribution of the assets of the Company in accordance with the Section 53 of the Code' 2016, the assets of the defaulter company/Corporate debtor stood dissolved under Section 54 of the IB Code 2016. Once the affairs of the Corporate debtor have been wound up and its assets completely liquidated, the petitioner herein no more remains the Director of the company, no recovery at all can be made from the ex-Directors of the Company which itself is not in existence. The demand notice/recovery against the Directors, therefore, liable to be quashed.

11. Reliance is placed on the decision of the Apex Court in ***Indian Overseas Bank v. RCM Infrastructure ltd*** reported in ***AIR Online 2022 SC 736*** to argue that the IBC' 2016 is a complete Code in itself and in view of Section 238 of the Code, it will override notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

12. It was argued that once Corporate Insolvency Resolution Process (CIRP) has been initiated, there is complete prohibition for any action including action against the Corporate debtor in respect of its property. It was submitted that in the aforesaid case, the Apex Court has held that the bank could not have continued the proceedings under the SARFAESI Act, 2002 once the CIRP was initiated and the moratorium was ordered.

13. The decisions of the National Company Law Tribunal (NCLT) Allahabad and NCLAT New Delhi in **Paschimanchal Vidyut Vitran vs Raman Ispat Pvt ltd and others** dated 15.05.2019 have been placed before us to submit that once liquidation order has been passed under Section 33 against the Corporate debtor, the liquidator's duty is to form liquidation

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estate of the "Corporate Debtor" in terms of Section 36(1) of the IB Code to consolidate the claims of creditors in accordance with Section 38 of the Code and then distribute the proceeds of liquidated estate to the creditors in the order of priority prescribed under Section 53 of the Code.

14. In the aforesaid case before the NCLAT, the District Collector had issued notice for recovery of outstanding dues for supply of electricity by auction of movable and immovable properties of the Corporate debtor. On the plea taken therein with regard to the overriding effect of Sections 173 and 174 of the Electricity Act, 2003, it was held that the IBC being a subsequent Act of Parliament, the Electricity Act, 2003 cannot override any provisions of the Code. If a conflict arises between one of the parliamentarian law and other parliamentarian law, the subsequent parliamentarian law has overriding effect on the earlier parliamentarian law. It is settled that earlier parliamentarian law inconsistent must give way to subsequent parliamentarian law. As per Sub-section (5) of Section 33 when a liquidation order has been passed, no suit or other legal proceeding can be instituted by or against the 'Corporate Debtor'. Section 35 which deals with the 'powers and duties of liquidator' provides that if there is any amount due to any creditor, he can file claim before the liquidator who shall verify the claims under Clause (a) of sub-Section (1) of Section 35 and, thereafter, on consolidation of claim under Section 38, after verification of claims under Section 39, it is the liquidator who is entitled to admit or reject the claim under Section 40. The District Collector could not have initiated proceeding for any outstanding dues for supply of electrical energy nor could auction movable and immovable properties, though it was open to the electricity authorities to file claim before the liquidator.

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15. It was argued that the position of law as stated therein will squarely apply in the facts and circumstances of the present case and no recovery after the liquidation of the assets of the defaulter company can be made from the petitioner, ex-director of the company.

16. Reliance is placed on the decision of the Division Bench of this Court dated in 14.9.2016 in Writ C no.14547 of 2016 (Raghvendra Garg vs State of U.P. And 5 Ors) to further submit that in absence of any statutory provision, no recovery can be made from the personal assets of the director namely the petitioner herein for any outstanding dues against the defaulter company.

17. In the end, it was argued that the expression “consumer” defined in Section 2(15) of the Electricity Act, 2003 does not cover the Director where the body corporate is a consumer and recovery, as such, also cannot be enforced against its Directors.

18. Sri Pranjal Mehrotra learned counsel for the Corporation namely respondent nos.1 and 3 herein, on the other hand, would submit that Clause 4.3(f) and Clause 6.15 of the Electricity Supply Code, 2005 clearly empower the electricity department to issue recovery proceeding against the Directors of the Company and any payment due to the licencee Company can be recovered as arrears of land revenue as per the provisions of the U.P. Government Electrical Undertakings (Dues and Recovery) Act 1958, in accordance with the Clause 6.15 of the Electricity Supply Code, 2005.

19. Placing Annexure-'1' to the counter affidavit filed on behalf of the respondent nos.1 and 2, it was submitted that out of total outstanding dues of the Corporation against the defaulter company to the tune of Rs.9 crores and odd, only an

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amount of Rs.6,62,848/- has been directed to be distributed as per the approved resolution plan, under the order dated 22.3.2022 passed by the NCLT, Allahabad.

20. A copy of the letter dated 11.01.2018 of the Managing Director of the U.P. Power Corporation ltd has been placed before us to assert that the direction has been issued to Managing Directors of all the Discoms, to recover dues of electricity from the Director/owner of the defaulter company. It is vehemently argued that Clause 4.3 (f)(v) clearly provides that the Directors of the company shall be liable for the electricity dues of the company.

21. In addition to the above, it was further argued that the defaulter company had entered into an agreement dated 8.4.2013 with the licencee, wherein one of its Director namely Sri Ashok Kumar is the signatory. The copy of the application form for supply of electricity alongwith the agreement executed with the defaulter company M/s Trimurti Concast Pvt ltd dated 8.04.2013 has been supplied to the Court to demonstrate that the guarantee for payment of dues, had been given by the signatory Director namely Ashok Sharma in his affidavit filed along with the application form.

22. Though no rejoinder affidavit has been filed in reply to the averments made in the counter affidavit. However, it was vehemently argued, in rejoinder, by Sri Ashish Kumar Singh learned counsel for the petitioner that the provisions of Clause 4.3(f)(v) of the aforesaid Supply Code, 2005 cannot be invoked for sustaining recovery proceedings against the Directors as the vires of the said provision has been challenged before this Court in Writ C no.8370 of 2016 (Izharul Hauque vs State of U.P and 6 others), wherein an interim order dated 24.02.2016 has been

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passed. It was not therein that since the Directors do not fall within the meaning of expression "consumer" defined under Section 2(15) of the Electricity Act, 2003, the subordinate legislation by which the Directors of the company have been made liable for recovery of dues against the defaulter consumer is ultra vires. It was, thus, argued by the learned counsel for the petitioner that from all angles, the recovery initiated against the Directors of the Company for dues of electricity of the defaulter company cannot be sustained.

23. Dealing with the arguments made above, we are required to first deal with the submissions of the learned counsel for the petitioner to challenge the recovery against the director in view of the insolvency proceeding /liquidation of the assets of the Company. The effect of the insolvency/liquidation process under the Insolvency and Bankruptcy Code, 2016 has to be examined by us so as to deal with the arguments of the learned counsel for the petitioner about the overriding effect given to its provisions by virtue of Section 238 of the Code.

24. It is well settled that IBC is a complete Code in itself and in view of the provision of Section 238 of the IBC, the provisions of Code will prevail notwithstanding anything inconsistent therewith contained in any other law for the time being in force. The Code is a beneficiary legislation intended to put the Corporate debtor back on its feet and is not a mere money recovery legislation. The CIRP (Corporate Insolvency Resolution Process) is not intented to be adversial to the Corporate debtor but is intended at protecting the interest of the Corporate debtor. It is no more res integra that the IB Code is a complete code- provisioning for actions and proceedings relating to, amongst others, reorganisation and insolvency

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resolution of Corporate persons in a time bound manner for maximisation of value of assets of such persons, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto. [Reference para-19 ***Laxmi Pat Surana vs Union of India and another*** reported in ***(2021) 8 SCC 481]***

25. By the Amendment Act 8 of 2018 with effect from 23.11.2017, the provision of Section 2 Sub Section (e) has been substituted as follows:-

> *"**2.Application**.-The provisions of this Code shall apply to-*
>
> ***
>
> *(e) personal guarantors to corporate debtors,"*

26. In the instant case, the recovery of electricity dues has been initiated against the Directors of the Company during the period when the defaulter company was in insolvency. The resolution plan submitted by the resolution applicant was approved under the order dated 22.3.2022 of the NCLT. The submission of the learned counsel for the petitioner is that the assets of the Company have been liquidated during the pendency of the present petition though there is no such material on record.

27. The waiver, reliefs and exemptions granted under the order dated 23.2.2022 passed by the NCLT Allahabad are with respect to the claims against the Corporate debtor and the assets of the Corporate debtor. A reading of the order of the NCLT Allahabad clearly shows that the reliefs, waiver and claims made by the resolution applicant were granted to the extent that

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after the payment of dues of the creditor as per the resolution plan, a creditor cannot initiate proceedings for recovery of claims against the Corporate debtor which are not part of the resolution plan. All encumbrance on the assets of the Corporate debtor prior to the plan stood permanently extinguished on completion of procedural formalities as provided in Companies Act 2013.

28. However, the question herein is about the personal liability of the Directors of the Defaulter Company/Corporate debtor which went into insolvency.

29. It is the stand of the respondents Corporation that one of the Directors of the defaulter company namely Sri Ashok Sharma, at the time of submitting the application form for supply of electricity filed his affidavit along with the application form to undertake that whatever be the dues of the Company, he would always be ready and bound to deposit the same in accordance with the orders of the Executive Engineer, U.P Power Corporation ltd. The copy of the notary affidavit filed along with the application form signed by Sri Ashok Sharma as the director of the defaulter company namely M/s Trimurti Concast Pvt ltd contains the following statements:-

> “*3-* यह िकि शपतकितार्ता किी उपरोक्त फर्मर्ता पर
> किोई िकिद न्यायालय मे नही है तथा उक्त फर्मर्ता पर
> जो भी बकािकयाक है विह
> श्रीमान जी िक आदेशानुसाकर जमा किरने िक ार वि बाध्य
> िलए तथहूँगा।
>
> *4-*यह िकि शपतकितार्ता उपरोक्त किॉंनेक्शन िकाक स्विीकृित भार पर ही
> प्रयोग किरगा स्विीकृित भार से उपर किॉंनक्शे न प्रयोग किरते पाकए
> जाने पर िविभाग किो शपतकितार्ता से अतितिरक्त रा
> ाजस्वि विसूली किािकाक आिधिकािकर होगा ।”

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30. The agreement for supply of electrical energy dated 8.4.2013 has been signed by Sri Ashok Sharma as Director of M/s Trimurti Concast Pvt ltd as the 'Consumer'.

31. The submission is that though the terms and condition of the agreement bound the 'Consumer' namely the defaulter company, but in view of the undertaking given by the Director of the Company, the signatory to the agreement on his affidavit, the Director became personal guarantor of the Corporate debtor, i.e the defaulter company namely M/s Trimurti Concast pvt ltd.

32. We may further note that the present petition has been filed by only one of the Directors of the defaulter company namely Narendra Singh Pawar seeking to challenge the entire demand notice jointly issued in the name of both the Directors of the Company under Section 3 read with Section 5 of U.P. Government Electrical Undertaking (Dues Recovery) Act, 1958. Another Director of the Company in whose name also the demand notice has been issued along with the petitioner herein, has not joined in the present petition for the reasons best known to him. However, the relief prayed herein is to set aside the entire demand notice dated 30.6.2022 issued jointly in the name of both the Directors seeking for Recovery of Electricity Dues of the defaulter company, namely M/s Trimurti Concast Pvt Ltd on the grounds to assail the same noted above.

We are, therefore, required to examine the question as to whether the Director of the Company who is claimed to be the personal guarantor in the matter of payment of electricity dues of the Company would be able to sustain the challenge to the demand of dues of electricity from the personal assets of the Directors, in view of the Insolvency Proceedings concluded in relation to the defaulter company namely the Corporate debtor.

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33. To answer this question, we may go through the decisions of the Apex Court clarifying such position. In ***State Bank of India vs V. Ramakrishna and anothers*** reported in ***(2018) 17 SCC 394,*** the controversy revolved around Section 14 of the Insolvency and Bankruptcy Code, 2016 which provides for moratorium for the limited period mentioned in the Code. The issue before the Apex Court was as to whether on admission of insolvency petition, the moratorium under Section 14 of the Code would apply to a personal guarantor of a Corporate debtor.

34. While answering the said question, the Apex Court had considered different provisions of the Code and the effect of enforcement of Section 2(e) w.e.f 23.11.2017 by the Amendment Act, 2018. It was noted that under Part II of the Code which deals with insolvency resolution and liquidation for Corporate persons, a financial creditor or a Corporate debtor may make an application to initiate the insolvency resolution process. Once initiated, the adjudicating authority, after admission of such application, shall by order declare a moratorium for the purposes referred to in Section 14 (as per Section 13 of the Code). Section 14 refers to four matters that may be prohibited once the moratorium comes into effect. Clause (a) to (d) of sub-section (1) of Section 14 are relevant to be extracted hereunder:-

> *"*14.(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—*
>
> *(a) the institution of suit or continuation of pending suits or <u>proceedings against the corporate debtor</u> including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*

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

(c)any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

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

35. It was noted by the Apex Court in ***State Bank of India*** (supra) that in each of the matters referred to in the above noted prohibition, under Section 14, what is conspicuous by its absence is any mention of the personal guarantor. Indeed, the corporate debtor and the corporate debtor alone is referred to in the said Section. A plain reading of the said Section, therefore, leads to the conclusion that the moratorium referred to in Section 14 can have no manner of application to personal guarantors of a Corporate debtor (Reference paragraphs-'19' and '20').

"19. Under Part II of the Code, which deals with "Insolvency Resolution and Liquidation for Corporate Persons", a financial creditor or a corporate debtor may make an application to initiate this process. Once initiated, the Adjudicating Authority, after admission of such an application, shall by order, declare a moratorium for the purposes referred to in Section 14 (See Section 13 of the Code).

*20.*Section 14 *refers to four matters that may be prohibited once the moratorium comes into effect. In each of the matters referred to, be it institution or continuation of proceedings, the transferring, encumbering or alienating of assets, action to recover security interest, or recovery of property by an owner*

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which is in possession of the corporate debtor, what is conspicuous by its absence is any mention of the personal guarantor. Indeed, the corporate debtor and the corporate debtor alone is referred to in the said Section. A plain reading of the said Section, therefore, leads to the conclusion that the moratorium referred to in Section 14 can have no manner of application to personal guarantors of a corporate debtor."

36. It was argued before the Apex Court therein that once a resolution plan, approved by the Committee of Creditors takes into effect, it shall be binding on the Corporate debtor as well as guarantor. It was also argued that by virtue of Section 2(e) and Section 60 of the Code, the Code will apply the personal guarantors of the Corporate debtors and Section 60 which provides for the proceedings against such personal guarantors will show that such moratorium extends to the guarantor as well.

37. The above arguments were turned down with the following observations:-

*"**21**. The scheme of Section 60(2) and (3) is thus clear – the moment there is a proceeding against the corporate debtor pending under the 2016 Code, any bankruptcy proceeding against the individual personal guarantor will, if already initiated before the proceeding against the corporate debtor, be transferred to the National Company Law Tribunal or, if initiated after such proceedings had been commenced against the corporate debtor, be filed only in the National Company Law Tribunal.*

However, the Tribunal is to decide such proceedings only in accordance with the Presidency-Towns Insolvency Act, 1909 or the Provincial Insolvency Act, 1920, as the case may be. It is clear that sub-section (4), which states that the Tribunal shall be vested with all the powers of the Debt Recovery Tribunal, as contemplated under Part III of this Code, for the purposes of sub-section (2), would not take effect, as the Debt

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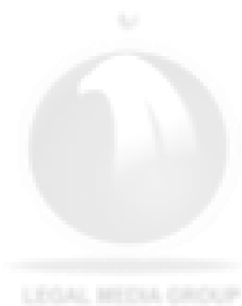
Recovery Tribunal has not yet been empowered to hear bankruptcy proceedings against individuals under Section 179 of the Code, as the said Section has not yet been brought into force. Also, we have seen that Section 249, dealing with the consequential amendment of the Recovery of Debts Act to empower Debt Recovery Tribunals to try such proceedings, has also not been brought into force. It is thus clear that Section 2(e), which was brought into force on 23.11.2017 would, when it refers to the application of the Code to a personal guarantor of a corporate debtor, apply only for the limited purpose contained in Section 60(2) and (3), as stated hereinabove. This is what is meant by strengthening the Corporate Insolvency Resolution Process in the Statement of Objects of the Amendment Act, 2018."

*"**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."*



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It was concluded in paragraphs 26.1 as under:

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

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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."

38. It was, thus, held therein that the object of the Code is not to allow personal guarantors such as Directors who are in management of the companies to escape from an independent and co-existent liability to pay off the entire outstanding debt. The decision in ***Sanjeev Shriya vs S.B.I*** reported ***(2017) 9 ADJ 723*** wherein moratorium was applied to enforcement of guarantee against personal guarantor to the debt, has been overruled.

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39. The findings of the Insolvency law Committee appointed by the Ministry of Corporate Affairs in its report dated 26.3.2018, in so far as the moratorium under Section 14 is concerned, have also been noted in para-'32' as under:-

*"**32**. The Committee insofar as the moratorium under Section 14 is concerned went on to find:*

***5.9** A contract of guarantee is between the creditor, the principal debtor and the surety, where under the creditor has a remedy in relation to his debt against both the principal debtor and the surety [National Project Construction Corporation Limited v. Sandhu and Co., AIR 1990 P&H 300]. The surety here may be a corporate or a natural person and*

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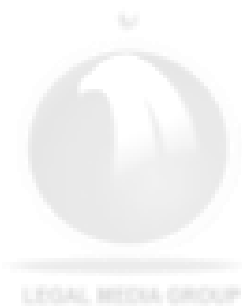
the liability of such person goes as far the liability of the principal debtor. As per section 128 of the Indian Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor and the creditor may go against either the principal debtor, or the surety, or both, in no particular sequence [Chokalinga Chettiar v. Dandayunthapani Chattiar, AIR 1928 Mad 1262]. Though this may be limited by the terms of the contract of guarantee, the general principle of such contracts is that the liability of the principal debtor and the surety is co-extensive and is joint and several [Bank of Bihar v. Damodar Prasad, AIR 1969 SC 297]. The Committee noted that this characteristic of such contracts i.e. of having remedy against both the surety and the corporate debtor, without the obligation to exhaust the remedy against one of the parties before proceeding against the other, is of utmost important for the creditor and is the hallmark of a guarantee contract, and the availability of such remedy is in most cases the basis on which the loan may have been extended.



***5.10** The Committee further noted that a literal interpretation of Section 14 is prudent, and a broader interpretation may not be necessary in the above context. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety. Thus, contractual principles of guarantee require being respected even during a moratorium and an alternate interpretation may not have been the intention of the Code, as is clear from a plain reading of Section 14.*

***5.11** Further, since many guarantees for loans of corporates are given by its promoters in the form of personal guarantees, if there is a stay on actions against their assets during a CIRP, such promoters (who are also corporate applicants) may file frivolous applications to merely take advantage of*

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the stay and guard their assets. In the judgments analysed in this relation, many have been filed by the corporate applicant under Section 10 of the Code and this may corroborate the above apprehension of abuse of the moratorium provision. The Committee concluded that Section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in Section 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only."

40. In **Laxmi Pat Surana** (supra) while dealing with the action under Section 7 of IBC' 2016 against the Corporate debtor, it was noted that Section 7 is an enabling provision, which permits the financial creditor to initiate CIRP (Corporate Insolvency Resolution Process) against a Corporate debtor. The Corporate debtor can be the principal borrower. It can also be a Corporate person assuming the status of Corporate debtor having offered guarantee, if and when the principal borrower/debtor commits default in payment of its debt. It was noted that indisputably a cause of action would enure to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor in equal measures in case, they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default committed by the guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of the amount of debt, for the obligation of the guarantor is coextensive and coterminus with that of the principal borrower to defray the debt, as predicated in Section 128 of the Contract Act.

41. In ***Lalit Kumar Jain vs Union of India and others*** reported in ***(2021) 9 SCC 321***, the challenge was to the validity of the notifications dated 15.11.2019 issued by the Central

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Government, Ministry of Corporate Affairs as also the Insolvency and Bankruptcy (application) to adjudicating authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

42. One of the issues raised before the Apex Court therein, to challenge the said notification was, that by applying the Code to personal guarantors, the protection afforded by law has been taken away. With reference to Sections 128, 133 and 140 of the Indian Contract Act, 1872, it was argued 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 that the impugned notifications which has the effect of allowing proceedings before NCLT by applying provisions of Part III of the Code deprive the guarantors of their valuable substantive rights to claim extinction of their liabilities with the discharge of liability of the principal debtor/Corporate debtor.

43. This issue was answered considering the provisions of Section 31 of the IB Code with regard to approval of resolution plan and the relevant provisions in Sections 128, 129, 130, 131, 133, 134, 140 and 141 of the Indian Contract Act, 1872. The arguments of the petitioners therein were noted in para-'118' as under:-

> "***118.*** *All creditors and other classes of claimants, including financial and operational creditors, those entitled to statutory dues, workers, etc., who participate in the resolution process, are heard and those in relation to whom the CoC accepts or rejects pleas, are entitled to vent their grievances before the NCLT. After considering their submissions and objections, the resolution plan is accepted and approved. This results in*

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> *finality as to the claims of creditors, and others, from the company (i.e. the company which undergoes the insolvency process). The question which the petitioners urge is that in view of this finality, their liabilities would be extinguished; they rely on Sections 128, 133 and 140 of the Contract Act to urge that creditors cannot therefore, proceed against them separately."*

44. Referring to the decisions of the Apex Court in ***Vijay Kumar Jain vs. Standard Chartered Bank*** reported in ***(2019) 20 SCC 455; SBI vs V. Ramakrishnan and another*** *(supra);* ***Essar Steel (India) ltd (CoC) vs Satish Kumar Gupta*** reported in ***(2020) 8 SCC 531,*** it was held in para-'122' that 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.

It was, thus, concluded in para-'125' as under:-

> ***"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."*

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45. In view of the above discussions, it is clear that approval of a resolution plan does not ipso facto absolve the surety/guarantor of his or her liability, which arises out of an independent contract of guarantee. To what extent, the liability of a guarantor can be pressed into service would depend on the

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terms of the guarantee/contract, itself.

For the above position of law, the main contention of the learned counsel for the petitioner to challenge the recovery on the ground that approval of the resolution plan in the insolvency proceeding in relation to the defaulter company namely M/s Trimurti Concast Pvt ltd (Corporate debtor) would ipso facto discharge both the Directors of the defaulter Company, one of whom is the petitioner before us, is liable to be turned down.

46. As noted above, another Director of the defaulter company namely Ashok Sharma, who is not before us, claim to have given personal guarantee for discharge of the electricity dues of the defaulter company by filing his affidavit along with the application form submitted by the defaulter consumer company (Corporate debtor) for the supply of electricity. To what extent, the contents of the said affidavit would operate as personal guarantee against the said director, is a question which is not to be answered by us as the same has neither been pressed before us nor is required to be answered, in as much as, the challenge to the demand notice by one of the Directors is only on the ground that once the defaulter company went into insolvency, with the approval of a resolution plan under Section 31 of the IB Code, 2016, with the discharge of the Corporate debtor of its liability and subsequent liquidation of the assets of the company, the liability of its Directors stood extinguished, which has been turned down by us for the reasoning given above. Moreover, the signatory director, who claims to have given personal guarantee for the electricity dues is not before us. The aforesaid issue, therefore, is open to be agitated by the parties at an appropriate proceeding.

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47. As to the issue of applicability of Clause 4.3(f)(v) of the Electricity Supply Code, 2005, the arguments with regard to validity of the same or the said provision being ultra vires to the Electricity Act, 2003, made in rejoinder half-heartedly, cannot be entertained, in as much as, no foundation has been laid in that regard in the writ petition.

48. For the above discussion, it is clarified that the legal issue with regard to the liability of the personal guarantor of the Corporate debtor whose liability is co-extensive with the principal debtor, i.e the Corporate debtor has been answered by us taking into consideration the law laid down by the Apex Court. However, for the rest of the issues, if any, arise with regard to the nature or extent of liability of the petitioner herein or another director of the Company as personal guarantor, the same have not been answered by us as no arguments have been placed in that regard.

49. In view of the above discussion, the challenge to the demand notice for dues of electricity, issued jointly in the name of the Directors of the Corporate debtor, the defaulter company which went into insolvency cannot be sustained on the ground that in view of the acceptance of the resolution plan under Section 31 of the Code, all liabilities of the Directors, who may be the guarantor, stood automatically discharged/extinguished.

No other point has been pressed before us.

The writ petition is, accordingly, **dismissed.**

Order Date :-12.01.2023
Harshita

Digitally signed by :-
HARSHITA
High Court of Judicature at Allahabad