NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 186 of 2021

IN THE MATTER OF:

State Bank of India, ...Appellant
Stressed Asset Management Branch,
SAMB-II,
1, Middleton Road Street,
1st Floor, Jeevan Deep Building,
Kolkata- 700 071

Versus

Mr. Animesh Mukhopadhyay, ..Respondent
Resolution Professional of Zenith Finesee India Pvt. Ltd.
Having its registered office at
Century Tower, 2nd Floor, 45, Shakespeare Sarani,
Kolkata - 700017

Present:

For Appellant: **Mr. VM Kannan, Mr. Sanjay Kapur, Ms. Megha Karnwal and Mr. Sambit Panja, Advocates.**

For Respondent: **Mr. Rishav Banerjee, Mr. Pranay Agarwal, Ms. Ankita Baid, Advocates for RP**
Mr. Animesh Mukhopadhyay, RP (Party in person)

O R D E R
(Virtual Mode)

08.03.2021: The Appeal has been filed by the State Bank of India against Impugned Orders dated 02.02.2021 passed in IA (IB) No. 755/KB/2020 in CP (IB) 159/KB/2019. The Appellant claims that the question of law involved in this matter is whether for the debt due is it admissible for the Financial Creditor to file separate claims:-

(i) In the CIRP of the Corporate Guarantor; and

(ii) In the CIRP of the Principal Borrower.

2. Appellant claims that the bank had granted credit facility in the nature of Term Loan to Purple Advertising Services Pvt. Ltd. (Principal Borrower). The present Respondent No. 1 was Guarantor for securing the dues of the Principal Borrower. The Principal Borrower became the NPA as well as the present Respondent No.1 (Corporate Guarantor), their liability being co-extensive, they became liable to pay outstanding dues to the Appellant bank. A sum of Rs. 29 crore approx. as on 20.11.2019, was due.

3. It is stated that vide its order dated 29.10.2019 in C.P. No. 108/KB/2019, the Ld. NCLT initiated CIRP against the Principal Borrower on an application filed by the United Bank of India. The Appellant Bank has filed its claim before the Resolution Professional and the CIRP is pending and the Resolution Plan is being evaluated. According to the Appellant it may not get any substantial sum (approx. less than 10% of the dues) in the CIRP of the Principal Borrower even if any resolution is found.

4. The Appellant claims that by order dated 20.11.2019 in C.P. No. 159/KB/2019, the Ld. NCLT initiated CIRP against Corporate Guarantor, on an application filed by the United Bank of India. On 11.02.2020, the Appellant bank filed its claim before Respondent/Resolution Professional and provided all necessary proof pertaining to its claim. However, the Resolution Professional after discussing the claim with the CoC, intimated the Appellant bank that the claim appears to be "not tenable in the eye of law" and that the "onus on the admissibility" of the claim is with the CoC. As the Resolution Professional failed to admit the claim of the Appellant, the Appellant had filed IA (IB) No. 755/KB/2020 in CP (IB) 159/KB/2019

inter alia praying for a direction to the Respondent to accept the Appellant's claim as submitted by the Appellant on 11.02.2020 and to reconstitute the CoC by including the Appellant as a member of CoC. According to the Appellant the Adjudicating Authority failed to appreciate that co-extensive liability and erroneously held that the claim of the Appellant Bank against the Corporate Guarantor was not admissible as Appellant had filed claim in the CIRP which was filed against the Principal Borrower also. Thus, in the present Appeal, the Learned Counsel for the Appellant has made submissions on above lines. The Learned Counsel for the Appellant referred to Judgment of this Tribunal in the matter of "*State Bank of India Vs. Athena Energy Ventures Pvt. Ltd. (2020) SCC online NCLAT 774".*

5. The Learned Counsel for the Appellant submits that although Judgment of this Tribunal was referred to and relied upon before the Adjudicating Authority, the Adjudicating Authority without discussing either the Judgment or the provisions as appearing in Section 60 of the IBC which have been amended, simply dismissed the I.A.

6. The Learned Counsel for the Resolution Professional has made submissions distinguished Judgment in the matter of "*Athena Energy Ventures Pvt. Ltd."* and submits that in the Judgment, if the Resolution Professional in both the CIRP was common such claim could be made and looked into.

7. The Learned Counsel for the Resolution Professional has further submitted that the Resolution Professional considered another Judgment of

another Bench of this Tribunal which was larger Bench and in which Judgment in the matter of "*Dr. Vishnu Kumar Agarwal Vs. M/s Piramal Enterprises Ltd."* has been followed.

8. The Learned Counsel submitted that Respondent before Adjudicating Authority made submissions and referred to Judgments, noted by Adjudicating Authority in Impugned Order in para 14 (d). He submits that there are Judgments of the Hon'ble Supreme Court with regard to following subsequent larger Bench Judgment.

9. It is further submitted that under Section 21 (4) (a) of the IBC the Financial Creditor to the extent of the Financial debt owed by the Corporate Debtor, can be included in the Committee of Creditor, with voting share proportionate to the extent of financial debt. It is stated when claim is made in CIRP of Principal Borrower, the same benefit in CIRP of Guarantor cannot be taken as amount would not be known what is recovered in other CIRP.

10. We have heard parties. From the Impugned Order it is apparent that the Impugned Order failed to discuss the provisions or Judgments. It was simply observed in paras 16 to 21 as under:

> *"16. Heard the Ld. Counsel for the Applicant and the Ld. Counsel for the Resolution Professional and have perused the application.*
>
> *17. The main issue in this application is whether the Applicant can be permitted to file its claim for the entire amount with two Resolution Professionals in the CIRP of two Corporate Debtors, one being the Principal Borrower and other the Guarantor. The claim admittedly has not been satisfied from the Principal Borrower's side. At this*

stage it is not possible to determine what percentage of the claim may be satisfied from the side of the Principal Borrower. It is needless to say that in case the whole of the Principal debt is satisfied from the side of the Principal Borrower then the Applicant is not entitled to claim anything from the Respondent herein. So, the amount the Applicant is entitled to claim at this stage from the Respondent is nebulous, at the stage.

18. *Moreover, the Applicant claims to be a Financial Creditor, in such circumstances if the Applicant is allowed to participate in the CoC of the Guarantor, then it will be difficult to determine the voting share of the Applicant and the other Financial Creditors as the claim has not been crystallised from the side of the Principal Borrower. For this reason too, I am not inclined to allow the Applicant to lodge another claim relating to the same debt of the Borrower in the CIRP of the Guarantor.*

19. *With regard to the second issue at hand, it is clear that there is an error of judgement committed by the Resolution Professional in discussing the claim with the CoC. It is the RP's prerogative to collect and collate the claims and the CoC has no role to play in this. For this reason I hold that the CoC is not a necessary party in these proceedings. If at all any member of CoC is aggrieved by any decision of the RP which would result in reduction of voting shares of such CoC member then such aggrieved party is at liberty to move this Adjudicating Authority in terms of section 60(5) of the Code. The fact that a claim, if admitted, would result in variation of the shares of the existing constituents of the CoC, is no reason for the RP to consult with the CoC prior to decision on collating claims.*

20. *In view of the above the issues framed at paragraph 4 are answered as follows:*

a. *Whether the Applicant can file a claim for the same debt with respect to the same loan in CIRP of two Corporate Debtors?---No*

b. *Whether the Resolution Professional has dealt with the rejection of claim in accordance with the Code?---No*

c. *Whether the Committee of Creditor can decide about the claim lodged by the Applicant?---No*

d. *Whether the CoC is required to be heard in the present application?---No*

21. *The **IA (IB) No. 755/KB/2020** shall stand disposed of."*

11. Thus, the Adjudicating Authority did not consider the provisions or Judgments. In Judgment in the matter of "*State Bank of India Vs. Athena Energy Ventures Pvt. Ltd." (2020) SCC online NCLAT 774*, we had referred to Section 60 of the IBC and the amendment made to sub-Section 2 in the following manner:

"13. Apart from this, the observations in the Judgment in the matter of Piramal do not appear to have noticed Sub- Sections 2 and 3 of Section 60 of IBC. It would be appropriate to reproduce Section 60 (1) to (3) which reads as under:-

" 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 the 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 of such corporate debtor] shall be filed before such 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."

In Sub- Section 2, the earlier words were "bankruptcy of a personal guarantor of such corporate debtor". These words were later on substituted by the words "liquidation or bankruptcy of a corporate guarantor or personal guarantor as the case may be, of such Corporate Debtor". These words were substituted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 Act 26 of 2018. This amendment was published in Government Gazette on 17th August, 2018 and this amendment was inserted with retrospective effect from 6th June, 2018. We have referred to these details as Hon'ble Supreme Court of India in Judgment in the matter of "State Bank of India v. V. Ramakrishnan" (Which was pronounced on 14th August, 2018 three days before the above Notification) ((2018)17 SCC 394) discussed Section 60 (2) and (3) as they stood before this

amendment was enforced. We will refer to the above Judgment in the matter of "Ramakrishnan" later. At present, we have referred to the above provision which had come on the statue book when Act 26 of 2018 was enforced and the Judgment in the matter of Piramal which was passed on 8th January, 2019 did not notice the above amendment. If the above provisions of Section 60 (2) and (3) are kept in view, it can be said that IBC has no aversion to simultaneously proceeding against the Corporate Debtor and Corporate Guarantor. If two Applications can be filed, for the same amount against Principal Borrower and Guarantor keeping in view the above provisions, the Applications can also be maintained. It is for such reason that Sub-Section (3) of Section 60 provides that if insolvency resolution process or liquidation or bankruptcy proceedings of a Corporate Guarantor or Personal Guarantor as the case may be of the Corporate Debtor is pending in any Court or Tribunal, it shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such Corporate Debtor. Apparently and for obvious reasons, the law requires that both the proceedings should be before same Adjudicating Authority."

12. We have further observed in para 16 is as under:

"16. We find substance in the arguments being made by the learned Counsel for Appellant which are in tune with the Report of ILC. The ILC in para – 7.5 rightly referred to subsequent Judgment of "Edelweiss Asset Reconstruction Company Ltd. V. Sachet Infrastructure Ltd." dated 20th September, 2019 which permitted

simultaneously initiation of CIRPs against Principal Borrower and its Corporate Guarantors. In that matter Judgment in the matter of Pirmal was relied on but the larger Bench mooted the idea of group Corporate Insolvency Resolution Process in para -34 of the Judgment. The ILC thus rightly observed that provisions are there in the form of Section 60 (2) and (3) and no amendment or legal changes were required at the moment. We are also of the view that simultaneously remedy is central to a contract of guarantee and where Principal Borrower and surety are undergoing CIRP, the Creditor should be able to file claims in CIRP of both of them. The IBC does not prevent this. We are unable to agree with the arguments of Learned Counsel for Respondent that when for same debt claim is made in CIRP against Borrower, in the CIRP against Guarantor the amount must be said to be not due or not payable in law. Under the Contract of Guarantee, it is only when the Creditor would receive amount, the question of no more due or adjustment would arise. It would be a matter of adjustment when the Creditor receives debt due from the Borrower/ Guarantor in the respective CIRP that the same should be taken note of and adjusted in the other CIRP. This can be conveniently done, more so when IRP/RP in both the CIRP is same. Insolvency and Bankruptcy Board of India may have to lay down regulations to guide IRP/RPs in this regard."

13. There is no substance in the submissions of Counsel for Respondent that case would be different if same IRP/RP is there in the two CIRPs. It would be just a matter of co-ordination between the two IRPs/RPs. Till payment is received in one CIRP, claim can be maintained in both CIRPs

for same amount and representation in CoC in both CIRPs to the extent of amount due will be justified. This is the reason why Section 60 (3) provides for transfer of proceeding to Adjudicating Authority where already there is a pending proceeding. There is no question of looking into Judgments when Section 60 of IBC is clear and makes the two CIRPs maintainable in such matters. If they are maintainable, claim in both (subject to adjustments on receipts) would also be maintainable. There is no need to be tied down with Judgments if we see Section 60 which has been reproduced (supra). That is the law.

14. We have yet passed another Judgment, incidentally today, in Company Appeal (AT) (Ins.) No. 1186 of 2019 in *"Edelweiss Asset Reconstruction Company Ltd."* in which in para 8, we have held that:

> "We do not find that there is bar for the Financial Creditor to proceed against the Principal Borrower as well as Corporate Guarantor at the same time, either in CIRPs or file claims in both CIRPs".

15. For the above reasons we find that the orders of the Adjudicating Authority as passed cannot be maintained.

16. Although this Appeal came up today for the first time but as the issue involved is only of law and time in CIRP is material, we have heard counsel of both sides and we are passing the present order.

17. The Appeal is allowed. The Impugned Order is set aside. The Respondent will consider the claim of the Appellant Borrower and appropriately deal with the Appellant as Financial Creditor in the CoC. The Appeal is disposed of accordingly.

18. Before parting we only note that during submissions, the Learned Counsel for the Respondent submits that the Appellant has made certain averments against the Resolution Professional. Learned Counsel for the Appellant states that they have not made any personal averments against the Resolution Professional.

[Justice A.I.S. Cheema]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

sa/md