2024 INSC 548

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**
**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 4565 OF 2021**

**BRS Ventures Investments Ltd. ... Appellant**

***versus***

**SREI Infrastructure Finance Ltd. & Anr. ... Respondents**

**J U D G M E N T**

**ABHAY S. OKA, J.**

**FACTUAL ASPECTS**

**1.** The 2nd respondent–Gujarat Hydrocarbon and Power SEZ Limited, is a corporate debtor. The corporate debtor approached the 1st respondent–SREI Infrastructure Finance Limited (the financial creditor), for a grant of a loan. Under the agreement dated 5th January 2011, the financial creditor granted the corporate debtor a loan of Rs.100 crores for setting up a SEZ project. The corporate debtor is a subsidiary of M/s. Assam Company India Limited (ACIL). The loan granted by the financial creditor to the corporate debtor was secured by a mortgage made by the corporate debtor of its leasehold land and a pledge of shares of the corporate debtor and ACIL. The loan was also secured by the corporate guarantee dated 5th

January 2011 furnished by ACIL. The financial creditor filed an Original Application before the Debt Recovery Tribunal-I, Kolkata (for short, 'the DRT') to recover the outstanding loan amount. On 24th March 2015, a "debt repayment and settlement agreement" was executed to which the financial creditor, the corporate debtor and ACIL (the guarantor) were parties. On account of the default committed by the corporate debtor, the financial creditor invoked the corporate guarantee of ACIL. Thereafter, an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short, 'the IBC') was filed concerning ACIL as the guarantee was not honoured. The adjudicating authority vide order dated 26th October 2017 admitted the said application. Thus, the Corporate Insolvency Resolution Process (for short, 'CIRP') of ACIL commenced. The 1st respondent-financial creditor filed a claim of Rs.648.81 crores, out of which the claim of Rs.357.29 crores was admitted towards the claim by the Interim Resolution Professional (for short, 'IRP'). After the appointment of the Resolution Professional (RP), the claim amount of the 1st respondent financial creditor was reassessed at Rs.241.27 crores inclusive of the principal amount of Rs.100 crores. The appellant is the successful Resolution Applicant of ACIL. The appellant submitted a resolution plan. The resolution plan was approved on 13th August 2018 by the Committee of Creditors (for short, 'the COC'), which was approved by the adjudicating authority by the order dated 20th September 2018. The order of the adjudicating authority was confirmed in appeal by the National Company Law Appellate Tribunal (for short, 'the NCLAT'). The appellant paid Rs.38.87 crores to the

1st respondent-financial creditor, against the admitted claim of Rs.241.27 crores in full and final settlement of all its dues and demands submitted in the resolution plan.

**2.** On 10th February 2020, the 1st respondent financial creditor filed an application under Section 7 of the IBC against the 2nd respondent corporate debtor. The claim of the 1st respondent-financial creditor was of Rs.1428 crores, which is claimed to be the balance amount payable to the financial creditor under the loan facility of Rs.100 crores. By the order dated 18th November 2020, the adjudicating authority admitted the application under Section 7 of the IBC. Aggrieved by the said order, the appellant preferred an appeal before the NCLAT. A suspended Director of the corporate debtor also preferred an appeal against the said order of the adjudicating authority. By the impugned judgment of the NCLAT, both appeals have been dismissed.

**3.** M/s. Zaveri & Co. Pvt. Ltd. has filed I.A. No.11685 of 2023 for intervention. It is stated in the application that the applicant and other interested parties had submitted the resolution plan of the 2nd respondent-corporate debtor. A final resolution plan was submitted by the applicant on 23rd August 2021, proposing to pay a sum of Rs.135 crores within a period of 15 months to the creditors of the 2nd respondent-corporate debtor. The COC of the 2nd respondent-corporate debtor approved the resolution plan of the applicant on 30th August 2021. As required by the approved resolution plan, the applicant has furnished a bank guarantee of Rs.2 crores on 3rd September 2021.

**SUBMISSIONS OF THE APPELLANT**

**4.** Mr. Jaideep Gupta, the learned senior counsel appearing for the appellant, submitted that in the CIRP of ACIL, the appellant's resolution plan was duly approved. As per the resolution plan, a sum of Rs.38.87 crores was paid to the 1st respondent-financial creditor, which was in full and final settlement of the dues of the 1st respondent-financial creditor. He submitted that upon such payment being made by the appellant, Section 140 of the Indian Contract Act, 1872 (for short, 'the Contract Act') would squarely apply as the rights of the 1st respondent-financial creditor shall stand subrogated in favour of the appellant. Therefore, through ACIL, the appellant would step into the shoes of the 1st respondent-financial creditor. He would, thus, submit that the appellant has the right of subrogation over the right of the financial creditor over the principal borrower (corporate debtor) in respect of its dues as well as the security provided to the financial creditor of the mortgage in respect of SEZ land. He submitted that upon payment of Rs.38.87 crores to the 1st respondent-financial creditor, as a full and final settlement of its total dues of Rs.241.27 crores, the appellant has now stepped into the shoes of the 1st respondent-financial creditor. He relied on this Court's decision in the case of ***Amit Lal Goverdhan Lalan v. State Bank of Travancore & Ors***[1].

**5.** The learned senior counsel further submitted that for attracting Section 140 of the Contract Act, the payment by the

[1] (1968) 3 SCR 724

guarantor does not have to be of the entire amount due from the principal debtor. Even a partial payment made in the full and final settlement is sufficient to trigger the principle of subrogation. He placed reliance on a decision of the Allahabad High Court in the case of ***Shib Charan Das v. Muqaddam & Ors[2].*** He submitted that the High Court of Karnataka, in the case of ***Kadamba Sugar Industries Pvt. Ltd. v. Devru Ganapathi Hegde Bhairi[3]*** has held that acceptance of the lesser amount by the creditor under the complete satisfaction of the dues paid by the surety, entitled surety to the right of subrogation. The surety is entitled to all the rights of the creditor against the principal debtor. He also relied upon a decision of this Court in the case of ***Economic Transport Organization, Delhi v. Charan Spinning Mills Pvt. Ltd. & Anr.[4]***.

**6.** He submitted that upon receipt of Rs.38.87 crores from the guarantor, the debt repayable to the 1st respondent financial creditor has been discharged. The 1st respondent financial creditor is now estopped from enforcing the remaining part of the debt from the 2nd respondent-corporate debtor in view of Section 63 read with Section 41 of the Contract Act. The 1st respondent financial creditor applied Section 7 of the IBC against the 2nd respondent corporate debtor, though the entire debt of the 1st respondent financial creditor has been discharged. Moreover, there is a right of subrogation. He relied upon a decision of this Court in the

[2] AIR 1936 ALL 62
[3] 1993 SCC Online KAR 7
[4] (2010) 4 SCC 114

case of ***Lala Kapurchand Godha & Ors. v. Mir Nawab Himayatalikhan Azamjah***[5]**.**

**SUBMISSIONS OF THE 1ST RESPONDENT – FINANCIAL CREDITOR**

**7.** Mr Abhimanyu Bhandari, the learned counsel appearing for the 1st respondent-financial creditor, has taken us through the impugned orders. He pointed out that the resolution plan of the 2nd respondent-corporate debtor has been approved by the adjudicating authority by the order dated 19th September 2023. He submitted that no payment was made against the claim raised by ACIL as it was an unsecured financial creditor primarily because the liquidation value of the 2nd respondent-corporate debtor is much lower than the total claim amount of the secured financial creditors. He pointed out that the main grievance of the appellant is that the institution of corporate insolvency has been upheld against the 2nd respondent-corporate debtor, for the assets allegedly part of the CIRP of ACIL, which is the holding company of the 2nd respondent-corporate debtor. He pointed out that under Section 36(4) of the IBC, the assets of the subsidiary of the corporate debtor cannot be included in the liquidation estate assets. He invited our attention to Section 18 of the IBC, which contains the duties of IRPs. He submitted that if there is a resolution of a corporate debtor, the assets of any of its subsidiaries will not be included in the scope of the resolution process. He submitted that the holding company and its subsidiaries are distinct legal persons, and the holding company does not own

[5] (1963) 2 SCR 168

the subsidiary's assets. The learned counsel relied upon a decision of this Court in the case of ***Vodafone International Holdings BV v. Union of India & Anr***[6]. He also relied upon a decision of this Court in the case of ***Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v. NBCC (India) Ltd. & Ors***[7]. Inviting our attention to the information memorandum in the CIRP of ACIL, he submitted that the same did not contain the particulars of the assets of the 2nd respondent-corporate debtor. It was specifically stated therein that the 2nd respondent-corporate debtor was still to unlock the value of the land, that is, the value of the investment made by ACIL. It was disclosed that the 2nd respondent-corporate debtor was a 51% subsidiary of ACIL. The assets and liabilities of ACIL, disclosed in the information memorandum, did not include the assets and liabilities of the subsidiaries. Therefore, the assets and liabilities of the 2nd respondent-corporate debtor were not part of CIRP of ACIL. He also pointed out the definition clause in the resolution plan. The liquidation value of ACIL was shown as Rs.360 crores, and the financial value did not include its subsidiaries' income. It is expressly provided in clauses 13.1 and 13.3 of the resolution plan that all the assets of ACIL shall stand extinguished, and the corporate guarantee of ACIL would also be extinguished. There is a specific clause that no right of subrogation shall be available to the existing guarantors. He submitted that only a sum of Rs.38.87 crores was given to the 1st respondent-financial creditor. Therefore, the liability of the

[6] (2012) 6 SCC 613
[7] (2022) 1 SCC 401

2nd respondent-corporate debtor concerning the balance amount continued to exist.

**8.** He invited our attention to the decision of this Court dated 21st May 2021 in the case of ***Lalit Kumar Jain v. Union of India & Ors***[8]**.** This judgment lays down that it is open for the creditors to move against personal guarantors under the IBC. He submitted that because the liability of the guarantor is co-extensive with the corporate debtor, this Court held that the approval of a resolution plan of the corporate debtor does not *ipso facto* discharge guarantors of the corporate debtor of their liabilities under the contract of guarantee. It was held that by involuntary process or due to liquidation or insolvency proceedings, corporate guarantors are not absolved of their liability, which arises out of an independent contract. In this case, the entire outstanding amount payable by the 2nd respondent-corporate debtor has not been recovered from ACIL. Therefore, there is no bar on the 1st respondent-financial creditor to proceed against the 2nd respondent-corporate debtor for the remaining amount. In this case, the 1st respondent-financial creditor first moved against the guarantor and, after exhausting the remedies against the guarantor, filed an application under Section 7 against the 2nd respondent-corporate debtor. Merely because the creditor has made a partial recovery from the guarantor, it does not absolve the corporate debtor of his financial obligations. Reliance was

[8] (2021) 9 SCC 321

placed upon a decision of this Court in the case of ***Maitreya Doshi v. Anand Rathi Global Finance Ltd. & Anr[9].***

**9.** Regarding the plea of subrogation, the learned counsel pointed out that the plea was never raised before the adjudicating authority and the NCLAT. The ground of subrogation was made by way of an amendment to the memorandum of this appeal; therefore, the contention not raised earlier cannot be considered at this stage. He pointed out that the COC and the adjudicating authority have already approved the resolution plan for the 2nd respondent-corporate debtor. He submitted that this Court had settled this issue in the case of ***Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta & Ors[10]***. He relied upon a decision of the Hyderabad Bench of the NCLT in the case of ***State Bank of India v. Ghanshyam Surajbali Kurmi[11],*** which covered the issue.

**SUBMISSIONS OF INTERVENORS**

**10.** Mr. Darius Khambata, the learned senior counsel appearing for the intervenor, also made detailed submissions. He pointed out that under Section 128 of the Contract Act, the liability of a surety is co-extensive with that of the principal debtor unless there is something contrary to that in the contract. He relied upon a decision of this Court in the case of ***Laxmi Pat Surana v. Union of India & Anr[12]*** on this

[9] 2022 SCC Online SC 1276
[10] 2019 SCC Online SC 1478
[11] 2022 SCC Online NCLT 14567
[12] (2021) 8 SCC 481

behalf. He submitted that the guarantor's liability is separate and distinct from the principal debtor as held by this Court in the case of ***Punjab National Bank Ltd. v. Shri Vikram Cotton Mills & Anr.***[13] This Court held that a binding obligation created under a composition under Section 391 of the Companies Act, 1956, between the company and its creditors, did not affect the liability of surety. He submitted that any variation in the contract between the creditor and guarantor does not discharge the principal debtor. If there is a variance made without the guarantor's consent in the contract between the corporate debtor and the creditor, it amounts to the discharge of the guarantor as regards the transactions subsequent to the variance. He pointed out various provisions of the Contract Act regarding the discharge of a guarantor. Relying upon Section 60(2) of the IBC and a decision of this Court in the case of ***Lalit Kumar Jain***[8]**,** he urged that the IBC permits simultaneous petitions against the corporate debtor and corporate guarantor. He also invited our attention to Section 60(2) of the IBC. He relied upon a decision of this Court in the case of ***State Bank of India v. V. Ramakrishnan & Anr***[14]. He submitted that Section 140 of the Contract Act will be applicable only when the guarantor pays all that he is liable for under the contract of guarantee. He submitted that if the guarantor makes only a part payment of the debt, Section 140 will not have any application. He relied upon a decision of the Allahabad High Court in the case

[13] (1970) 1 SCC 60
[14] (2018) 17 SCC 394

of ***Darbari Lal & Anr. v. Mahbub Ali Mian & Ors***[15]. He submitted that this proposition finds support even in the decision of the Allahabad High Court in the case of ***Shib Charan Das***[2] relied upon by the appellant. He pointed out that in the information memorandum of ACIL, the assets and liabilities of the 2nd respondent-corporate debtor were not included. The assets of the 2nd respondent-corporate debtor cannot be treated as a part of ACIL's assets. He submitted that the resolution plan of ACIL has been prepared based on the information memorandum. He submitted that the information memorandum and the resolution plan must be consistent with Section 36(4)(d) of the IBC.

**REPLY OF THE APPELLANT**

**11.** Replying to the submissions made by the learned counsel appearing for the 1st respondent-financial creditor, the learned senior counsel appearing for the appellant reiterated his submissions on the applicability of Section 140 of the Contract Act. His submission is that the information memorandum indicates taking over the business of ACIL and the 2nd respondent-corporate debtor. He submitted that the business of the 2nd respondent-corporate debtor was included in the insolvency plan. He submitted that by the admission of an application under Section 7 against the 2nd respondent-corporate debtor, a valuable asset of ACIL has been taken away.

[15] (1927) SCC Online ALL 121

**CONSIDERATION**

**12.** Before we deal with the submissions canvassed across the Bar, we must note the issues formulated in the impugned judgment of the NCLAT. Based on the submissions made before it, two issues were framed, which read thus:

> **"13.** Following issues arise in this appeal for our consideration:
>
> (i) Whether the application under Section 7 of IBC is barred by limitation?
>
> (ii) Whether the second Application under Section 7 of IBC is not maintainable against the Corporate Debtor as for the same debt and default, CIRP has already been taken place against the Corporate Guarantor and the Financial Creditor has accepted the amount in full and final settlement of all its dues?**"**

**13.** The present appellant did not canvas the issue of subrogation before the NCLAT. It is also not urged in the memorandum of appeal before the NCLAT. We may note here that the appellant has not seriously pressed the issue of the bar of limitation in this appeal. The NCLAT rendered the findings on both issues in favour of the respondents. There is no dispute that the 1st respondent financial creditor had granted a loan of Rs.100 crores to the 2nd respondent corporate debtor. The loan was secured by the corporate guarantee furnished by ACIL, which is the holding company of the corporate debtor. There is no dispute that the 2nd respondent-corporate debtor committed a default in payment

of the loan amount. Therefore, the guarantee was invoked by the 1st respondent-financial creditor, which led to the filing of an application under Section 7 of the IBC against ACIL. The CIRP of ACIL was completed, and the resolution plan was approved. The claim lodged by the 1st respondent-financial creditor was of Rs.241.27 crores. However, as per the resolution plan, the 1st respondent-financial creditor had to accept a haircut as it was provided therein that the 1st respondent-financial creditor would get only a sum of Rs.38.87 crores from the resolution applicant.

**LIABILITY OF GUARANTOR / SURETY**

**14.** As far as the guarantee is concerned, the law is very well settled. The liability of the surety and the principal debtor is co-extensive. The creditor has remedies available to recover the amount payable by the principal borrower by proceeding against both or any of them. The creditor can proceed against the guarantor first without exhausting its remedies against the principal borrower. Chapter VIII of the Contract Act contains provisions regarding indemnity and guarantee. Section 126 is relevant for our purposes, which reads thus:

> **"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.**"**

A surety is also known as a guarantor. Section 128 reads thus:

> **"128. Surety's liability.—** The liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract.**"**

It lays down the fundamental principle that the liability of the surety is co-extensive with that of the principal debtor unless otherwise provided by the contract. Sections 133 to 139 deal with the discharge of surety, which read thus:

> **"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 debtor 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.**"**

Thus, the law provides that if any variance is made without surety's consent in the terms of the contract between the principal debtor and the creditor, it amounts to discharge of

the surety as to the transactions subsequent to the variance. Under the provisions of Section 133, surety can be discharged only when there is a variance made in the terms of the contract between the principal debtor and the creditor. Section 134 contemplates a situation where the principal debtor is released by a contract between the creditor and the principal debtor. In such a case, the surety is discharged. If by any act or omission on the part of the creditor, the legal consequence of which is the discharge of the principal debtor, the surety stands discharged. Section 135 is based on the same principle on which Section 133 is based. If there is a contract between the creditor and the principal debtor by which the creditor makes a composition or promise with the principal debtor, or gives time to the principal debtor or agrees not to sue the principal debtor, it amounts to discharge of the surety provided the surety has not assented to such a contract. If the creditor contracts with a third party to give time to the principal debtor, and when the principal debtor is not a party to such a contract, the surety is not discharged. Section 137 lays down a settled principle that it is not necessary for the creditor to first sue the principal debtor or adopt a remedy against him. If the creditor omits to do that, unless there is a contract to the contrary, it will not amount to discharge of the surety. This means that without proceeding to recover the debt against the principal debtor, the creditor can proceed against the surety unless there is a contract to the contrary. Even if the creditor discharges one surety, it will not amount to the discharge of the other surety. There are two other contingencies provided under Sections 138 and 139. We are

not concerned with these two contingencies in the present case.

**15.** If the creditor recovers a part of the amount guaranteed by the surety from the surety and agrees not to proceed against the surety for the balance amount, that will not extinguish the remaining debt payable by the principal borrower. In such a case, the creditor can proceed against the principal borrower to recover the balance amount. Similarly, if there is a compromise or settlement between the creditor and the surety to which the principal borrower is not a consenting party, the liability of the borrower *qua* the creditor will remain unaffected. The provisions regarding the discharge of the surety discussed above show that involuntary acts of the principal borrower or creditor do not result in the discharge of surety.

**16.** In the case of ***Lalit Kumar Jain***[8], this Court dealt with the legal effect of approving the resolution plan in CIRP of the corporate debtor on the liability of the surety. This is in the context of Section 135 of the Contract Act, which provides that if the creditor compounds with or gives time or agrees not to sue the principal debtor, it amounts to discharge of the surety. In paragraphs 122 to 125 of the said decision, this Court held thus:

> **"122.** It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee

itself. **However, this Court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In Maharashtra SEB [Maharashtra SEB v. Official Liquidator, (1982) 3 SCC 358] the liability of the guarantor (in a case where liability of the principal debtor was discharged under the Insolvency law or the Company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realise the same from the guarantor in view of the language of Section 128 of the Contract Act, 1872 as there is no discharge under Section 134 of that Act.** This Court observed as follows : (SCC pp. 362-63, para 7)

> "7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute

and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Contract Act, 1872, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under Section 134 of the Contract Act, 1872 by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. **But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability** (see Jagannath Ganeshram Agarwale v. Shivnarayan Bhagirath [Jagannath Ganeshram Agarwale v. Shivnarayan Bhagirath, 1939 SCC OnLine Bom 65:AIR 1940 Bom 247]; see also Fitzgeorge, In re [Fitzgeorge, In re,(1905)1KB462] )."

**123.** This legal position was noticed and approved later in Industrial Finance Corpn. of India Ltd. v. Cannanore Spg. & Wvg. Mills Ltd. [Industrial Finance Corpn. of India Ltd. v. Cannanore Spg. & Wvg. Mills Ltd., (2002) 5 SCC 54] An earlier decision of three Judges in Punjab National Bank v. State of

U.P. [Punjab National Bank v. State of U.P., (2002) 5 SCC 80] pertains to the issues regarding a guarantor and the principal debtor. The Court observed as follows : (Punjab National Bank case [Punjab National Bank v. State of U.P., (2002) 5 SCC 80] , SCC p. 80-81, paras 1-6)

> "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 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.
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> 3. The following preliminary issue was, on the pleadings of the parties, framed:
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> '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 nationalised 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 [Maharashtra SEB v. Official Liquidator, (1982) 3 SCC 358] 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 realise the same from the guarantor in view of the language of Section 128 of the Contract Act, 1872 as there is no discharge under Section 134 of that Act.**

> 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 deeds of guarantee which are not in any way superseded or brought to a naught merely because the appellant may not have been 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 & Friedlander Ltd. [Kaupthing Singer & Friedlander Ltd. (No. 2), In re, (2012) 1 AC 804 : (2011) 3 WLR 939 : (2012) 1 All ER 883, paras 11, 12, 53-54] the UK Supreme Court reviewed a large number of previous authorities on the concept of double proof i.e. recovery from guarantors in the context of insolvency proceedings. The Court held that: (AC p. 814, para 11)

> "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."**
>
> (emphasis added)

This Court dealt with a situation where a resolution plan for the principal borrower was approved in CIRP, and the

principal borrower was discharged from the debt by operation of law through an involuntary process. It was held that the contract between the creditor and the surety is independent; therefore, the approval of the resolution plan of the principal borrower will not amount to the discharge of the surety. The same principles will apply when the resolution plan is approved in CIRP of the surety. In such a case, the surety gets a discharge from his liability under the guarantee by operation of law or by involuntary process. It will not amount to the discharge of the principal borrower.

**17.** Section 31 of the IBC reads thus:

> **"31.Approval of resolution plan.–**
>
> (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, **it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.**
>
> Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this

sub-section, satisfy that the resolution plan has provisions for its effective implementation.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),-

> (a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and
>
> (b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of

such resolution plan by the committee of creditors.**"**

(emphasis added)

The resolution plan of the corporate debtor approved by the adjudicating authority binds the corporate debtor, its employees, members, creditors, guarantor and other stakeholders. Therefore, where a company furnishes a corporate guarantee for securing a loan taken by another company and if the CIRP of the corporate guarantor ends in a resolution plan, it will bind the creditor of the corporate guarantor. The corporate guarantor's liability may end in such a case by operation of law. However, such a resolution plan of the corporate guarantor will not affect the liability of the principal borrower to repay the loan amount to the creditor after deducting the amount recovered from the corporate guarantor or the amount paid by the resolution applicant on behalf of the corporate guarantor as per the resolution plan.

**18.** As observed earlier, in such a loan transaction secured by a guarantee, the guarantor has an obligation to repay the loan amount to the creditor, and there is a separate and distinct obligation on the borrower to pay the amount to the creditor. Such a transaction creates a right in favour of the creditor to proceed against the guarantor and borrower for recovery. However, he has the right to recover the amount only to the extent of the loan amount payable by the borrower.

**SIMULTANEOUS PROCEEDINGS UNDER THE IBC AGAINST THE CORPORATE DEBTOR AND GUARANTOR**

**19.** Now, we turn to the provisions of the IBC. Sub-section (8) of Section 5 defines 'financial debt'. Clauses (a) and (i) of sub-section (8) show that the money borrowed against the payment of interest and the amount of any liability in respect of any guarantee for repayment of the loan covered by clause (a) have been put under separate headings. Thus, the liability of the guarantor or surety is a financial debt, and even the money borrowed against the payment of interest is also a financial debt. In the light of these provisions, Section 60 of the IBC is relevant, which reads thus:

> **"60. Adjudicating Authority for corporate persons. -**
>
> (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of a corporate person is located.
>
> (2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, **where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall**

**be filed before the National Company Law Tribunal.**

**(3) An insolvency resolution process or liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.**

(4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

> (6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.**"**
>
> (emphasis added)

Sub-section (2) of Section 60 contemplates separate or simultaneous insolvency proceedings against the corporate debtor and guarantor. Therefore, sub-section (3) of Section 60 provides that if CIRP in respect of the corporate guarantor is pending before an adjudicating authority and if the CIRP against the corporate debtor is pending before another adjudicating authority, CIRP proceedings against the corporate guarantor must be transferred to the adjudicating authority before whom CIRP in respect of the corporate debtor is pending. Thus, consistent with the basic principles of the Contract Act that the liability of the principal borrower and surety is co-extensive, the IBC permits separate or simultaneous proceedings to be initiated under Section 7 by a financial creditor against the corporate debtor and the corporate guarantor.

## WHETHER THE ASSETS OF THE CORPORATE DEBTOR WERE PART OF CIRP IN RESPECT OF ACIL – CORPORATE GUARANTOR

**20.** Now, we will deal with the submissions made by the appellant that the assets of the 2nd respondent-corporate debtor were also a part of the CIRP in respect of ACIL. This

submission was made on the ground that according to the appellant, the information memorandum published in accordance with Section 29 of the IBC indicates taking over of the business of ACIL and the 2nd respondent-corporate debtor. Clause 3, under the heading "SEZ Business" in the information memorandum, specifically mentions that ACIL has acquired, through its subsidiary (2nd respondent-corporate debtor), 296 hectares of land for setting up the SEZ project. It is further stated that the entire project cost of SEZ, inclusive of land acquisition, was financed through equity and unsecured loans contributed by ACIL. It further records that SEZ is a separate company. However, it is stated that the financial obligations of the SEZ units are on ACIL. As SEZ is stated to be a separate company, it is not included in the resolution plan, which was duly approved. As rightly found by the NCLAT, the resolution plan takes care only of the investments of ACIL in the subsidiaries and not the assets of subsidiaries. As indicated in the subsequent paragraphs, considering the scheme of the IBC, assets of a subsidiary company cannot be part of the resolution plan of the holding company.

**21.** It is necessary to take notice of the two critical provisions of the IBC, which are Sections 18 and 36. Section 18 and Section 36 read thus:

> **"18. Duties of interim resolution professional.-**
>
> The interim resolution professional shall perform the following duties, namely: -

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to-

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including –

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board.

**Explanation. – For the purposes of this, the term "assets" shall not include the following, namely: -**

**(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;**

**(b) assets of any Indian or foreign subsidiary of the corporate debtor; and**

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

.. .. .. .. .. .. .. .. .. .. ..

(emphasis added)

**36. Liquidation estate. –**

(1) For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.

(2) The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following: -

(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

(c) tangible assets, whether movable or immovable;

(d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments,

insurance policies, contractual rights;

(e) assets subject to the determination of ownership by the court or authority;

(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;

(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and

(i) all proceeds of liquidation as and when they are realised.

**(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation: -**

(a) assets owned by a third party which are in possession of the corporate debtor, including –

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

**(d) assets of any Indian or foreign subsidiary of the corporate debtor; or**

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.**"**

(emphasis added)

There is a mandate of clause (d) of sub-section (4) of Section 36 of the IBC that the assets of an Indian subsidiary of the corporate debtor shall not be included in the liquidation estate assets and shall not be used for the recovery in liquidation. Section 18 entrusts several duties to the IRPs concerning the corporate debtor's assets. Consistent with the provisions of Section 36(4)(d), the explanation (b) to Section 18(1) provides

that the term 'assets' used in Section 18 shall not include the assets of any Indian subsidiary of the corporate debtor. Perhaps the reason for including these two provisions is that it is well-settled that a shareholder has no interest in the company's assets. This view has been taken by this Court in paragraph 10 of its decision in the case of ***Bacha F. Guzdar v. Commissioner of Income Tax, Bombay***[16], which reads thus:

> **"10.** The interest of a shareholder vis-à-vis the company was explained in Charanjit Lal Chowdhury v.Union of India [CharanjitLal Chowdhury v. Union of India, 1950 SCC 833 at p. 862 : 1950 SCR 869 at p. 904]. That judgment negatives the position taken up on behalf of the appellant that a shareholder has got a right in the property of the company. **It is true that the shareholders of the company have the sole determining voice in administering the affairs of the company and are entitled, as provided by the articles of association, to declare that dividends should be distributed out of the profits of the company to the shareholders but the interest of the shareholder either individually or collectively does not amount to more than a right to participate in the profits of the company. The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders. The dividend is a share of the profits declared by the**

[16] (1955) 1 SCR 876

**company as liable to be distributed among the shareholders."**

(emphasis added)

A holding company and its subsidiary are always distinct legal entities. The holding company would own shares of the subsidiary company. That does not make the holding company the owner of the subsidiary's assets. In the case of ***Vodafone International Holdings BV***[6]**,** this Court took the view that if a subsidiary company is wound up, its assets do not belong to the holding company but to the liquidator. As mentioned in the decision, the reason is that a company is a separate legal persona and the fact that the parent company owns all its share has nothing to do with its separate legal existence. Therefore, the assets of the subsidiary company of the corporate debtor cannot be part of the resolution plan of the corporate debtor.

**22.** In the impugned judgment, the NCLAT has referred to various clauses in the revised resolution plan of ACIL, including clauses 12.3 and 13.3 and held that these clauses do not suggest that the 1st respondent-financial creditor accepted the amount as full and final settlement of all its dues. It was held that the effect of approval of the resolution plan is that the right to recover the loan amount from the corporate guarantor stands extinguished. Chapter VI, under the heading 'financial, value and projections' in the approved resolution plan, records as follows:

**"**The projections have been made on the basis that ACIL shall continue to operate all the businesses. Provided that the investments of ACIL in the subsidiaries

> may be discontinued/liquidated sold depending a business exigency. **Therefore, the business plan financial projections do not include income that the subsidiaries**."
>
> (emphasis added)

Clause 13.3 of the approved resolution plan reads thus:

> **"13.3** All corporate guarantees, indemnities, letters of comfort, undertakings provided by ACIL., in respect of any third party liability (including of subsidiaries) shall stand revoked and extinguished on the effective date pursuant to approval of the resolution plan by the order of the NCLT, without the requirement of any further act or deed by the Resolution Applicant and/or ACIL.**"**

The effect of the said clause is that the liabilities of ACIL in respect of the third parties including the subsidiaries shall stand revoked and extinguished with effect from the effective date.

**23.** Thus, by virtue of the CIRP process of ACIL (corporate guarantor), the 2nd respondent-corporate debtor does not get a discharge, and its liability to repay the loan amount to the extent to which it is not recovered from the corporate guarantor is not extinguished.

**SUBROGATION UNDER SECTION 140 OF THE CONTRACT ACT**

**24.** Now, we come to the argument based on subrogation as provided under Section 140 of the Contract Act. Reliance was placed by both parties on conflicting decisions of different High

Courts. Therefore, this issue will have to be resolved. Section 140 is relevant which reads thus:

> **"140.Rights of surety on payment or performance.—** Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for is invested with all the rights which the creditor had against the principal debtor.**"**

The words used in Section 140 are "upon payment or performance of all that he is liable for". When the principal debtor commits a default and when the liability under the deed of guarantee of the surety is not limited to a particular amount, its liability is in respect of the entire amount repayable by the principal debtor to the creditor. The words 'all that he is liable' used under Section 140 cannot be ignored. The principal borrower must continuously indemnify the surety. Section 140 of the Contract Act may be founded on the said obligation. The 1st respondent-financial creditor relied upon a decision of this Court in the case of ***Economic Transport Corporation, Delhi***[4], which holds that the doctrine of subrogation is a creature of equity. Therefore, the Section will have to be interpreted having regard to the equitable principles. If the surety pays the entirety of the amount payable under guarantee to the creditor, Section 140 provides a remedy to the surety to recover the entire amount paid by him in the discharge of his obligations. Therefore, the surety gets invested with the rights of the creditor to recover from the principal debtor the amount which was paid as per

the guarantee. If the surety pays only a part of the amount payable to the creditor, the equitable right the surety gets under Section 140 will be confined to the debt he cleared.

**25.** Under the corporate guarantee, in the facts of this case, the liability of ACIL was to the extent of the entire amount repayable by the 2nd respondent-corporate debtor to the corporate creditor. In the CIRP of ACIL, the appellant paid a sum of Rs.38.87 crores only to the 1st respondent-financial creditor. The amount was paid by the appellant on behalf of ACIL, the corporate guarantor. For the rest of the amount payable as per the guarantee, the 1st respondent-financial creditor had to take a haircut because of the involuntary process by operation of law. Only the liability of ACIL under the corporate guarantee to repay the loan to the 1st respondent-financial creditor has been extinguished on the payment of Rs.38.87 crores. By the involuntary act of the creditor of accepting part of the amount from the surety in the discharge of the entire liability of the surety, even if Section 140 is attracted, it will confer on the guarantor or the appellant the right to recover only the amount mentioned above from the corporate debtor. The subrogation will be only to the extent of the amount recovered by the creditor from the surety. Notwithstanding the subrogation to the extent of the amount paid on behalf of the corporate guarantor by the resolution applicant, the right of the financial creditor to recover the balance debt payable by the corporate debtor is in no way extinguished.

**26.** In the circumstances, we cannot accept the submissions made by the learned counsel appearing for the appellant based on Section 140 of the Contract Act. As stated earlier, the issue of the subrogation canvassed before us has not been pressed into service by the appellant, as can be seen even from the written submissions.

**27.** The last argument sought to be canvassed was that by the admission of an application under Section 7 of the IBC against the 2nd respondent-corporate debtor, the valuable assets of ACIL have been taken away. As observed earlier, the assets of the subsidiary company of ACIL cannot form part of the CIRP process of ACIL, and factually, the assets of the 2nd respondent-corporate debtor were not part of the resolution plan approved in the CIRP of ACIL.

**28.** Hence, we summarize some of our conclusions as under:

**a.** Payment of the sum of Rs.38.87 crores to the 1st respondent-financial creditor under the resolution plan of the corporate guarantor-ACIL will not extinguish the liability of the 2nd respondent-principal borrower/corporate debtor to pay the entire amount payable under the loan transaction after deducting the amount paid on behalf of the corporate guarantor in terms of its resolution plan;

**b.** A holding company is not the owner of the assets of its subsidiary. Therefore, the assets of the subsidiaries cannot be included in the resolution plan of the holding company, and

**c.** The financial creditor can always file separate applications under Section 7 of the IBC against the corporate debtor and the corporate guarantor. The applications can be filed simultaneously as well;

**29.** Thus, the view taken by NCLAT cannot be faulted. Accordingly, the appeal is hereby dismissed with no order as to costs.

.....J.
(Abhay S. Oka)

.....J.
(Pankaj Mithal)

**New Delhi;**
**July 23, 2024.**