

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) INS No. 239 of 2022

In the matter of:

Mr. Satyan Kasturi
S/o. K.S. Kothandaraman,
No. 102/36, Defence Colony,
Chennai – 600032

..... Appellant

v.

State Bank of India
Stressed Assets Management Branch,
Red Cross Building,
32, Montieth Road,
Egmore, Chennai – 600008

..... Respondent-1

M/s. PPS Enviro Power Private Limited
97/A, Road No. 18, Phase-1, IDA,
Jeedimelta
Hyderabad – 500055

..... Respondent-2

PVB Sudhakara Rao
Resolution Professional
8-3-677/8, Divya Collections,
2nd Floor, Near Ganapathi Complex,
SKD Nagar, Yellareddyguda,
Hyderabad – 500073

..... Respondent-3

Present:

**For Appellant : Mr. PH. Arvinth Pandian, Senior Advocate
For Mr. Avinash Krishnan Ravi, Advocate**

**For Respondent No.1 : Mr. Vipin Warriar & Ms. Vidyalakshmi,
Advocates**

Respondent No.2 : Corporate Debtor / Respondent

**For Respondent No.3/ : Ms. Mummaneni Vazra Laxmi, Advocate
Resolution Professional**

JUDGMENT
(Virtual Mode)

Justice M. Venugopal, Member (Judicial):

The Appellant / 1st Respondent has preferred Comp. App (AT) (CH) (INS) No. 239 of 2022 as an 'Aggrieved Person' on being dissatisfied with the impugned order dated 20.06.2022 in CP(IB) No. 401/95 of IBC/ HDB/ 2020, passed by the 'Adjudicating Authority' ('National Company Law Tribunal', Bench – I , Hyderabad), in admitting the 'Petition'.

2. The 'Adjudicating Authority' ('National Company Law Tribunal', Bench – I, Hyderabad), while passing the impugned order dated 20.06.2022 in CP(IB) No. 401/95 of IBC/HDB/2020 at paragraphs 12 and 13 had observed the following:

12. ``At the outset it may be stated that the Financial Creditor has initiated Corporate Insolvency Resolution Process against respondent no. 2 in CP (IB) No. 407 of 2018 which has been admitted by the Adjudicating Authority vide order dated 13.08.2019. The present Petition is filed against respondent no.1, who is Personal Guarantor to the Corporate Debtor. Despite service of notice and opportunity afforded, respondent no.1 did not

choose to contest the matter. Thus, the claim of the applicant as against respondent no. 1 stands unrebutted.

13. It has been stated that respondent no.2 is now under liquidation as resolution failed. The report of the Resolution Professional discloses that respondent no.1 has neither made any request for holding negotiations with the creditor for arriving at repayment plan nor any repayment plan has been submitted. Therefore, under the circumstances, the liability of respondent no.1 herein being coextensive with that of respondent no. 2 and as the debt which has been guaranteed by respondent no.1 since defaulted, the prayer of the applicant to order Insolvency Resolution Process against respondent no.1, since finds merit, the same is hereby allowed.’’

and admitted the ‘Petition’ and initiated the ‘Insolvency Resolution Process’ against the ‘Appellant / 1st Respondent, by declaring ‘Moratorium’, etc.

Appellant’s submissions:

3. The Learned Senior Counsel for the Appellant / 1st Respondent / Personal Guarantor submits that the ‘impugned order’ dated 20.06.2022 in CP(IB) No. 401/95 of IBC/HDB/2020 is an illegal one, because of the fact that the said ‘Order’ was passed without adverting to the Counter filed by the ‘Appellant’, where objections in regard to lack of any ‘Agreement of Guarantee’, invalidity of any such ‘Guarantee’, even if issued and the plea of ‘barred by limitation’ were raised.

4. The Learned Counsel for the Appellant contends that the Appellant is an 'Australian National' and cannot guarantee an 'Indian Debt', without prior permission from the 'Reserve Bank of India', being secured thereto, in terms of Regulation 3A of the Foreign Exchange Management (Guarantees) Regulations, 2000.

5. The Learned Counsel for the Appellant submits that the 'Debt' allegedly to be owed by the 'Appellant' is clearly barred by 'limitation'; as cause of action for the purpose of I & B, Code, 2016, in the absence of 'an acknowledgement' begins from the date of 'Non Performing Asset' and comes to an end three years thereafter.

6. It is represented on behalf of the Appellant the 'Adjudicating Authority' in the instant case has passed an 'Order' without considering any of the objections and submissions projected by the 'Appellant'.

7. The Learned Counsel for the Appellant takes a stand that any breach of Foreign Exchange Management Act, Regulation attracts the Section 13 of the FEMA 1999, whereby a 'Penalty' is fashioned for any such violation.

8. The Learned Counsel for the Appellant refers to Regulation 3A of the Foreign Exchange Management (Guarantees) Regulations, 2000, which reads as under:

3A. `No corporate registered under the Companies Act, 1956 (1 of 1956) shall avail domestic rupee denominated structure obligations by obtaining credit enhancement in the form of guarantee by international banks, international financial institutions or joint venture partners, except with the prior approval of the Reserve Bank:

Provided howsoever that, 1 [a person resident in India who is eligible to raise foreign currency loan under sub-regulation [1] of Regulation 6 of Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 read with Schedule I thereto,] may obtain, without the prior approval of the Reserve Bank, credit enhancement in the form of guarantee from a person resident outside India for the domestic debts raised by such companies through issue of capital market instrument like bonds and debentures subject to satisfying the terms and conditions as may be stipulated by the Reserve Bank from time to time, in this regard.]''

and comes out with a plea that a 'Foreign National' cannot 'Guarantee' a 'Debt' taken by an 'Indian Company' without the permission of 'Reserve Bank of India' and even in a case, where the 'Law' does not expressly provide that the 'Contracts' in 'Violation of Law' are void, as per Section 23 of the Indian Contract Act, 1872.

9. The Learned Counsel for the Appellant forcefully urges before this Tribunal that the 'Appellant' had never executed any 'Personal Guarantee', in his individual capacity and that numerous documents filed before the 'Adjudicating Authority' was forged and on 10.08.2016, the

'Appellant' was not in India and was residing in United Kingdom for which there is proof Viz. Passport Entries, Hotel Receipts, etc.

10. The Learned Counsel for the Appellant raises an argument that the Appellant had signed certain 'Deeds of Guarantee' as a 'Director' of a Company named M/s. Sunpower Solar Technick Pvt. Ltd., which stood as a 'Corporate Guarantor'.

11. The Learned Counsel for the Appellant points out that the Appellant was not even in India and was residing in United Kingdom (as seen from the entries made in the Passport, Hotel Receipts, etc.) and further that the 1st Respondent / Bank had 'forged' and 'doctored' documents to create a 'Personal Guarantee' when none was signed by the Appellant.

12. The Learned Counsel for the Appellant refers to the Principles of Section 106 of the Indian Evidence Act, 1872, the onus is upon the 1st Respondent/Bank to exhibit how it claims that the confirmations were signed on 10.08.2016, when the Appellant was not even India on the said date.

13. The Learned Counsel for the Appellant points out that the Account of the Corporate Debtor / M/s. PPS Enviro Power Pvt. Ltd., Hyderabad,

became 'Non Performing Asset' on 26.12.2015, but the instant 'Application' was filed in the Year 2020, after five years.

14. The Learned Counsel for the Appellant refers to the Judgment of this Tribunal dated 27.08.2021 in Rishima SA Investments LLC and Ors. V. Sarga Hotel Private Limited and Ors., reported in MANU/NL/0366/2021, wherein at paragraph at 27, it is observed as under:

'27. An argument placed before us by the Appellant is the way the application for urgent mentioning by the operational creditor vide email dated 10.8.2020 sent to the Registry of the NCLT was dealt. The NCLT Registry immediately replied to the operational creditor asking for a Defence Note in 15-20 lines within 24 hours, for consideration. It is quite surprising that even when the mentioning had not been made before the NCLT, the NCLT Registry presumed that the mentioning would be about final hearing of the case and asked for a Defence Note. Furthermore, after the Defence Note was sent by the Corporate Debtor vide email dated 11.8.2020 (attached at page 27, Reply of Respondent No.2 UICL in CA No. 892/2020, diary number 23638/21.11.2020), the corporate debtor proceeds to admit the operational debt of UICL without so much as a weak defence, nor did it seek the right and time to file a complete reply, as would be normally expected. Thus, without a full and proper hearing, as was desirable from the point of view of natural justice, the impugned order is passed by the Adjudicating Authority (NCLT) on 12.8.2020. If anything, the events as they unfolded show the haste and alacrity with which the matter as serious as initiating CIRP against a 'going concern' was dealt with, without any regard to natural justice.'

15. The Learned Counsel for the Appellant refers to the Judgment of this `Tribunal' dated 21.10.2021 in Arvind Bali and Ors., Union of India, Ministry of Corporate Affairs and Ors., reported in MANU/NL/0460/2021, wherein at paragraphs 45 to 47, it is observed as under:

45. `It must be borne in mind that the `Rules of Natural Justice' are not the edicts of a statute. As a matter of fact, the rudimentary requirement is that (i) Fair play (ii) a Determination/An Adjudication is to be made after ascribing necessary reasons in a fair, just, and objective manner of course, based on the relevant facts/materials in a given case.

46. In reality, an opportunity of hearing is to be afforded to an `individual' to air / put forward is point of view by either contradicting or raising objection, in regard to the claim which is `Detrimental' to him. No wonder, the `Rules of Natural Justice' do supplement the Law and they do not `Supplant the Law'.

47. It cannot be forgotten that the `Tribunal' has the trappings of a `Court' and its powers are limited to the ingredients of the Companies Act, 2013 in that behalf and exercised in specified matters mentioned therein. The `Tribunal' and the `Appellate Tribunal' are to be guided by the `Principles of Natural Justice'.'

16. The Learned Counsel for the Appellant refers to the Judgment of this `Tribunal' dated 26.03.2021 in Abhishek Jain V. Mis Puerto Life Sciences Private Limited and Ors., reported in MANU/NL/0107/2021, wherein it is observed as under:

`Though prima facie we are not inclined to deal with any of the issues on merits. Further, following the Principle of Natural

Justice, we would afford an opportunity a liberty to the Appellant to address the issues before the learned NCLT with regard to the bank statement of the Respondent No. 1 Company for the reasons that the Appellant disputed the payments made by the other Directors. The Appellant may file these documents by way of Additional Documents before the learned NCLT after serving a copy of the same upon the Respondent well in advance. The Respondents may file their rebuttal/Reply, if any to the pleadings or additional pleadings.’

17. The Learned Counsel for the Appellant refers to the Judgment of the Hon’ble Supreme Court of India in *Asha John Divianathan v. Vikram Malhotra*, reported in MANU/SC/0120/2021, wherein at paragraph 21, it is observed as under:

21. ‘‘The Appellant has invited our attention to the dictum in Union of India & Ors. v. A.K. Pandey MANU/SC/1665/2009: (2009) 10 SCC 552 (paras 14 and 15), that where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect. Further, a contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. Similarly, in the case of Union of India v. Colonel L.S.N. Murthy & Anr. MANU/SC/1377/2011 : (2012) 1 SCC 718 (paras 16 to 19 and 21), the Court opined that the contract would be lawful, unless the consideration and object thereof is of such a nature that, if permitted, it would defeat the provisions of law and in such a case the consideration or object is unlawful and would become void and that unless the effect of an agreement results in performance of an unlawful act, an agreement which is otherwise legal cannot be held to be void and if the effect of an agreement did not result in performance of an unlawful act, as a matter of public policy, the court should refuse to declare the contract void with a view to save the bargain entered into by the

parties and the solemn promises made thereunder. The Court adverted to the exposition in the earlier decision in Shri Lachoo Mal v. Shri Radhey Shyam MANU/SC/0715/1971 : (1971) 1 SCC 619 as to what makes an agreement, which is otherwise legal, void is that its performance is impossible except by disobedience of law.’

18. The Learned Counsel for the Appellant falls back upon the decision of Hon’ble Supreme Court of India in the matter of Mannalal Khetan and Ors. V. Kedar Nath Khetan and Ors. (1977) 2 SCC 424, wherein at paragraphs 19 to 21, it is observed as under:

19. ‘‘It is well established that a contract which involves in its fulfilment the doing of an act prohibited by statute is void. The legal maxim ‘A pactis privatorum publico juri non derogatur means that ‘private agreements’ cannot alter the general law. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court can lend its assistance to give it effect. (See Mellis v. Shirley L.B.). What is done in contravention of the provisions of an Act of the Legislature cannot be made the subject of an action.

20. If anything is against law though it is not prohibited in the statute but only a penalty is annexed the agreement is void. In every case where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful, because it is not intended that a statute would inflict a penalty for a lawful act.

21. Penalties are imposed by statute for two distinct purposes (1) for the protection of; the public against fraud, or for some other object of public policy (2) for the purpose of securing certain sources of revenue either to the state or to certain public bodies. If it is dearth it a penalty is imposed by statute for the purpose of preventing something from being, done in some ground of public

policy, the thing prohibited, if done, will be treated as void, even though the penalty imposed is not enforceable.’’

19. The Learned Counsel for the Appellant strenuously projects an argument that the ‘impugned order’ fails to take into account the fact that even in the ‘Application’ under Section 95 of the I & B Code, 2016, was barred by ‘Limitation’, as the ‘Account’ of the ‘Corporate Debtor’ became a ‘Non Performing Asset’ on 26.12.2015, but the instant Application is filed in the Year 2020, after a gap of five years.

20. According to the Appellant, the date of ‘Non Performing Asset’ as per the ‘2nd Respondent/Corporate Debtor’ was 26.12.2015 and therefore, the ‘cause of action’ against any ‘purported guarantor’, being co-terminus, would commence on 26.12.2015. In this connection, the Learned Counsel for the Appellant refers to the Judgment of the Hon’ble Supreme Court in B.K. Educational Services Pvt Ltd. Parag Gupta & Associates dated (vide Civil Appeal No. 23988 of 2017) dated 11.10.2018, wherein at paragraph 27, it is observed as under:

27. ‘‘It is thus, clear that since the Limitation Act is applicable to applications filed under Section 7 and 9 of the Code from the inception of the code, Article 137 of the Limitation Act gets attracted ‘the right to sue’, therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those

cases, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such applications.’’

21. The Learned Counsel for the Appellant refers to the decision of High Court of Patna in Bihar State Co-operative Bank & Ors. V. Nareshwar Prasad, reported in MANU/BH/0270/2004, wherein it is observed as under:

‘‘The limitation begins to run against the surety at the same time as against the principal debtor, depending upon the form of the contract entered into between the surety and the creditor, and whether or not the surety and the principal debtor are co-terminus.’’

Pleas of 1st Respondent / Bank:

22. The Learned Counsel for the 1st Respondent/Bank contends that the Corporate Debtor is the Principal Borrower and that the Appellant / Personal Guarantor, stood as a ‘Guarantor’ in order to secure the payment of financial assistance availed by the ‘Corporate Debtor’. As on 06.12.2017, the ‘Outstanding Debt’ was Rs.237,94,44,380.77 (Rupees Two Hundred and Thirty Seven Crores Ninety Four Lakhs Forty Four Thousand Three Hundred and Eighty and Seventy Seven Paise only) along with interest at the contractual rate and other costs.

23. It is the version of the 1st Respondent/Bank that the 'Operation and Conduct of the financial assistance / credit facilities given to the Corporate Debtor', became a irregular one and that the 'Debt' / 'Account' of the 'Corporate Debtor' was classified as 'Non Performing Asset' on 26.12.2015. In fact, the Corporate Debtor was placed under the 'Corporate Insolvency Resolution Process', by the 'Adjudicating Authority', ('National Company Law Tribunal', Bench – I, Hyderabad) as per the 'Order' dated 13.08.2019.

24. The Learned Counsel for the 1st Respondent/Bank brings it to the notice of this 'Tribunal' that the 'Appellant' / 'Personal Guarantor' had executed to and in favour of the 1st Respondent / Bank / Financial Creditor, a 'Deed of Guarantee' for overall limit dated 13.05.2014, wherein at Clause 20, it is mentioned as under:

20. "The Guarantors agree that amount due under or in respect of the aforesaid credit facilities and hereby guaranteed shall be payable to the Bank on the Bank serving the Guarantors with a notice requiring payment of the amount and such notice shall be deemed to have been served on the Guarantors either by actual delivery thereof to the Guarantors or by despatch thereof by Registered Post or Certificate of Posting to the Guarantors address herein given or any other address in India to which, the Guarantors may by, written intimation give to the Bank or request that communication addressed to the Guarantors be despatched. Any notice despatched by the Bank by Registered Post or Certificate of Posting to the address to which it is required to be despatched under this Clause shall be deemed to have been duly

served on the Guarantors four days after the date of posting thereof, and shall be sufficient if signed by any Officer of the Bank and in proving such service it shall be sufficient if it is established that the envelope containing such notice, communication or demand was properly addressed and put into the post office.’’

25. The Learned Counsel for the 1st Respondent/Bank by referring to the 'Deed of Guarantee' for overall Limit dated 13.05.2014, executed by the Appellant / Personal Guarantor in favour of the 1st Respondent/Bank brings it to the notice of this 'Tribunal, in the said 'Guarantee Deed', it was mentioned that PPS Enviro Power Private Limited ('Corporate Debtor'), Hyderabad (referred to as a Borrower and the amount of the Original Overall Limit was mentioned as Rs.149,35,00,000/- as the 'Aforesaid Credit Facilities' on the terms and conditions specified and contained in the agreement of loan.

26. It is pointed out on behalf of the 1st Respondent / Bank that the Appellant/Personal Guarantor address is mentioned in the 'Deed of Guarantee' for Overall Limit dated as 13.05.2014 as No. 165, Lake View Road, West Mambalam, Chennai. Further, the 1st Respondent/Bank/Financial Creditor had issued a 'Legal Notice' dated 11.10.2017 to the Appellant / Personal Guarantor and other Parties

recalling and demanding the payment of 'Outstanding Sum' mentioned in the 'Notice', within 7 days from the date of receipt of 'Notice'.

27. The Learned Counsel for the 1st Respondent/Bank points out that the 1st Respondent/Bank had issued a 'Demand Notice' dated 23.09.2020 to the 'Appellant/Personal Guarantor' in the address at 165, Lake View Road, West Mambalam, Chennai - 600033, and that the 'Outstanding Total Debt' was mentioned as Rs.237,94,44,380.77, as on 06.12.2017 together with interest at contract rate till date and other costs. Further the 'Debt' was due on 18.10.2017 and the 'Default' date was mentioned as 18.10.2017. The nature of the 'Debt' was mentioned in the 'Demand Notice' at 'Serial No. 5' as 'Loan for Business Purpose'. The unsecured debt (as applicable) was mentioned as Rs.121.11 Crores.

28. According to the 1st Respondent/Bank, the Demand Notice dated 23.09.2020 to the Appellant / Personal Guarantor, was served on him, on 06.10.2020.

29. The Learned Counsel for the 1st Respondent/Bank proceeds to take a stand that the 'Sanction Letter' in respect of the 'Unpaid Debt in Default' due from M/s. PPS Enviro Power Private Limited was 03.04.2014 and the existing limits were Rs.129.35 Crores and the same was revised and

increased to Rs.149.35 Crores. In this connection, it is pointed out by the Learned Counsel for the 1st Respondent/Bank that the 'Appellant'/'Personal Guarantor' had not executed the 'Guarantee Agreement' dated 13.05.2014, in respect of the difference of 'Enhanced Limit' of Rs.20 Crores, but for the whole amount of Rs.149.35 Crores, which includes the existing 'Outstanding Liability' as on date of Sanction Letters. In Serial No. 12 of the 'Demand Notice' issued by the 1st Respondent/ Bank dated 23.09.2020, addressed to the 'Appellant'/'Personal Guarantor' mentions the 'Sanction Letter' dated 25.03.2010, 28.01.2016, 20.01.2010, 19.06.2013, 19.08.2013, 27.03.2015, 04.03.2010, 28.06.2010, 30.03.2011, 14.09.2011, 26.05.2012, 27.02.2013, 05.04.2013, 03.04.2014 and the 'Guarantee Deed' C4 and CF4 on 13.05.2014.

30. The Learned Counsel for the 1st Respondent/Bank comes out with a plea that the 'Appellant'/'Personal Guarantor' had executed a 'Revival Letter' dated 10.08.2016, acknowledging its liability, in respect of the 1st Respondent/Bank/Financial Creditor, after two years, from the date of execution of the 'Guarantee Agreement', acknowledging his liability, which exhibits the 'Existence of a Valid and Subsisting Guarantee Agreement'.

31. The Learned Counsel for the 1st Respondent/Bank emphatically urges before this 'Tribunal' that the address mentioned in the Appeal Memorandum is the actual address of the 'Appellant/Personal Guarantor' Viz. Indian Address and in the Guarantee Agreement, the residence address of the Appellant is shown as 'Indian Address'. Further I & B Code, 2016, is an overriding one, over other 'Laws'.

32. The Learned Counsel for the 1st Respondent/Bank points out that as per Section 95 of the I & B Code, 2016, the Financial Creditor has to establish 'Debt' and 'Default' committed by the Personal Guarantor and the 'Default' committed ought to be more than Rs.1,000/- and in the 'Revival Letters', 'Guarantee Agreements', 'Statement of Accounts' and other 'Loan Documents' in the Company Petition indicate that the Company Petition filed before the 'Adjudicating Authority' was within the period of Limitation. Moreover, the 'Appellant/Personal Guarantor' had not made payments to the Financial Creditor towards satisfaction of the 'Unpaid Financial Debt' and hence, the '1st Respondent/Bank prays for the dismissal of the instant 'Appeal' by this 'Tribunal' to secure the 'Ends of Justice'.

Gist of 3rd Respondent/Resolution Professional's Status Report:

33. As against the Personal Guarantor, the 'Adjudicating Authority' had passed necessary orders on 28.07.2021, by commencing the 'Interim Moratorium' and appointed 'Mr. Krishnasamy Vasudevan', as an 'Interim Resolution Professional', who was directed to file the 'Report' as per Section 99 of the I & B Code, 2016. As a matter of fact, the 'Interim Resolution Professional' had filed his report on 15.08.2021, recommending to commence the 'Insolvency Resolution Process' of the 'Personal Guarantor'.

34. The 'Adjudicating Authority' was pleased to admit the captioned 'Petition', as per Section 100 of the I & B Code, 2016, on 22.06.2022, commenced the 'Insolvency Resolution Process', of the 'Personal Guarantor'/'Appellant', and appointed the 'Resolution Professional' and declared 'Moratorium'.

35. The Resolution Professional / 3rd Respondent had issued a 'Public Notice' on 27.06.2022 in Newspapers a) 'The Financial Express' b) 'Mana Telengana' and c) 'Makkal Kural', furnishing necessary details therein (including the last date for submission of Claims being 18.07.2022 – within 21 days from the date of issue of 'Public Notice').

Gist of I & B Code, 2016:

36. Section 2 `Application' of the I & B Code, 2016, enjoins as under:

``The provisions of this Code shall apply to—

(a) any company incorporated under the Companies Act, 2013 (18 of 2013) or under any previous company law;

(b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;

(c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008 (6 of 2009);

(d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf; ¹ []*

(e) personal guarantors to corporate debtors;

(f) partnership firms and proprietorship firms; and

(g) individuals, other than persons referred to in clause (e).] in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.''

Definitions:

Claim:

37. Section 3 (6) of the I & B Code, 2016 defines `Claim', meaning:

``(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.''

Creditor:

38. Section 3 (10) of the I & B Code, 2016 defines 'Creditor', meaning 'any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder'.

Debt:

39. Section 3 (11) of the I & B Code, 2016 defines 'Debt', meaning 'a liability or obligation in respect of a 'Claim', which is due from any person and includes a 'financial debt' and 'operational debt'.

Default:

40. Section 3 (12) of the I & B Code, 2016, defines 'Default', meaning 'non-payment 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';

Person:

41. Section 3 (23) of the I & B Code, 2016, defines 'person', including- (a) an individual; (b) a Hindu Undivided Family; (c) a company; (d) a trust; (e) a partnership; (f) a limited liability partnership; and (g) any

other entity established under a statute; and includes a person resident outside India;

Person resident in India:

42. Section 3 (24) of the I & B Code, 2016, enjoins that 'a person resident in India', shall have the meaning as assigned to such term in clause (v) of Section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999)'.

Person resident outside India:

43. Section 3 (25) of the Code, provides that 'person resident outside India', means 'a person other than a person resident in India'.

Personal Guarantor:

44. Section 5 (22) of the Code, defines 'Personal Guarantor' meaning, 'an individual' who is a 'surety', in a contract of guarantee to a 'corporate debtor'.

Adjudicating Authority for Corporate Persons:

45. Section 60 (1) of the Code, says that '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'.

46. Section 60 (2) of the Code, says that '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 such National Company Law Tribunal.

47. Section 60 (3) of the Code, says that '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'.

Section 234 of the I & B Code, 2016 – Agreements with Foreign Countries:

48. Section 234 of the Code, specifies that;

“(1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.

(2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor,

including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.’’

Section 238 of the I & B Code, 2016:

49. Section 238, provisions of this Code to override other laws, enjoins that;

‘‘The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law’’.

The Foreign Exchange Management Act, 1999 (42 of 1999):

50. Section 2 (v) of The Foreign Exchange Management Act, 1999, defines, ‘‘person resident in India’’, means –

- (i) a person who has gone out of India or who stays outside India, in either case—
 - (a) for or on taking up employment outside India, or*
 - (b) for carrying on outside India a business or vocation outside India, or*
 - (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;**
- (B) a person who has come to or stays in India, in either case, otherwise than—
 - (a) for or on taking up employment in India, or*
 - (b) for carrying on in India a business or vocation in India, or*
 - (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;**

- (ii) any person or body corporate registered or incorporated in India,*
- (iii) an office, branch or agency in India owned or controlled by a person resident outside India,*
- (iv) an office, branch or agency outside India owned or controlled by a person resident in India.*

51. Section 2 (w) of The Foreign Exchange Management Act, 1999, defines, *‘‘person resident outside India’’, means a person who is not resident in India’’.*

52. Section 2 (zb) of The Foreign Exchange Management Act, 1999, defines, *‘‘service’’ means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.’’*

53. Section 2 (ze) of The Foreign Exchange Management Act, 1999, defines, *‘‘transfer’’, includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.*

54. Section 3 of the Foreign Exchange Management Act, 1999, pertains to dealing in Foreign Exchange, etc., to the effect that; ``save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person, shall— (a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person; (b) make any payment to or for the credit of any person resident outside India, in any manner; (c) receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

Explanation. – For the purpose of this clause, where any person in, or resident in, India receives any permanent by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;”

55. Regulation 3 of The Foreign Exchange Management (Guarantees) Regulations 2000, under the caption ``Prohibition’’, provides as under:

``Save as otherwise provided in these regulations, or with the general or special permission of the Reserve Bank, no person resident in India shall give a guarantee or surety in respect of, or undertake a transaction, by whatever name called, which has the effect of guaranteeing, a debt, obligation or other liability owed by

a person resident in India to, or incurred by, a person resident outside India.’’

56. Section 3-A of the Foreign Exchange Management (Guarantees) Regulations 2000, under the heading ‘‘Restriction on obtaining overseas guarantee’’, reads as under:

‘‘No corporate registered under the Companies Act, 1956 (1 of 1956) shall avail domestic rupee denominated structured obligations by obtaining credit enhancement in the form of guarantee by international banks, international financial institutions or joint venture partners, except with the prior approval of the Reserve Bank:

Provided howsoever that, [a person resident in India who is eligible to raise foreign currency loan under sub-regulation (1) of Regulation 6 of Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 read with Schedule 1 thereto,] may obtain, without the prior approval of the Reserve Bank, credit enhancement in the form of guarantee from a person resident outside India for the domestic debts raised by such companies through issue of capital market instrument like bonds and debentures subject to satisfying the terms and conditions as may be stipulated by the Reserve Bank, from time to time, in this regard.]’’

57. Section 13 of the Foreign Exchange Management Act, 1999, deals with ‘Penalties’—

‘‘13. Penalties.—(1) If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is

issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

¹*[(1-A) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the Foreign exchange, foreign security or immovable property.*

(1-B) If the Adjudicating Authority, in a proceeding under sub-section (1A) deems fits, he may, after recording the reasons in writing, recommend for the initiation of prosecution and if the Director of Enforcement is satisfied, he may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director.

(1-C) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37-A, he shall be, in addition to the penalty imposed under sub-section (1-A),

punishable with imprisonment for a term which may extend to five years and with fine.

(1-D) No court shall take cognizance of an offence under sub-section (1-C) of section 13 except as on complaint in writing by an officer not below the rank of Assistant Director referred to in sub-section (1-B).]

(2) Any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

Explanation.—For the purposes of this sub-section, “property” in respect of which contravention has taken place, shall include—

- (a) deposits in a bank, where the said property is converted into such deposits;*
- (b) Indian currency, where the said property is converted into that currency; and*
- (c) any other property which has resulted out of the conversion of that property.’’*

Power to Compound Contravention:

58. Section 15 of The Foreign Exchange Management Act, 1999, relates to 'compounding' the contravention, committed by a 'Person', based on an 'Application', etc.

Civil Court not to have Jurisdiction:

59. As per Section 34 of The Foreign Exchange Management Act, 1999, 'no Civil Court shall have Jurisdiction to entertain any 'Suit' or 'Proceeding' in respect of any matter which an 'Adjudicating Authority' or the 'Appellate Tribunal' or the 'Special Director' ('Appeals'), is empowered by or under this 'Act' to determine and no injunction shall be granted by any Court or other Authority in respect of any action taken or to be taken in pursuance of any Power conferred by or under this 'Act'.

Analysis:

60. It transpires that in CP(IB) No. 407 / 7 / HDB / 2018, on the file of 'National Company Law Tribunal', Hyderabad Bench (filed by the 1st Respondent / Bank / Financial Creditor / Petitioner – under Section 7 of the I & B Code, read with Rule 4 of I & B (AAA) Rules, 2016), against the Respondent / Corporate Debtor (M/s. PPS Enviro Power Private Limited), the 'Adjudicating Authority' (NCLT, Hyderabad Bench) had

admitted the 'Application', by declaring 'Moratorium' and appointed Shri. Anurag Kumar Sinha, Mumbai, as an 'Interim Resolution Professional' to carry out the functions prescribed under I & B Code, 2016.

61. The 1st Respondent/Bank/Financial Creditor had sanctioned the 'Loans' to the 'Corporate Debtor'. As a matter of fact, the 'Loans' were earlier sanctioned by the 'State Bank of Hyderabad', later merged with the 'State Bank of India'. The breakup details of the 'Loan' are as under:

<i>Facility</i>	<i>Amount Granted (Rs./Crores)</i>	<i>Amount Disbursed (Rs./Crores)</i>
<i>Term Loan (SBH)</i>	<i>8.78</i>	<i>8.78</i>
<i>Term Loan (SBT)</i>	<i>35.00</i>	<i>35.00</i>
<i>Term Loan – I (SBI)</i>	<i>34.18</i>	<i>34.18</i>
<i>Term Loan – II (SBI)</i>	<i>30.38</i>	<i>30.38</i>
<i>Cash Credit (SBH)</i>	<i>15.00</i>	<i>15.00</i>
<i>Cash Credit (SBI)</i>	<i>30.00</i>	<i>30.00</i>
<i>Corporate Loan (SBH)</i>	<i>3.00</i>	<i>3.00</i>
<i>Corporate Loan (SBT)</i>	<i>4.00</i>	<i>4.00</i>
<i>Letter of Credit (SBH)</i>	<i>30.00</i>	<i>30.00</i>
<i>Bank Guarantee / Letter of Credit (SBI)</i>	<i>35.60</i>	<i>35.60</i>
<i>Total</i>	<i>225.94</i>	<i>225.94</i>

More importantly, the Financial Creditor/Bank had sanctioned ten different types of loans (under Ten Account Numbers) to the Corporate

Debtor and the disbursement dates for fuller and better appreciation are mentioned as under:

<i>S.No.</i>	<i>Account No.</i>	<i>Amount (Rs.)</i>	<i>Date of Disbursement</i>
01	62131971788	3,30,76,593.75	21.05.2010
02	62411094312	2,27,05,401.90	27.03.2015
03	62305798321	41,91,90,154.27	27.09.2013
04	67186526001	19,41,88,628.00	15.06.2012
05	67351168660	3,95,00,000.00	24.02.2016
06	32506801679	31,13,83,711.00	01.09.2012
07	31236416885	25,04,51,333.00	27.05.2011
08	30017665227	51,74,95,603.89	07.10.2015
09	34958991534	2,50,00,000.00	28.05.2015
10	34963065381	2,50,00,000.00	30.05.2015

62. According to the 1st Respondent/Bank, the 'Date of Default' of the 'Corporate Debtor' (PPS Enviro Power Private Limited) was on 26.12.2015 and the Accounts were declared as 'Non Performing Asset'. It is pertinently pointed out by this 'Tribunal', that in CP (IB) No. 407/7/HDB/2018, before the 'Adjudicating Authority', the '1st Respondent/Bank' had in its 'Application' under Section 7 of the Code had mentioned that the 'Corporate Debtor' (M/s. PPS Enviro Power Private Limited) had committed 'Default' in repaying an amount of Rs.237,94,44,380.77 and prayed for initiation of 'Corporate Insolvency

Resolution Process' and admitting the 'Application' against the said 'Corporate Debtor'.

63. In the instant 'Appeal', before this 'Tribunal', the 'Appellant/Personal Guarantor', is challenging the 'impugned order' in CP (IB) No. 401 / 95 of IBC/ HDB/ 2020 dated 20.06.2022, passed by the 'Adjudicating Authority', ('National Company Law Tribunal', Hyderabad Bench), whereby and whereunder on the 1st Respondent/Bank's 'Application' under Section 95 of the Code, read with Rule 7 (2) of the I & B (Application to Adjudicating Authority for Insolvency Process for Personal Guarantor to Corporate Debtor, Rules, 2016) was admitted and Mr. P.V.B. Shadakara Rao was appointed as 'Resolution Professional'.

64. According to the Appellant, the 2nd Respondent/Corporate Debtor had availed numerous loans to an extent of Rs.225.94 Crores from the '1st Respondent/Bank' and the 'Account' of the 'Corporate Debtor' was classified as 'Non Performing Asset' on 26.12.2015.

65. Before this 'Tribunal', on behalf of the 'Appellant/Personal Guarantor' of the '2nd Respondent/Corporate Debtor', it is contended that the 'Appellant' being an 'Australian Citizen' (Foreign National), holds a 'Valid Australian Passport', bearing No. PB4816649 and that as per

Regulation 3A of the Foreign Exchange Management (Guarantees) Regulations 2000, a 'Foreign National' cannot guarantee a 'INR Denominated Debt' of an 'Indian Company' without the permission of the 'Reserve Bank of India', and in the instant case, the said permission / sanction was not obtained by the 1st Respondent/Bank. Therefore, it is the plea of the 'Appellant' that the underlying guarantee is not 'Valid', in the 'eye of law', in terms of Section 23 of the Indian Contract Act, 1872.

66. According to the 1st Respondent/Bank, the 'Guarantee Agreement' dated 13.05.2014 was executed by the 'Appellant', to obtain the financial facilities, availed by the Corporate Debtor / PPS Enviro Power Pvt. Ltd. In fact, the name of the 'Deed of Guarantee' for 'Overall Limit' dated 13.05.2014, executed by the 'Appellant/Personal Guarantor', to and in favour of the '1st Respondent/Bank' was to the tune of Rs.149.35 Crores (as made mention of in Form C of the 'Application' dated 16.10.2020 by Creditor to initiate Insolvency Resolution Process (vide Rule 7 (2) of the I & B (Application to Adjudicating Authority) for Insolvency and Resolution Process for Personal Debtor, Rules, 2019.

67. In Part II of the 'Application' dated 16.10.2020 of the 1st Respondent/Bank to initiate 'Insolvency Resolution Process' in respect of the Appellant/Personal Guarantor (Mr. Satyan Kasturi), under the caption

'Particulars of the Guarantor', at Serial No. 4, 'address' is mentioned as under:

Present	Permanent	Business
102/36, Defence Officers Colony, Ekkattuthangal, Chennai – 600032	165, Lake View Road, West Mambalam, Chennai – 600033	97/A, Road No. 18, Phase-1, IDA Jeedimetla, Hyderabad - 500055

68. In the Counter, filed by the 'Appellant/Personal Guarantor' as 1st Respondent, before the 'Adjudicating Authority' to CP (IB) No. 401/95 of IBC/ HDB/ 2020 filed by the 1st Respondent / Bank had not whispered about the 'Regulation 3A of the Foreign Exchange Management (Guarantees) Regulations', 2000. Also, the plea of the 'Contract(s)' being 'Void', as per Section 23 of the Indian Contract Act, 1872, was not raised.

69. The Appellant/Personal Guarantor in its Counter, to CP(IB) No. 401/95 of IBC/HDB/2020 on the file of the 'Adjudicating Authority' (NCLT), Hyderabad at paragraphs 9 to 11 (vide Vol. 5, pages 843 and 844), it is mentioned as under:

9. 'It is also submitted that the last sanction accorded by erstwhile SBH was a Short-Term Corporate Loan of Rs.3 Cr conveyed vide SBH Bank letter dated 27.03.2015 (pages 194-213 of the Application filed), and the R-1 did not consent to the loan as is evident on the face of the Arrangement Letter itself. It is also relevant to point out that SBH, in its sanction dated 19.06.2013 (pages 164 to 174 of the Application), waived the stipulation vide its letter dated 19.08.2013 (page 174 of the Application).'

10. It is also submitted that the last sanction accorded by erstwhile SBT was a Short-Term Corporate Loan of Rs. 4 Cr conveyed vide SBH Bank Letter dated 28.01.2016 (pages 214 – 219 of the Application filed), and the R-1 was not a guarantor at all.

11. It is also submitted that the procedure adopted under Section 99 of IBC, 2016, is considered arbitrary, and the same was challenged before the Karnataka HC in Babu A Dhammanagi v. Union of India with WP 21626 / 2021. In the event, at a later date, if the vires of the Section was challenged in other High Courts also and the Section was held to be constitutionally invalid, there would be irretrievable injustice to the Respondent herein if the Application filed by the Bank / IRP is admitted and insolvency proceedings as a sequel are taken forward. Therefore, it is prayed to defer the proceedings until the validity of Section 99 is upheld or otherwise. Such a deferment over a short period would not be prejudicial to the Creditors' interests.''

70. At this juncture, this 'Tribunal', relevantly points out that the transaction of 'Issuance of Guarantee' is, a 'Capital Transaction' and the governing regulation is issued under 'Notification' no 'FEMA 8' / dated 03.05.2000, namely, 'The Foreign Exchange Management (Guarantees) Regulations 2000'. It is not out of place for this 'Tribunal' to make a significant mention that the 'Transaction' of furnishing 'Guarantee', by a 'Company' does not appear in the 'Balance Sheet', but comes below the 'Balance Sheet' as 'Contingent Liabilities' and 'Commitments', as the 'Invocation of Bank Guarantee' is subject to not meeting of obligation by 'any person'.

71. It is to be remembered that although, at the time of issuance of 'Guarantee', the 'Funds' do not really / actually flow from India, yet at the time of invocation of 'Guarantee', the 'Funds', may be required to be remitted.

72. This 'Tribunal' quite aptly points out that as per A.P. (DIR Series), Circular No. 20 dated 29.08.2012, the 'Reserve Bank of India', has extended the 'Facility of Non-Resident Guarantee' under general permission for 'Non-Fund Based Facilities', Viz. 'Letters of Credit' / 'Guarantees' / 'Letter of Undertaking' (LOU) / 'Letter of Comfort' (LOC), entered into between the 'two persons resided in India'.

73. In this connection, this 'Tribunal', points out that a 'Guarantee' by a 'resident outside India' is permitted as 'Capital Account Transaction'. The non-resident 'Guarantor' may discharge the 'Liability' by (a) Payment out of Rupee Balances held in India (b) By remitting funds to India and (c) By deposit to his FCNR / NRE Account, maintained with an 'Authorised Dealer' in India A.P. (DIR Series), Circular No. 28 dated 30.03.2021.

The Indian Contract Act, 1872 (9 of 1872):

74. Be it noted, Section 126 of the Indian Contract Act, 1872, deals with 'contract of guarantee', 'surety', 'principal debtor' and

“creditor”. Section 128 of the Indian Contract Act, 1872, pertains to “Surety’s Liability”, which is co-extensive with that of the “Principal Debtor”, unless it is otherwise provided by the “Contract”. Further, this ‘Tribunal’ worth recalls and recollects the decision of the Hon’ble Supreme Court of India in Central Bank of India v. C L Vimla, reported in AIR 2015 SC Page 2280, wherein it is observed as under:

“We are of the opinion that the questions that need to be decided by us are regarding the liability of the guarantor under Section 128 of the Indian Contract Act, 1872. The legislature has succinctly stated that the liability of the guarantor is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. This Court has decided on this question, time and again, in line with the intent of the legislature. In Ram Kishun and Ors. v. State of U.P. and Ors., (2012) 11 SCC 511, this Court has held that in view of the provisions of Section 128 of the Contract Act, the liability of the guarantor/surety is co-extensive with that of the debtor. The only exception to the nature of the liability of the guarantor is provided in the Section itself, which is only if it stated explicitly to be otherwise in the Contract.

In the case of Ram Kishun and Ors. v. State of U.P. and Ors., (2012) 11 SCC 511, this Court has also stated that it is the prerogative of the Creditor alone whether he would move against the principal debtor first or the surety, to realize the loan amount. This Court observed: Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as to how he should make the recovery and pursue his remedies against the principal

debtor at his instance. Thus, we are of the view that in the present case the guarantor cannot escape from her liability as a guarantor for the debt taken by the principal debtor. In the loan agreement, which is the contract before us, there is no clause which shows that the liability of the guarantor is not co-extensive with the principal debtor. Therefore Section 128 of the Indian Contract Act will apply here without any exception.’

75. Section 129 of the Indian Contract Act, 1872, provides for ‘Continuing Guarantee’, a ‘Guarantee’ which extends to a series of transaction being called a ‘Continuing Guarantee’. Section 130 of the Indian Contract Act, 1872, concerns with ‘Revocation of Continuing Guarantee’. Section 131 of the Contract Act, 1872, relates to ‘Revocation of Continuing Guarantee by Surety’s death’.

76. It is pointed out that a ‘Continuing Guarantee’ is different from ‘Ordinary Guarantee’. Further, depending upon the ‘Terms of Guarantee’, the ‘Liability’ of ‘Guarantee’, may be limited to a particular sum, instead the ‘Liability’ being to the same extent as that of ‘Principal Debtor’. A ‘Claim’ may be even time barred against the ‘Principal Debtor’, but still enforceable against the ‘Guarantor’. The ‘Parties’ may agree that the ‘Liability’ of the ‘Guarantor’, shall arise at a later point of time, than that of ‘Principal Debtor’. Moreover, when a ‘Demand’ is made requiring the payment within specified period Viz., 15 days, the ‘breach occurs’ or ‘right to sue accrues’, if payment is not made or is refused within 15 days,

if while making the demand for payment, no period is specified, within which the payment should be made, the 'breach occurs' or 'right to sue accrues' when demand is served on the 'Guarantor', as per decision of Hon'ble Supreme Court of India in Syndicate Bank v. Chenna Veerappa Belari & Ors., AIR 2006 SC Page 1874.

77. It is pointed out that the 'Liability' of a 'Guarantor' is co-extensive and the word 'co-extensive' was on an 'objective' for word 'extent' and it related to 'quantum of principle debt' as per the decision in Indian Bank, Madras v. State of Tamil Nadu rep. by Secretary, Department of Handlooms and Textiles, 2002 (2) M.L.J. 649.

78. The 'Bank Guarantees' have their 'Genesis' in 'Primary Contract' between the 'Parties', are nevertheless 'Autonomous' and 'Independent Contracts'. A 'Bank Guarantee' is a 'Contract' between 'Bank Beneficiary of Guarantee' and it is also a 'Security' given to the 'Beneficiary' by a 'Third Party'.

79. A 'Suit' to enforce 'Liability' borne out of 'Continuing Guarantee', is governed by Article 115 of the 'Limitation Act, 1963', and the 'Cause of Action' arises, when the 'Contract of Guarantee', is 'Violated'.

80. At this juncture, this 'Tribunal', aptly points out the decision of the Hon'ble Supreme Court in Lalit Kumar Jain v. Union of India and Ors., reported in 2021 (9) SCC at Page 321, wherein at paragraphs 95, 96 and 106, it is observed as under:

95. ``The impugned notification authorises the Central Government and the Board to frame rules and regulations on how to allow the pending actions against a personal guarantor to a corporate debtor before the Adjudicating Authority. The intent of the notification, facially, is to allow for pending proceedings to be adjudicated in terms of the Code. Section 243, which provides for the repeal of the personal insolvency laws has not as yet been notified. Section 60(2) prescribes that in the event of an ongoing resolution process or liquidation process against a corporate debtor, an application for resolution process or bankruptcy of the personal guarantor to the corporate debtor shall be filed with the concerned NCLT seized of the resolution process or liquidation. Therefore, the Adjudicating Authority for personal guarantors will be the NCLT, if a parallel resolution process or liquidation process is pending in respect of a corporate debtor for whom the guarantee is given. The same logic prevails, under Section 60(3), when any insolvency or bankruptcy proceeding pending against the personal guarantor in a court or tribunal and a resolution process or liquidation is initiated against the corporate debtor. Thus if A, an individual is the subject of a resolution process before the DRT and he has furnished a personal guarantee for a debt owed by a company B, in the event a resolution process is initiated against B in an NCLT, the provision results in transferring the proceedings going on against A in the DRT to NCLT.

96. This court in V. Ramakrishnan (supra), noticed why an application under Section 60(2) could not be allowed. At that stage, neither Part III of the Code nor Section 243 had not been notified.

This meant that proceedings against personal guarantors stood outside the NCLT and the Code. The non-obstante provision under Section 238 gives the Code overriding effect over other prevailing enactments. This is perhaps the rationale for not notifying Section 243 as far as personal guarantors to corporate persons are concerned. Section 243(2) saves pending proceedings under the Acts repealed (PIA and PTI Act) to be undertaken in accordance with those enactments. As of now, Section 243 has not been notified. In the event Section 243 is notified and those two Acts repealed, then, the present notification would not have had the effect of covering pending proceedings against individuals, such as personal guarantors in other forums, and would bring them under the provisions of the Code pertaining to insolvency and bankruptcy of personal guarantors. The impugned notification, as a consequence of the non obstante clause in Section 238, has the result that if any proceeding were to be initiated against personal guarantors it would be under the Code.

106. The rationale for allowing directors to participate in meetings of the CoC is that the directors liability as personal guarantors persists against the creditors and an approved resolution plan can only lead to a revision of amount or exposure for the entire amount. Any recourse under Section 133 of the Contract Act to discharge the liability of the surety on account of variance in terms of the contract, without her or his consent, stands negated by this court, in V. Ramakrishnan where it was observed that the language of Section 31 makes it clear that the approved plan is binding on the guarantor, to avoid any attempt to escape liability under the provisions of the Contract Act. It was observed that:

25. 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. And further that:

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

that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and coextensive liability to pay off the entire outstanding debt, which is 67 2019 SCC OnLine SC 103 why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor.’

The Indian Evidence Act, 1872 (1 of 1872):

81. Section 101 of the Indian Evidence Act, 1872, deals with ‘Burden of Proof’. It cannot be ignored that as per Section 106 of the Indian Evidence Act, 1872, ‘when any fact is essentially within the knowledge any person the ‘burden of proving’ that fact upon him’.

Adjudicating Authority under I & B Code, 2016:

82. An ‘Adjudicating Authority’ (‘Tribunal’) is not a ‘Court of Law’ and it does not determine a ‘Money Claim’ or ‘Civil Suit’, in a summary proceeding as per Judgment of this ‘Tribunal’ dated 18.11.2019 in Hardeep Singh Sawhney v. Sawhney Builders Pvt. Ltd. (vide Comp. App (AT) (INS) 1147 / 2019). It must be remembered that the ‘Proceedings under I & B Code, 2016’ are not adversarial in character.

83. On behalf of the 1st Respondent/Bank, it is pointed out before this 'Tribunal', that the 'Appellant/Personal Guarantor' of the 'Corporate Debtor' had executed the 'Personal Guarantee' by representing that he is an 'Indian Citizen' residing in India, which is evidenced from the 'Resident Address' shown in 'Guarantee Agreement' Viz., the address in India. Moreover, all the Correspondences issued were only in regard to the Appellant's India Address.

84. The emphatic stand of the 1st Respondent/Bank is that no record has been exhibited / placed before this 'Tribunal' in 'Appeal' that the 'Appellant/Personal Guarantor' is not a 'Citizen of India'.

85. A mere running of the eye of Section 95 of the I & B Code, 2016, unerringly points out that the right showered upon a 'Financial Creditor' under the I & B Code, 2016, to initiate 'Insolvency Resolution Process Proceedings' is an 'independent' and 'special proceedings', which the 'Financial Creditor' can take recourse, despite availability of any other 'Fora', in 'Law'.

86. It is pointed out that the 'Hon'ble High Court of Karnataka, on 05.04.2022, had dismissed the Writ Petition, assailing the Constitutional validity of Section 95, 99 and 100 of the I & B Code, 2016. In fact, the

'Application' was filed by the 'Financial Creditor' / 'Piramal Capital & Housing Finance Limited', before the 'Adjudicating Authority' ('Tribunal'), through the Resolution Professional, under Section 95 of the Code for initiation of 'Insolvency Resolution Process' against the 'Personal Guarantor'. The Hon'ble Court had considered that I & B Code provides a particular eligibility criterion which a 'Resolution Professional' must possess and a Code of Conduct is to be followed, which governs their activities.

87. Apart from that, the Hon'ble Supreme Court of India in the decision of State Bank of India (Stressed Asset Management Branch) v. Mahendra Kumar Jajodia had held that the 'Financial Creditors' specially Banks may now initiate 'Insolvency Proceedings' directly against the 'Personal Guarantors' of 'Corporate Debtors', irrespective of pending proceedings in the Court against the 'Corporate Debtor' under I & B Code.

88. In the decision in State Bank of India v. Ramakrishnan & Another, the Hon'ble Supreme Court of India has held that Section 14 of the I & B Code, did not apply to 'Personal Guarantor', but only applies to the 'Corporate Debtor'. The 'Creditor' can proceed against the 'Assets' of either 'Principal Debtor' or 'Surety; or both in no particular 'Order'.

89. Moreover, Section 234 of the I & B Code, 2016, 'Agreements with Foreign Countries' enjoins that the Central Government may, by 'Notification' in the 'Official Gazette' direct that the 'application of provisions of this Code in relation to assets or property of the corporate debtor, including a personal guarantor of a corporate debtor, as the case may be, situated any place in a Country outside India, etc.

90. In the instant case, the Statement of Account filed together with the Company Petition before the 'Adjudicating Authority' proves that the 'Sum' is due and payable by the 'Personal Guarantor'. Added further, the execution of 'Revival Letter' dated 10.08.2016 by the 'Appellant / Personal Guarantor', acknowledging its 'Liability', in respect of the '1st Respondent/Bank/Financial Creditor', after two years' from the date of 'Execution of the Guarantee Agreement', acknowledging its 'Liability' shows the 'Subsistence of a Valid Guarantee Agreement'.

91. In terms of the ingredients of Section 95 of the I & B Code, 2016, the 1st Respondent/Bank has, in the instant case, proved the 'Debt' and 'Default' committed by the 'Appellant/Personal Guarantor' and undoubtedly, the 'Default' is more than Rs.1,000/- and that the Company

Petition (IB) / 401 /95 of IBC / HDB / 2020, on the file of the 'Adjudicating Authority', is well within the 'Limitation Period' which is evident from the 'Statement of Account', 'Guarantee Agreements', 'Revival Letters', 'Loan Documents', which are quite explicit, self-explanatory and admits of no exception, as opined by this 'Tribunal'.

92. The Appellant / Personal Guarantor had entered appearance before the 'Adjudicating Authority' resting upon the Indian Address and as such, the 'Appellant' cannot take a mutually contradictory and inconsistent stand, especially in the teeth of I & B Code, 2016, which is an inbuilt, and self contained Code, overriding other laws. Viewed in that perspective, this 'Tribunal' holds that the 'Appellant' as a 'Personal Guarantor' of the 'Corporate Debtor', cannot wriggle out of his 'Liability' under the 'Guarantee Deed'.

93. In regard to the plea taken on behalf of the 'Appellant'/'Personal Guarantor' that the 'Impugned Order' passed by the 'Adjudicating Authority' is 'not a speaking one' and is in 'negation' of the 'principles of natural justice', Viz., the 'Reply' / 'Response' of the 'Appellant'/'Personal Guarantor' and his 'defences' raised were not taken into account by the 'Adjudicating Authority' / 'Tribunal', it is to be

pointed out that the 'Adjudicating Authority' / 'National Company Law Tribunal', performs a 'judicial function' and that the 'Adjudicating Authority's Order' while dealing with the given proceedings must advert to the 'pleas' / 'contentions' of the 'Parties' and to arrive at a finding(s) and ultimate conclusion, in an 'order' which must have 'sanctity', 'clarity' and 'certainty' in the 'eye of law'. Hence, the 'Adjudicating Authority' is perforced to pass an 'Order' with utmost 'care', 'caution' and 'circumspection', as opined by this 'Tribunal'.

94. It cannot be brushed aside that a 'reasoned/speaking order', passed by an 'Adjudicating Authority', will have an appearance of justice. An 'unreasoned order' will be just and valid from the point of view of the 'Authority' who passes the same, but to the 'Affected Person', the said order is an 'unreasonable' and an 'illegal' one.

95. An 'Appeal', in 'Law', is an elongation of 'Original Proceedings' of the 'Adjudicating Authority' and an 'Appellate Tribunal', has same powers of an 'Adjudicating Authority' ('Tribunal'). In fact, the 'Propriety', 'Legality', 'Validity' of the 'impugned order', passed by an 'Adjudicating Authority' ('Tribunal') is the primary consideration in an 'Appeal'.

96. It is pointed out that it is not within the purview of an 'Adjudicating Authority' to determine the 'Debt Sum', at the time of 'Admission' of an 'Application' filed under the I & B Code, 2016.

97. In regard to the plea of the 'Appellant' / 'Personal Guarantor' that the 2nd Respondent/Corporate Debtor's Account became a 'Non-Performing Asset' on 26.12.2015 (in respect of the numerous Loans availed from the 1st Respondent/Bank) and that the 1st Respondent/Bank had issued a 'Recall Notice' dated 11.10.2017 to the 'Corporate Debtor' and others (including the 'Appellant'/'Personal Guarantor') inter alia mentioning that the Credit Facilities were secured by the 'Personal Guarantee' of Mr. Badri Kasthuri, A.N. VijayaRaghavan, Appellant/Personal Guarantor and Corporate Guarantee of M/s. Sunpower Solar Technick Pvt. Ltd., Hyderabad, this 'Tribunal' relevantly points out that Form C.4 ('Deed of Guarantee for Overall Limit') was executed by the 'Appellant' / 'Personal Guarantor' at 165, Lake View Road, West Mambalam, Chennai – 600033, in favour of the '1st Respondent/State Bank of India' and Clause 20 of the said 'Guarantee Agreement' clearly mentions that any 'Notice' despatched by the Bank by Registered Post or Certificate of Posting to the address to which it is required to be

despatched under this Clause shall be duly served on the Guarantors, 4 days after the date of posting thereof and shall be sufficient if signed by any Officer of the Bank and in proving such Service, it shall be sufficient if it is established that the envelope containing such 'Notice', 'Communication' or 'Demand' was properly addressed and put into the Post Office'.

98. It is not in dispute that the Appellant/Personal Guarantor stood as 'Guarantor' in order to secure the repayment of financial assistance availed by the 'Principal Borrower/Corporate Debtor'. In the instant case, the 'Notice' was addressed to the 'Appellant/Personal Guarantor' of the 'Corporate Debtor' and others on 11.10.2017, requiring them jointly and severally to pay the sum of Rs.2,27,05,401.90, along with interest and other charges. Even though the 'Loan Account' of the 'Corporate Debtor' was classified as 'Non Performing Asset' on 26.12.2015, in view of the fact that 'Notice' demanding 'Recall of Loan' was issued to the 'Appellant'/'Personal Guarantor' was on 11.10.2017, the 'Demand Notice' dated 23.09.2020 was issued to the 'Appellant'/'Personal Guarantor' through Registered Post demanding unpaid 'Debt' in 'Default' due from M/s. PPS Enviro Power Private Limited, was served on the 'Appellant' on 06.10.2020 at the address bearing No. 102/36, Defence

Officers' Colony, Ekkattuthangal, Chennai – 600032, in the teeth of the 'Guarantee Agreement' dated 13.05.2014, executed by the 'Appellant'/'Personal Guarantor' and because of the fact that the 'Appellant'/'Personal Guarantor' had executed the 'Revival Letters', the 'Revival Letter' dated 10.08.2016 acknowledging its liability in respect of the 1st Respondent/Bank/Financial Creditor (after 2 years from the date of execution of 'Guarantee Agreement'), the 'Petition' in CP(IB)/401/95(IBC)/HDB/2020 on the file of the 'Adjudicating Authority' ('National Company Law Tribunal', Hyderabad Bench – I, Hyderabad), is well within the period of limitation and therefore, the 'Contra Plea' taken on behalf of the 'Appellant/Personal Guarantor', is not acceded to by this 'Tribunal'.

99. In the light of foregoing detailed deliberations, this 'Tribunal' keeping in mind of a vital fact that the 'Appellant'/'Personal Guarantor' of the 'Corporate Debtor' (1st Respondent in CP(IB) No. 401/95(IBC)/HDB/2020, was served with a 'Notice' and inspite of opportunity provided, the same was not availed by him before the 'Adjudicating Authority'), taking note of the fact that in CP(IB)No.407/7/HDB/2018, the 'Corporate Insolvency Resolution Process' was ordered on 13.08.2019 against the 'Corporate Debtor',

based on the 'principle of law' that the 'Liability' of the 'Appellant'/Personal Guarantor' being co-extensive with that of the 'Corporate Debtor' (2nd Respondent'), the 'Appellant'/Personal Guarantor' (in the instant case), whether he resides in India or outside India, when a 'Petition' is filed against him, as 'Personal Guarantor' of the 'Corporate Debtor', the 'Adjudicating Authority', ('National Company Law Tribunal') has jurisdiction, in whose 'territorial jurisdiction', the Registered Office of the 'Corporate Person' is located, the right showered upon the 1st Respondent/Bank/Financial Creditor' under Section 95 (1) of the Code being an 'independent' and 'special proceeding', which can be invoked by the 'Financial Creditor' (without any fetter), despite, availability of any other 'Fora', as per Section 60 (1) of the Code, the residence of 'Personal Guarantor' is not taken into account when proceedings against 'Personal Guarantor' are initiated, without any hesitation, comes to a consequent conclusion that the view taken by the 'Adjudicating Authority', ('National Company Law Tribunal', Hyderabad Bench) in admitting CP(IB) No. 401/95 (IBC) /HDB/2020, is free from any legal flaws. Resultantly, the 'Appeal' fails.

Result:

In fine, the Company Appeal (AT) (CH) (INS) No. 239 of 2022 is dismissed. No costs.

The connected pending I.A. No. 512 of 2022 (For Stay) and I.A. No. 513 of 2022 (To exempt from filing Certified copy of the Impugned Order) are Closed.

[Justice M. Venugopal]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

25/08/2022

SR/TM