NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH

NEW DELHI

COMPANY APPEAL (AT)(Insolvency) No.1096 of 2020

IN THE MATTER OF:

Kanwar Raj Bhagat
Suspended Director of Gujarat
Hydrocarbons and Power SEZ Ltd.,
Residing at No. 6 GF, Block 3,
Eros Garden, Charmwood Village,
Surajkund Road, Faridabad - 121009

...Appellant

Vs

1.Gujarat Hydrocarbons and Power SEZ Ltd.
Through IRP, Rakesh Kumar Agarwal,
having his office at 20, N.S. Road,
Room No. 15, Block A,
Kolkata - 700001

...Respondent No. 1

(Corporate Debtor)

2.SREI Infrastructure Finance Ltd.
Having its registered office at:
Vishwakarma, 86C, Topsia Road (South), Kolkata – 700046

... Respondent No. 2

(Financial Creditor)

Present:

For Appellant:- Mr Abhijeet Sinha, Mr. Divij Kumar and Mr. Varun Tandon, Advocates.
For Respondent:- Ms Supriyo Gole, Mr. Rishav Banerjee, Advocates for R1.
Ms Nattasha Garg, Mr Abhimanyu Bhandari and Mr. Arav Pandit, Advocates for R2.

With

COMPANY APPEAL (AT)(Insolvency) No.1109 of 2020

IN THE MATTER OF:

BRS Ventures Investments Ltd ...Appellant

(Resolution Applicant)

Vs

1.SREI Infrastructure Finance Ltd.

...Respondent No. 1

2. Gujarat Hydrocarbons and Power SEZ Ltd.
Represented by Rakesh Kr. Agarwal, IRP.

... Respondent No. 2

Present:

For Appelalnt:- Mr. Robin Singh Sirohi and Mr. Ajay Gaggar, Advocates.
For Respondent:- Ms Nattasha Garg, Mr Abhimanyu Bhandari and Mr. Arav Pandit, Advocates for R1.

J U D G M E N T

Jarat Kumar Jain: J.

The Appellant 'Kanwar Raj Bhagat', Ex-Director of Gujarat Hydrocarbons and Power SEZ Ltd. (Corporate Debtor) has filed a appeal being CA (AT) (Ins.) 1096 of 2020 against the order dated 18.11.2020 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench-III) in CP (IB) 571/ND/2020. In the said petition, the Adjudicating Authority admitted the application filed by the Financial Creditor (SREI Infrastructure Finance Ltd) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IBC') and initiated the Corporate Insolvency Resolution Process (hereinafter referred to as 'CIRP') against the Corporate Debtor. It is against the impugned order dated 18.11.2020 that the appellant

'BRS Ventures Investment Ltd.', the successful Resolution Applicant in a CIRP against the Corporate Guarantor, Assam Company India Ltd., (hereinafter referred to as ACIL) has filed an appeal being CA(AT) (Ins) No. 1109 of 2020.

2(a). In the present judgment the parties are referred in their original status i.e. SREI Infrastructure Finance Ltd., as Financial Creditor, Gujarat Hydrocarbons and Power SEZ Ltd. as the Corporate Debtor and Assam Company India Ltd. (ACIL) as the Corporate Guarantor, as well as BRS Ventures Investment Ltd. as the Resolution Applicant.

2(b). Brief and relevant facts for these appeals are that SREI Infrastructure Finance Ltd. (Financial Creditor) had granted a loan of Rs. 100 Crores to Gujarat Hydrocarbons and Power SEZ Ltd. (Corporate Debtor) wherein Assam Company India Ltd. (ACIL) was a Corporate Guarantor. ACIL is the holding Company of Corporate Debtor. The Corporate Debtor failed to repay the loan amount and interest which prompted the Financial Creditor to file an application being OA No. 477/2012 against the Corporate Debtor and guarantors including ACIL under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 before DRT-1, Kolkata. During the pendency of the proceedings before DRT-1, Kolkata, the Financial Creditor, Corporate Debtor, Corporate Guarantor and one Mr. Adilya Kumar Jajodia entered into a Debt Repayment and Settlement Agreement (DRSA) dated 24.03.2015. Subsequently, the DRSA was terminated vide Cancellation Agreement dated

29.05.2017. Thereafter, in order to initiate CIRP against the Corporate Guarantor (ACIL), the Financial Creditor filed an Application under Section 7 of the IBC. The Application was admitted on 26.10.2017 by the Adjudicating Authority (NCLT, Guwahati). In the CIRP the Financial Creditor filed its claim to the tune of Rs. 648.81 Crores against the dues recoverable from the Corporate Debtor with the Interim Resolution Professional (IRP) of ACIL. The IRP initially admitted an amount of Rs. 357.29 Crores and excluded the penal interest from the claim amount. The IRP was replaced by the Resolution Professional. The Resolution Professional upon verification of the Financial Creditor's claim admitted an amount of 247.27 Crores including principal plus interest. In the CIRP of ACIL, BRS Ventures Investment Ltd. had submitted a resolution plan which was unanimously approved by the Committee of Creditors (CoC) including the Financial Creditor. As the Resolution Professional had rejected partly claim of the Financial Creditor, therefore, Financial Creditor filed an Application under Section 60(5) of the IBC before the Adjudicating Authority, Guwahati. This Application was dismissed vide its order dated 23.07.2018. The resolution plan was duly approved by the Adjudicating Authority vide its order dated 20.09.2018.

3. On 10.02.2020, the Financial Creditor filed an Application under Section 7 of the IBC against the Corporate Debtor before the Adjudicating Authority (NCLT, Delhi) on the basis of the same set of debt and default

against which a CIRP of the Corporate Guarantor of the Corporate Debtor has already taken place.

4. The Corporate Debtor resisted the application on the ground that the application is filed with ulterior motives to create undue pressure on the Corporate Debtor and the Application is barred by principle of estoppel, waiver and acquiescence. Moreover, the said Application is barred by law of limitation.

5 Ld. Adjudicating Authority found that the plea taken by the Corporate Debtor is devoid of merits, therefore, rejected the plea for the reasons which have been recorded in the impugned order dated 18.11.2020 and admitted the Application under Section 7 of the IBC along with initiation of CIRP. One Mr. Rakesh Kumar Agarwal was appointed as the IRP.

6. Being aggrieved with this order, the Ex-Director of the Corporate Debtor and the successful Resolution Applicant in the CIRP of Corporate Guarantor, ACIL have filed these appeals.

CA (AT) (Ins.) 1096 of 2020

7. Ld. Counsel for the Appellant, Ex-Director of Corporate Debtor has submitted that the impugned order incorrectly treats the Debt Repayment Settlement Agreement (DRSA) dated 24.03.2015 and Cancellation Agreement dated 29.05.2017 as acknowledgement of debt by the Corporate Debtor and hence extends the limitation in terms of Section 18 of the Limitation Act,

1963. It is no longer *res integra* that Section 18 of the Limitation Act is not applicable to the proceedings under IBC. In this regard, reliance was placed on the judgment rendered by the Hon'ble Supreme Court in the case of B.K Educational Services Pvt. Ltd. Vs. Parag Gupta (2019) 11 SCC 633, Babulal Vardharji Gurjar Vs. Veer Gurjar 2020 SCC Online SC 647 and the judgments of this Appellate Tribunal in the cases of State Bank of India Vs. Krishidhan Seeds CA (AT) (Ins) No. 972 of 2020, Jagdish Pd. Sarada Vs. Allahabad Bank CA (AT) (Ins.) 183/2020. B. Prashanth Hegde Vs. State Bank of India CA (AT) (Ins.) 68/2019 Bishal Jaiswal Vs. ARCIL CA (AT) (Ins.) 385/2020 (an order passed by the Five Member Bench of the NCLAT dated 22.12.2020).

8. Ld. counsel for the appellant further submitted that the Application under Section 7 of the IBC is not maintainable on the same set of debt and default as successful CIRP has already taken place against the Corporate Guarantor (ACIL). There is no bar in the IBC for simultaneously filing two applications under Section 7 against the Principal Borrower as well as the Corporate Guarantor. However, once an Application under section 7 has been admitted against one of the Corporate Debtor, a second application for the same Financial Creditor for same set of claim and default cannot be admitted against the other Corporate Debtor. Reliance was placed on the judgment rendered by this Appellate Tribunal in the case of Dr. Vishnu Kumar Agarwal Vs. Piramal Enterprises Ltd., CA (AT) (Ins.) 346/2018 and the same

proposition was reiterated in the case of SEW Infrastructure Ltd. Vs. Mahender Investment Advisors Pvt. Ltd. CA (AT) (Ins.) 1500/2019.

9. It is further submitted that upon approval of the plan, the Financial Creditor accepted Rs. 38.87 Crores against its claim of Rs. 648.81 crores as full and final settlement of its outstanding dues. After a period of two years from approval of the plan; admitting the subsequent application under section 7 of IBC would tantamount to defeating the Resolution Plan. Ld. Adjudicating authority erroneously admitted the application therefore, the impugned order is liable to be set aside.

10. *Per contra*, Ld. Counsel for the Respondent no 2, Financial Creditor submitted that the loan was defaulted for the first time on 15.04.2014. Undisputedly, Corporate Debtor acknowledged the debt within three years on 24.03.2020 in the Debt Repayment and Settlement Agreement. The period of limitation was further extended when the Debt Repayment and Settlement Agreement was cancelled on 29.05.2017. The Application was filed on 10.02.2020 i.e. within three years from the date of acknowledgment. Relianve was placed on the judgment rendered by the Hon'ble Supreme Court in the case of Jignesh Shah & Anr. Vs. Union of India (2019) 10 SCC 750 wherein it was held that any acknowledgment in writing will increase period of limitation for IBC. Further, reliance was also placed on a judgment of this Appellate Tribunal being MM Ramchandran Vs. South Indian Bank 2020 SCC Online NCLAT 503 wherein it was held that Section 18 of the Limitation Act, 1963 is

applicable to Section 7 application of the IBC. Against the said judgment, the Hon'ble Supreme Court has dismissed the appeal under Section 62 of IBC vide order dated 17.11.2020 and thus, as per the doctrine of merger the impugned judgment of this Appellate Tribunal became absolute that Section 18 of the Limitation Act is applicable to Section 7 of IBC. The doctrine of merger has been elaborated by the Hon'ble Supreme Court in the matter of Kunhayammed Vs. State of Kerala (2000) 6 SCC 359.

11. Ld. Counsel for the respondent no. 2, Financial Creditor submitted that Section 128 of Indian Contract Act, 1872 provides that the liability of the guarantor/surety is co-extensive with that of principal debtor. In the present case, the Financial Creditor has first approached the guarantor for its outstanding claim by initiating CIRP against the Corporate Guarantor (ACIL) of the Corporate Debtor. The Financial Creditor has now approached the Corporate Debtor, (the Principal Borrower) only for the balance amount. The liability of the Corporate Debtor is co-extensive with that of the guarantor; therefore, the liability of the Corporate Debtor cannot be extinguished simply because the liability of the Guarantor has been extinguished. Any partial recovery by the Creditor from the guarantor does not absolve the Corporate Debtor (Principal Borrower) of its financial obligations, except to the extent of the amount already recovered from the guarantor. He placed reliance on the Judgment of the Hon'ble High court of Calcutta in the Case of Gouri Shankar Jain Vs. Punjab National Bank & Ors. (2019 SCC Online Calcutta 7288) and

Judgment of Hon'ble Supreme court in the Case of CoC Essar Steel India Limited Vs. Satish Kr. Gupta 2019 SCC Online SC 1478. It was argued that the Judgment passed by this Appellate Tribunal in the matter of Dr. Vishnu Kumar Agarwal (supra.) is not applicable to the present case as the facts of this case are completely different.

12. Having heard Ld. Counsel for the parties, we have minutely examined the record and considered their rival submissions.

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?

Issue No. (i)

14. Ld. Counsel for the appellant, Ex-director of the Corporate Debtor argued that Section 18 of the Limitation Act, 1963 is not applicable to the IBC. For this purpose, he placed reliance on the Judgment of the Hon'ble Supreme Court in the Case of B.K. Educational Services (supra.), Jignesh Shah (supra.), Babulal Vardharji (supra.) and an order passed by a five-member Bench of this Appellate Tribunal in the case of Bishal Jaiswal (supra).

15. Against the order of Bishal Jaiswal, Asset Reconstruction Company (India) Ltd. filed an appeal being Civil Appeal No. 323 of 2021 before the Hon'ble Supreme Court. The Hon'ble Supreme Court in its judgment dated 15.04.2021 considered all earlier judgments i.e. B.K. Educational Services(supra.), Jignesh Shah (supra.), Babulal Vardharji (supra.) on the subject and held as under: -

> "8. The aforesaid question is no longer res integra as two recent judgments of this Court have applied the provisions of Section 14 and Section 18 of the Limitation Act to the IBC. Thus, in Sesh Nath Singh v. Baidyabati Sheoraphuli Co-operative Bank Ltd., Civil Appeal No. 9198 of 2019 (decided on 22.03.2021), after setting out the issues that arose in that case in paragraph 57, and after referring to Section 238A of IBC, held:
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> "66. Similarly under Section 18 of the Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing of a fresh period of limitation, from the date on which the acknowledgement is signed. However, the acknowledgement must be made before the period of limitation expires.
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> 67. As observed above, Section 238A of the IBC makes the provisions of the Limitation Act, as far as may be, applicable to proceedings before the NCLT and the NCLAT. The IBC does not exclude the application of Section 6 or 14 or 18 or any other provision of the Limitation Act to proceedings under the IBC in the NCLT/NCLAT. All the provisions of the Limitation Act are applicable to proceedings in the NCLT/NCLAT, to the extent feasible.
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> 68. We see no reason why Section 14 or 18 of the Limitation Act, 1963 should not apply to proceeding under Section 7 or Section 9 of the IBC. Of course, Section 18 of the Limitation Act is not attracted in this case, since the impugned order of the NCLAT does not proceed on the basis of any acknowledgement."
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> 9. Nearer home, in Laxmi Pat Surana v. Union Bank of India, Civil Appeal No. 2734 of 2020, a judgment delivered on 26.03.2021, this Court, after referring to various judgments of this Court, including the judgment in Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries (P) Ltd., (2020) 15 SCC 1 ["Babulal"], then held:
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> "35. The purport of such observation has been dealt with in the case of Babulal Vardharji Gurjar (II) [Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries (P) Ltd., (2020) 15 SCC 1]. Suffice it to observe that this Court had not ruled out the application of Section 18 of the Limitation Act to the

proceedings under the Code, if the fact situation of the case so warrants. Considering that the purport of Section 238A of the Code, as enacted, is clarificatory in nature and being a procedural law had been given retrospective effect; which included application of the provisions of the Limitation Act on case-to-case basis. Indeed, the purport of amendment in the Code was not to reopen or revive the time barred debts under the Limitation Act. At the same time, accrual of fresh period of limitation in terms of Section 18 of the Limitation Act is on its own under that Act. It will not be a case of giving new lease to time barred debts under the existing law (Limitation Act) as such.

36. Notably, the provisions of Limitation Act have been made applicable to the proceedings under the Code, as far as may be applicable. For, Section 238A predicates that the provisions of Limitation Act shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the NCLAT, the DRT or the Debt Recovery Appellate Tribunal, as the case may be. After enactment of Section 238A of the Code on 06.06.2018, validity whereof has been upheld by this Court, it is not open to contend that the limitation for filing application under Section 7 of the Code would be limited to Article 137 of the Limitation Act and extension of prescribed period in certain cases could be only under Section 5 of the Limitation Act. There is no reason to exclude the effect of Section 18 of the Limitation Act to the proceedings initiated under the Code. Section 18 of the Limitation Act reads thus:

"18. Effect of acknowledgement in writing.–

(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

(2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.–For the purposes of this section,–

(a) an acknowledgement may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right;

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right."

> 37. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 of the Code. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" - not the date of notifying the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean nonpayment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to non-payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgements, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgement in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code ensures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgement, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgement of the debt, from time to time, for institution of the proceedings under Section 7 of the Code. Further, the acknowledgement must be of a liability in respect of which the financial creditor can initiate action under Section 7 of the Code."

16. With the aforesaid preposition, the question is no longer *res integra* that the provisions of Section 18 of the Limitation Act, 1963 are applicable to Section 7 and Section 9 of IBC.

17. In the present case, admittedly the date of default is 15.04.2012. Within three years, i.e on 24.03.2015, the Debt Repayment and Settlement Agreement was entered into by the parties (Diary no. 24049, Page 214-245, Appeal Paper Book). The Corporate Debtor failed to repay the debt as per Debt Repayment and Settlement Agreement. Therefore, Financial Creditor cancelled the said agreement (Diary no. 24049, Page 246-256, Appeal Paper

Book) on 29.05.2017. In this agreement, the Corporate Debtor has specifically acknowledged the debt. The relevant portion of the said agreement is reproduced hereinunder (Page 251):

> "Acknowledgment of Debt
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> Each of the Borrower, Guarantors and Pledgor acknowledges and agrees by their respective execution hereof that the indebtedness evidenced and secured by the financing documents is due and owing to lender as provided thereunder. Furthermore, the Borrower, Guarantors and Pledgor and each of them agree that:
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> 2.1 The Lender has not waived any of its rights or remedies under the Financing Documents and all the Financing Documents are effective and subsisting as on the Effective Date and shall continue to be so until the entire indebtedness of the Borrower with respect to the Obligations under the Financing Documents, stands fully repaid to the Lender;
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> 2.2 The Loan had been properly disbursed under the Financing Documents;
>
> 2.3 As of the Effective date, the outstanding aggregate balance due under the Financing Documents is equal to Rs:- 231,48,67,202/- (Rupees Two Hundred Thrity One Crore, Forty Eight Lakh, Sixty Seven Thousand, Two Hundred and Two Only)."

Thereafter, within three years i.e on 10.02.2020, the Financial Creditor filed the Application under Section 7 of the IBC. It is apparent that the Application is filed within extended period and the Application is within limitation. We find no force in the arguments advanced by the Ld. Counsel for the appellant. Thus, we affirm the finding of Ld. Adjudicating Authority that the Application is within limitation.

Issue No. (ii)

18. Ld. Counsel for the appellant, Ex-Director of the Corporate Debtor raised a plea that Financial Creditor has initiated CIRP against the Corporate Guarantor, therefore, after two years, for the same debt and default, CIRP

cannot be initiated against the Corporate Debtor. For this purpose, he placed reliance on the judgment of this Appellate Tribunal in the case of Dr. Vishnu Kumar Agarwal (supra.) and SEW Infrastructure Ltd. Vs. Mehendra Investment Advisors Pvt. Ltd. (supra.)

19. This Appellate Tribunal in the judgment of SEW Infrastructure Ltd.(supra.) has relied on its earlier judgment in Dr. Vishnu Kumar Agarwal (supra.)

20. Further, this Appellate Tribunal in the case of State Bank of India Vs. Athena Energy Ventures Pvt. Ltd. CA (AT) (Ins) No. 633 of 2020 considered the earlier judgment of Dr. Vishnu Kumar Agarwal (supra.) and after interpreting the law held that the Financial Creditor can simultaneously or one after another initiate CIRP against the Corporate Debtor as well as Corporate Guarantor. It is useful to refer the relevant paragraphs which are reproduced below: -

> "13. Apart from this, the observations in the Judgement 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:-
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> "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 Judgement in the matter of "State Bank of India versus V. Ramakrishnan & Anr." (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 Judgement in the matter of "Ramakrishnan" later. At present, we have referred to the above provision which had come on the statute book when Act 26 of 2018 was enforced and the Judgement 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.

14. It would be appropriate now to refer to the observations made by the Insolvency Law Committee in its Report of February, 2020. Relevant part of the Report has been filed by the Appellant as Annexure – C (Diary No.23383). Para 7 of the Report is as follows:-

7. ISSUES RELATED TO GUARANTORS

7.1. Under Section 128 of the Indian Contract Act, 1872, the liability of a surety towards a creditor is coextensive with that of the principal borrower. When a default is committed, the principal borrower and the surety are

jointly and severally liable to the creditor, and the creditor has the right to recover its dues from either of them or from both of them simultaneously.26 The Committee discussed whether in light of this rule of co-extensive liability of the surety and the principal borrower, a creditor should be permitted to initiate CIRP against both the principal borrower and its surety and whether it should be permitted to file its claims in the CIRPs of both the principal borrower and its surety.

Initiation of Concurrent Proceedings against the Principal Borrower & the Guarantor

7.2. The Committee noted that the Appellate Authority, in Dr. Vishnu Kumar Agarwal v M/s. Piramal Enterprises Ltd., has prevented admission of multiple CIRP applications which were filed by the same creditor for the same set of claims against different corporate debtors by holding that: "However, once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' or 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower')."

7.3. The Committee noted that while, under a contract of guarantee, a creditor is not entitled to recover more than what is due to it, an action against the surety cannot be prevented solely on the ground that the creditor has an alternative relief against the principal borrower.29 Further, as discussed above, the creditor is at liberty to proceed against either the debtor alone, or the surety alone, or jointly against both the debtor and the surety.30 Therefore, restricting a creditor from initiating CIRP against both the principal borrower and the surety would prejudice the right of the creditor provided under the contract of guarantee to proceed simultaneously against both of them.

7.4. Further, Section 60(2) of the Code provides that when a CIRP or liquidation process against a corporate debtor is pending before an Adjudicating Authority, any insolvency resolution, liquidation or bankruptcy proceeding against any guarantor of that corporate debtor should also be initiated before the same Adjudicating Authority. Similarly, Section 60(3) requires transfer of any such proceeding which may be pending before any court or tribunal to the Adjudicating Authority dealing with the CIRP or liquidation process of the corporate debtor. Therefore, as the Code does require proceedings against a corporate debtor and its guarantors to be simultaneously heard by the same Adjudicating Authority, the Committee was of the view that the Code in fact, envisages initiation of concurrent proceedings against both a corporate debtor and its sureties. Given this, the Committee recommended that a creditor should not be prevented from proceeding against both the corporate debtor and its sureties under the Code.

7.5. However, the Committee noted that the Appellate Authority has, in certain cases, taken a view contrary to its decision taken in the Piramal

Enterprises Ltd.31 case. For example, in Edelweiss Asset Reconstruction Company Limited v Sachet Infrastructure Pvt. Ltd. & Ors.,32 the Appellate Authority has permitted simultaneous initiation of CIRP against the principal borrower and its corporate guarantors. Further, the Appellate Authority has also admitted a petition to review its aforesaid judgement in the Piramal Enterprises Ltd. case.33 Given this, the Committee decided that no legal changes may be required at the moment, and this issue may be left to judicial determination.

7.6. It was also represented before the Committee that in certain cases creditors extend loans to a debtor solely by relying on the contract of guarantee provided by a thirdparty surety, and without considering the commercial viability of the debtor and its ability to repay the debt. The Committee deprecated this practice, and agreed that creditors should necessarily carry out adequate due diligence regarding the debtor's financial position and should not extend a loan solely by relying on a contract of guarantee without assessing the financial and technical feasibility of the respective project. Filing of Claims by a Creditor in Proceedings of the Principal Borrower & the Guarantor

7.7. The Committee further discussed whether, in cases where CIRP has already been initiated against the principal borrower and the surety, a creditor should be allowed to file claims (with respect to the same set of debts) in the CIRP of both the corporate debtors. The Appellate Authority, in Dr. Vishnu Kumar Agarwal v 31 Dr. Vishnu Kumar Agarwal v M/s. Piramal Enterprises Ltd., 34 had opined that "for same set of debt, claim cannot be filed by same 'Financial Creditor' in two separate 'Corporate Insolvency Resolution Processes'".

7.8. However, as discussed above, the principal borrower and the surety being jointly and severally liable to the creditor is a key feature of a contract of guarantee. Therefore, the very object of a contract of guarantee would be prejudiced if the creditor is prohibited from filing claims in the CIRP of both the principal borrower and the surety.35 Even in the First ILC Report, this Committee, while discussing the scope of moratorium under Section 14 vis-à-vis the assets of a surety of the corporate debtor, had observed that the "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."36 If a creditor is denied the contractual right to proceed simultaneously against the corporate debtor and the surety, the ability of the creditor to recover its debt may be seriously impaired.

7.9. As the right to simultaneous remedy is central to a contract of guarantee, the Committee suggested that in cases where both the principal borrower and the surety are undergoing CIRP, the creditor should be permitted to file claims in the CIRP of both of them. Since, as the Code does

not prevent this, the Committee recommended that no amendments were necessary in this regard.

7.10. It was brought to the Committee that this right may be misused by a creditor to unjustly enrich herself by recovering an amount greater that what is owed to her. However, the right to simultaneous remedy under a contract of guarantee does not entitle a creditor to recover more than what is due to her, and the Committee agreed that upon recovery of any portion of the claims of a creditor in one of the proceedings, there should be a corresponding revision of the claim amount recoverable by that creditor from the other proceedings.

15. The learned Counsel for the Appellant is relying on the above observations of the ILC to argue that the Creditor cannot be restrained from initiating CIRP against both the Principal Borrower as well as the surety and also maintaining the same. The learned Counsel submitted that when remedy is available against both, Application can be maintained against both and only at the stage of disbursement, adjustment may have to be made.

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 Judgement of "Edelweiss Asset Reconstruction Company Ltd. v. Sachet Infrastructure Ltd. and Ors." 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 Judgement. 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.

17. The Hon'ble Supreme Court in the matter of V. Ramakrishnan dealt with Section 60(2) and (3) of IBC in Paragraphs – 24 and 25 of the Judgement, Hon'ble Supreme Court observed as under:-

"24. The scheme of Sections 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 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."

18. We have already mentioned that when Hon'ble Supreme Court was dealing with Section 60(2), it was in the context of bankruptcy of Personal Guarantor and the Act 26 of 2018 was yet not published. The above para – 24 of the Judgement in the matter of Ramakrishnan can be conveniently read keeping in view the substituted provisions as per Act 26 of 2018. In place of Personal Guarantor, one can read "Corporate Guarantor" and with suitable changes, scheme of Section 60(2) and (3) can be appreciated from that angle also. The issue involved in the matter of "Ramakrishnan" was

whether Section 14 of IBC will provide for a moratorium for the limited period mentioned in the Code, on admission of an insolvency petition would the same apply to Personal Guarantor of a Corporate Debtor. The issue was answered in negative by the Hon'ble Supreme Court. The Hon'ble Supreme Court in such context made observations as above in Paragraphs – 24 and 25 of the Judgement.

19. It is clear that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as Guarantor. The law as laid down by the Hon'ble High Courts for the respective jurisdictions, and law as laid down by the Hon'ble Supreme Court for the whole country is binding. In the matter of Piramal, the Bench of this Appellate Tribunal "interpreted" the law. Ordinarily, we would respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner it was interpreted in the matter of Piramal. For such reasons, we are unable to uphold the Judgement as passed by the Adjudicating Authority."

21. We are of the view that Application under Section 7 of the IBC against the Corporate Debtor for the same debt and default is maintainable in the light of judgment of Athena Energy Ventures (supra.)

22. Now we have considered whether the Financial Creditor had accepted the amount in the resolution plan as full and final settlement of all its dues.

23. For this purpose, it is useful to refer to Clause 12.3 and Clause 13.3 of the Revised Resolution Plan (dated 05.08.2018) in relation to ACIL Corporate Guarantor submitted by Resolution Applicant (Page no. 325 and 328 of the Appeal Paper Book; Diary No. 24049).

"**12.3. Treatment of Contractual Claims and Liabilities**

While the existing contracts of ACIL, shall be continued, except as stated herein. All liabilities (statutory or otherwise) of ACIL, arising from any contractual agreements entered into by ACIL, any claims against ACIL, or liabilities of ACIL, arising or having crystalized prior to the Effective Date shall be deemed to be cancelled and written off on the Effective Date pursuant to NCLT Approval Order. Further, any claim against ACIL, arising from any contractual arrangements, whether set out herein or not, whether admitted or not, due to contingent, asserted or unasserted, present or future, whether or not set out in the Information Memorandum, the balance sheet or the books of accounts of ACIL, in relation to any period prior to the Effective Date, will be written off in full and will

be deemed to be permanently extinguished by virtue of the NCLT Approval Order and the Resolution Applicant, ACIL, and /or the new management of ACIL shall, at no point, be made directly or indirectly responsible or liable for the same…."

13.3 all corporate guarantees, indemnities, letters of comfort, undertakings (including as listed below) 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.

Details of Corporate Guarantee as on December 31, 2017.

Sl. No.	Particulars	Amount of Guarantee (In INR Crores)
1.	Duncan Macneill Natural Resources Ltd	191.78 ($30 mlo)
2.	SREI Infrastructure Finance Ltd.	100.00
3.	Duncan Macneill Power India Ltd.	24.95
	Total	**316.73**

24. With the aforementioned Clause of the Resolution Plan, it cannot be said that the Financial Creditor accepted the amount in full and final settlement of all its dues. However, the right of recovery of debt of Financial Creditor available against the Corporate Guarantor has extinguished. It is useful to refer to the judgment passed by the Hon'ble High Court of Calcutta in the case of Gouri Shankar Jain Vs. Punjab National Bank & Anr. 2019 SCC Online Calcutta 7288 wherein it was held that:

"19. Section 128 of the Act of 1872 stipulates that, the liability of the surety is coextensive with the of the principal debtor, unless it is otherwise provided by the contract. The onus is on the petitioner to establish that, the contract of guarantee provided anything to diminish the liability of the petitioner under the contract of guarantee excepting the liability of the petitioner being coextensive as that of the company. The petitioner, as noted above, has not produced the contract of guarantee and therefore, has failed to establish that, the contract of guarantee contain any stipulation contrary to the liability of the petitioner being coextensive with that of the company.

.....

25. When a financial creditor approaches the Adjudicating Authority under the provisions of the Code of 2016 and applies under section 7 thereof for initiation of Corporate Insolvency Resolution process in respect of a corporate debtor, the financial creditor is trying to recover the defaulted amount from the corporate debtor. It cannot be said that, the financial creditor when it applies under section 7 of the Code of 2016, does so with the view to enter into any compromise or composition with the corporate debtor in respect of the claim. In a given situation, the Resolution Plan submitted with the resolution professional and accepted by the committee of creditors and ultimately approved by the Adjudicating Authority, may provide for payment of the entirety of the claim of the financial creditor applying for initiation of the Corporate Insolvency Resolution process. In such a situation, no compromise takes place. In a given situation, the financial creditor applying for initiation of the Corporate Insolvency Resolution process may receive a portion of the claim as full and final settlement as against the corporate debtor, in accordance with the Resolution Plan approved under the Code of 2016. In neither of the two situations, can it be said that, the financial creditor entered into a voluntary compromise with the corporate debtor with regard to the quantum of the claim.

26. The Code of 2016 stipulates that, a Resolution Plan in respect of a corporate debt is required to be approved by a vote of not less than 66% of the voting share of the financial creditors. In a given case, the financial creditor applying for initiation of Corporate Insolvency Resolution process in respect of a corporate debtor may be holding more than 66% of the voting share of the financial creditors in respect of such corporate debtor. In such case, the best available Resolution Plan in respect of the corporate debtor may contemplate payment of a portion of the claim of the financial creditors in full and final settlement. Such Resolution Plan may be approved by the financial creditor in the meeting of the committee of creditors. Would such an approval mean that, the financial creditor entered into a composition with the corporate debtor, thereby impairing the right of the financial creditor to recover the balance amount from the guarantor of the corporate debtor ? In my view, the answer is in the negative.

27. An application under Section 7 of the Code of 2016 once admitted under Section 7(5) thereof has two terminal points for the corporate debtor. The Code of 2016 does not contemplate withdrawal of an application under Section 7 once it is admitted under Section 7(5). The terminal points are, firstly, the approval of a Resolution Plan and secondly, the initiation of liquidation proceeding on a Resolution Plan not being approved. When a financial creditor applies under Section 7 of the Code of 2016 it is exercising a statutory right. The exercise of such statutory right does not depend upon the contractual obligations of the parties bound by the respective contracts between the creditor, principal debtor and the surety. Such contracts cannot be said to have rescinded, novated, frustrated, modified, altered or affected in any manner, on an application under Section 7 of the Code of 2016 being filed. After its admission under Section 7(5) of the Code of 2016, when an order under Section 14 is passed, then also only the statutory right of a financial institution to proceed under the SARFAESI Act, 2002 remains suspended for a limited period. The existing contracts between the surety, principal debtor and the creditor remains unaffected.

25. With the aforesaid discussion, we are not convinced with the argument made by the Ld. Counsel of the appellant that CIRP has already taken place against the Corporate Guarantor therefore, the second application against the Corporate Debtor is not maintainable. It cannot be held that the Financial Creditor accepted the amount in full and final settlement of all its dues. We are therefore of the considered view that the Application under Section 7 of the IBC is maintainable against the Corporate Debtor for the same debt and default and the Financial Creditor can recover the remaining dues from the Corporate Debtor.

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26. Ld. Counsel for the Appellant, Resolution Applicant (BRS Ventures Investment Ltd.) submitted that the information memorandum was prepared by the RP under Section 29 of the IBC. It contained three business segments of ACIL, namely Tea Business, Oil & Gas Business and SEZ Business which is the business of Corporate Debtor, the subsidiary of ACIL. The Information memorandum further indicates that ACIL and its subsidiaries were consolidated for obtaining a Resolution Plan which would maximize the value of the assets of ACIL. The information memorandum was circulated amongst the members of the CoC including the Financial Creditor but they never raised any objection that SEZ Business of the Corporate Debtor has wrongly been included in the information memorandum. The Resolution Applicant agreed to take over ACIL, including the shares of the Corporate Debtor for a

considerable amount of Rs. 1062 crores against the liquidation value of only Rs. 360 crores. This substantial amount has been invested by the Resolution Applicant not only to take over ACIL, but also SEZ Business of the Corporate Debtor.

27. It is submitted that the Resolution Applicant even in absence of any express provisions in the resolution plan, after taking over the Corporate Debtor is entitled to exercise its right over the subsidiary company of ACIL. For this preposition, reliance was placed on a judgment rendered by this Appellate Tribunal in the case of Facor Alloys Ltd. & Anr. Vs. Bhuvan Madan (RP) CA (AT) (Ins) No. 340 of 2020. The Resolution plan which was duly consented by Financial Creditor and approved by the Adjudicating Authority Guwahati is binding on all the stakeholders including Financial Creditor.

28. The Ld. Counsel for the Appellant further argued that the initiation of CIRP of the Corporate Debtor by the impugned order is not only frustrating the approved resolution plan but the Resolution Applicant shall lose a substantial amount towards the valuation of shares of the Corporate Debtor held by ACIL, which shall practically have no value as a consequence thereof. The Resolution Applicant while valuing ACIL alongwith subsidiaries had earmarked a substantial amount towards the share of Corporate Debtor held by ACIL.

29. Ld. Counsel for the Appellant, Resolution Applicant also submitted that the claim of Financial Creditor falls under the definition of unsecured Financial Creditor. The total claim of the unsecured Financial Creditors is Rs. 290.22 crores which includes the claim of Financial Creditor of Rs. 241.27 crores. The Resolution Applicant proposed to pay unsecured Financial Creditors an amount of Rs. 50 Crores which includes Rs. 38.87 crores payable to the Financial Creditor in full and final settlement of all its dues. Thus, the Financial Creditor could have not claim any further amount from the Corporate Debtors. The settled amount of Rs. 38.87 crores is compete discharged of debt of the Financial Creditor against the Corporate Debtor. The Financial Creditor in its reply has taken an incorrect stand that the amount settled was only towards the discharged of the liability of ACIL and not for Corporate Debtor. Thus, the impugned order is liable to be set aside.

30. *Per contra*, Ld. Counsel for the Respondent (Financial Creditor) submitted that the Financial Creditor after exhaustion of its remedy against the Corporate Guarantor has claimed only the balance amount from the Corporate Debtor. The liability of Corporate Debtor is co-extensive with the Guarantor and the liability of the Corporate Debtor cannot be extinguished. Simply because the liability of the guarantor has been extinguished, any partial recovery by the Financial Creditor from the Guarantor does not absolve the Corporate Debtor (Principal Borrower) of its financial obligations except to the extent of the amount already recovered by the Financial Creditor

from the Guarantor. The Judgment passed by this Appellate Tribunal in the matter of Dr. Vishnu Kumar Agarwal Vs. Piramal Enterprises Ltd. (supra.) is not applicable to the present case.

31. Ld. Counsel for the Respondent (Financial Creditor) further submitted that Section 128 of the Indian Contract Act, 1872 provides that the liability of the guarantor/surety is co-extensive with that of the Principal Debtor. Hon'ble Supreme Court in the case of State Bank of India Vs. V. Ramkrishnan & Ors. in Civil Appeal No. 3959 of 2018 vide its judgment dated 14.08.2018 held that moratorium under Section 14 of the IBC does not extend to the guarantor as the object of the IBC was not to allow such guarantor to escape from an independent and co-extensive liability to pay off the entire outstanding debt.

32. Ld. Counsel for the Respondent further submitted that the Information Memorandum (IM) was wrongly relied upon by the Appellant to state that the CIRP of ACIL also included the business of its subsidiary, which is not found anywhere in the IM. On the other hand, the resolution plan states that though the SEZ is separate company but financial obligations of the SEZ Unit are on the ACIL. The resolution plan nowhere states that the assets of the Corporate Debtor would be part of CIRP of ACIL.

33. Ld. Counsel for the Respondent also submitted that the RP had sought legal advice of their solicitors, they opined that *"RP can take care of*

investments in subsidiaries and not the assets of the subsidiaries. However, if the RP can prove fraudulent transactions for investments in subsidiaries, he can take necessary avoidance of transactions undertaken by the ACIL in the past, depending on the report of forensic audit." However, there is no such audit report, therefore, the approved resolution plan cannot include the SEZ Business of the Corporate Debtor.

34. Ld. Counsel for the Respondent further submitted that the reliance placed by the Appellant on the Judgment of Facor Alloys Ltd. (supra.) is completely misplaced because the facts of this judgment are quite different from those of the present case. In the case of Facor Alloys Ltd. (supra.), the Corporate Debtor held 89% of the share of the subsidiaries and separate valuation of the subsidiaries was conducted and mentioned in the resolution plan, which is unlike the facts of the present case. Thus, there is no merit in this Appeal. Therefore, the Appeal is liable to be dismissed.

35. The following issues arise in this Appeal for our consideration:

(i) Whether the Resolution Applicant is entitled to exercise its right over the subsidiaries company of ACIL (Corporate Guarantor)?

(ii) Whether the approved resolution plan has included the SEZ business of the Corporate Debtor?

Issue No. (i)

36. The 4th Meeting of CoC of ACIL held on 12.02.2018 has resolved as under:- (Page 255-256 Appeal Paper Book Vol. II)

> "In dealing with subsidiaries of CD, the RP and CoC have many options depending on situation in each case. Some actions/options are:
>
> 1. RP must collect all constitutional documents and shareholding agreements concerning subsidiaries early in the CIPR process. Also collect information on receivables from the subsidiaries and defaults if any, in receiving such payments.
>
> 2. Subsidiaries may be having significant assets of the value and if they have been acquired out of investments made by CD, the Resolution Plan could incorporate selling of such assets if required, to meet and funds for resolution, subject to confirmation with applicable laws.
>
> 3. If subsidiaries have defaulted in dues to CD, the RP on behalf of the CD and with approval of CoC, can also initiate CIRP against such subsidiaries.
>
> 4. If CD has transferred significant assets (tangible, intangible and cash) to subsidiaries in two years preceding insolvency commencement date, they can be investigated for making avoidance application/s if required.
>
> 5. in case of listed (and even unlisted) subsidiaries, RP with CoC approval, can call EGMs of such subsidiaries to modify or replace their boards and KMPs.
>
> 6. Sale of Shares held by CD in subsidiaries can always form part of Resolution Plan."

37. The 5th Meeting of the CoC of ICIL held on 28.02.2018 has resolved as under:- (Page 244 of Appeal Paper Book Vol. II)

> "ITEM: 8- OTHER MISCELLANEOUS AGENDA AS ON DATE OF CIRCULATION OF NOTICE OF MEETING OR ARISING SUBSEQUENTLY
>
> i. Status of opinion sought from M/S Khaitan & Co., Solicitors and Advocates.
>
> a. Regarding demerger of oil and tea verticals Khaitan & Co. opined that we have to float a single EOI since the CD is single entity.
>
> b. Regarding Investment in subsidiary, Khaitan & Co. opined under Section 11 (a) that RP on behalf of the CD cannot file Petition for initiating CIRP as the CD is already undergoing the CIRP. In addition, it was stated that RP can only take care of the investments in subsidiaries and not the assets of the subsidiaries. However, if RP can prove fraudulent transactions for investments in subsidiaries, he can

> take necessary avoidance of transactions undertaken by the CD in the past, depending on the report of the forensic audit."

38. In the light of aforesaid opinion of Solicitors & Advocates, no forensic audit report place on record to prove that the ACIL fraudulently made investments in its subsidiaries i.e. Corporate Debtor. Therefore, the assets of the subsidiaries cannot be included in the resolution plan in relation to ACIL submitted by Resolution Applicant (Appellant).

Issue No. (ii)

39. Ld. Counsel for the Resolution Applicant tried to convince us that SEZ Business of the Corporate Debtor is included in the Resolution Plan. We have minutely examined the resolution plan it is nowhere mentioned that SEZ Business of the Corporate Debtor included in the Resolution plan. We have already noted in the aforesaid paragraph that the RP can only take care of the investments in the subsidiaries and not the assets of the subsidiaries. The resolution plan in regard to SEZ Business of the Corporate Debtor states as under:-

> "(c) SEZ Business
>
> ACIL through its subsidiary Gujarat Hydrocarbons and Power SEZ Ltd. (GHPSL) has acquired 296 hecters of land from Gujarat Industrial Development Corporation (GIDC) in Vilayat Vagra Industrial Estate in the Bharuch District in Gujarat for setting up a sector specific Hydrocarbon SEZ for providing services to the Oil & Gas and Energy Sector. The subject site is within the proposed Petroleum, Chemical & Petrochemical Investment region (PLPIR). The entire up to date project cost which in inclusive of land acquisition and preliminary project expenses was financed to equity and unsecured loan contributed by ACIL, its holding company and a secured loan from an NBFC, which has been guaranteed by ACIL. Thus, though the SEZ is a separate company, but the financial obligations of the SEZ unit are on ACIL."

40. With the aforementioned clause of the approved resolution plan it is apparent that SEZ is a separate company not included in the resolution plan of Resolution Applicant (Appellant). The financial obligations of the SEZ are on ACIL.

41. Now, we have considered the Judgment of this Appellate Tribunal in the case of Facor Alloys Ltd. (supra.). In this case, the shares of Facor Power Ltd. i.e. 86% shares were held by the Corporate Debtor. The RP in accordance with regulation 27 of the IBBI (Insolvency Resolution Process of Corporate Persons) Regulations 2016 appointed two registered valuers to determine the fair value and liquidation value of the assets of the Corporate Debtor (Including the shares held by the Corporate Debtor in FPL). However, in the present case, during the CIRP of ACIL, no valuer was appointed to determine the fair value of the shares held by the the Corporate Debtor. Therefore, the assets of the Corporate Debtor (Respondent) cannot be included in the resolution plan. Thus, the facts of the case of Facor Alloys Ltd. (supra.) are quite different from those of the present case. Thus, this citation is not helpful to the Appellant.

42. With the aforesaid discussion, we are of the considered view that the SEZ Business of the Corporate Debtor is not included in the resolution plan submitted by the Appellant.

We find no merit in these Appeals, therefore, the Appeals are dismissed, however, no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

New Delhi
11th May, 2021
SC

The Bench consisting of Justice Jarat Kumar Jain & Mr. Kanthi Narahari heard these Appeals. Mr. Kanthi Narahari is not readily available today, however, he approved the Judgment and requested to pronounce the same for and on behalf of the Bench. Therefore, as per rule 92 of National Company Law Appellate Tribunal Rules 2016 the Judgment is pronounced by Justice Jarat Kumar Jain for and on behalf of the Bench.

11th May, 2021.

[Justice Jarat Kumar Jain]
Member (Judicial)