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K. PARAMASIVAM

v.

THE KARUR VYSYA BANK LTD. & ANR.

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(Civil Appeal No. 9286 of 2019)

SEPTEMBER 06, 2022

[INDIRA BANERJEE AND J. K. MAHESHWARI, JJ.]

Insolvency and Bankruptcy Code, 2016: ss. 3(7), 3(8), 5(5A), 7, 62 – Initiation of Corporate Insolvency Resolution Process-CIRP – Borrowers failed to repay the debts to financial creditor – Application u/s. 7 by the financial creditor for initiating CIRP against corporate debtor; and that corporate guarantor liable to re-pay loan having extended guarantee for the loans availed by borrowers – Guarantor’s case that they were not corporate debtors – Application admitted by NCLT and upheld by NCLAT – On appeal, held: Liability of the guarantor is co-extensive with that of the principal borrower – It was open to the financial creditor to proceed against the guarantor without first suing the principal borrower, in respect of the guarantee given by it, once the borrower committed default – Guarantor is then, the corporate debtor.

Dismissing the appeal, the Court

HELD: Under Section 7 of the Insolvency and Bankruptcy Code, 2016, CIRP can be initiated against a corporate entity who has given a guarantee to secure the dues of a non-corporate entity as a financial debt accrues to the corporate person, in respect of the guarantee given by it, once the borrower commits default. The guarantor is then, the Corporate Debtor. Liability of the guarantor is co-extensive with that of the Principal Borrower. It was open to the Financial Creditor to proceed against the guarantor without first suing the Principal Borrower. There is no ground to interfere with the concurrent findings of the Adjudicating Authority (NCLT) and the Appellate Authority (NCLAT). [Para 13, 16, 17][104-A-B; 109-B, C]

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Laxmi Pat Surana v. Union Bank of India and Another A
(2021) 8 SCC 481: [2021] 2 SCR 924 – relied on.

Case Law Reference

[2021] 2 SCR 924 relied on Para 12

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9286 B
of 2019.

From the Judgment and Order dated 18.11.2019 of the National
Company Law Appellate Tribunal, New Delhi in Company Appeal (AT)
(Ins) No.538 of 2019.

Amitesh Chandra Mishra, P. J. Sriganesh, Ankit Chaturvedi for C
M/s ACM Legal, Advs. for the Appellant.

Nikhil Nayyar, V. Prakash, Sr. Advs., T. V. S. Raghavendra Sreyas,
Vijay Kumar, Ms. Sugandha Batra, Siddharth Vasudev, Iyengar
Shubharanjani Ananth, Adarsh Mohandas, Ms. R. Sowmya, Advs. for D
the Respondents.

The Judgment of the Court was delivered by

INDIRA BANERJEE, J.

This appeal under Section 62 of the Insolvency and Bankruptcy
Code, 2016, hereinafter referred to as the “IBC”, is against a final E
judgment and order dated 18th November 2019, passed by the National
Company Law Appellate Tribunal (NCLAT) dismissing the Company
Appeal (AT) (Insolvency) No.538 of 2019, against an order dated 8th
April 2019 passed by the Adjudicating Authority, admitting the application
filed by the Respondent No.1 being CP/1314/IB/2018 under Section 7 F
of the IBC for initiation of the Corporate Insolvency Resolution Process
(CIRP) against the Corporate Debtor, Maharaja Theme Parks and
Resorts Private Limited, hereinafter referred to as “Maharaja Theme
Parks and Resorts”.

2. The Appellant is the promoter, shareholder and suspended/
discharged director of Maharaja Theme Parks and Resorts, a company G
registered under the Companies Act, 1956. The Respondent No.1,
hereinafter referred to as “Financial Creditor” had advanced credit
facilities to the following three entities:-

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- A (i) Sri Maharaja Refineries, a Partnership Firm;
(ii) Sri Maharaja Industries, a proprietary concern of K. Paramasivam; and
(iii) Sri Maharaja Enterprises, a proprietary concern of P. Sathiyamoorthy
- B 3. Maharaja Theme Parks and Resorts stood guarantor for the loans availed by all the three borrowers. The borrowers failed to repay the debts payable by them to the Financial Creditor.
- C 4. On or about 24th October 2018, the Financial Creditor filed an application under Section 7 of the IBC being CP/1314/IB/2018 for initiation of CIRP against Maharaja Theme Parks and Resorts. In the said application the Financial Creditor stated that Maharaja Theme Parks and Resorts had extended corporate guarantee(s) for loans availed by each of the borrowers. On failure of the borrowers to repay the loans, Maharaja Theme Parks and Resorts, as Guarantor, became liable to repay the loan.
- D 5. Maharaja Theme Parks and Resorts filed its counter statement before the Adjudicating Authority, objecting to the jurisdiction of the NCLT to entertain the petition under Section 7 of the IBC, on the contention that, the company, Maharaja Theme Parks and Resorts Private Limited,
- E was not a Corporate Debtor, which is defined in Section 3(8) of the IBC to mean, “*a corporate person who owes a debt to any person.*” It was contended that Maharaja Theme Parks and Resorts did not owe any financial debt to the Financial Creditor.
- F 6. The Appellant contends that, Maharaja Theme Parks and Resorts does not also fall within the definition of ‘Corporate Guarantor’ in Section 5(5A) of the IBC, which reads “*‘corporate guarantor’ means a corporate person who is the surety in a contract of guarantee to a corporate debtor.*” Mr. Mishra, appearing for the Appellant, submitted that Maharaja Theme Parks and Resorts had not guaranteed any loan given to a corporate person.
- G 7. Mr. Mishra referred to the definition of ‘Corporate Person’ in Section 3(7) of the IBC which reads: -
- “3. ...
- H (7) “*corporate person*” means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of

2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;”

8. Mr. Mishra argued that on a conjoint reading of Section 5(5A), Section 3(7) and Section 3(8) of the IBC, it is apparent that a Corporate Guarantor is the surety in a contract of guarantee to a Corporate Debtor. The borrowers not being Corporate Debtors, Maharaja Theme Parks and Resorts is not a Corporate Guarantor as defined in Section 5(5A) of the IBC.

9. By an order dated 8th April 2019, the Adjudicating Authority admitted the petition under Section 7 of the IBC and initiated the CIRP against Maharaja Theme Parks and Resorts. The Respondent No.2 was appointed Interim Resolution Professional.

10. Being aggrieved by the order dated 8th April 2019 of the Adjudicating Authority, admitting the application for CIRP, the Appellant filed an appeal. The appeal filed by the Appellant, has been dismissed by the NCLAT (Appellate Authority), by the judgment and order impugned.

11. Mr. Amitesh Chandra Mishra appearing on behalf of the Appellant submitted that the appeal filed by the Appellant under Section 61 of the IBC has been dismissed by the Appellate Authority (NCLAT) on the ground that the company, Maharaja Theme Parks and Resorts, is a Corporate Guarantor, without considering the fact that Maharaja Theme Parks and Resorts does not fall within the ambit of the definition of Corporate Guarantor, and therefore CIRP cannot be initiated against it.

12. Mr. Nikhil Nayyar, learned Senior Counsel appearing on behalf of the Respondent Financial Creditor submitted that the issue of whether an action under Section 7 of the IBC can be initiated by a Financial Creditor, against a corporate person, in relation to a corporate guarantee, given by that corporate person, in respect of a loan advanced to the principal borrower, who is not a corporate person, has been answered by this Court in *Laxmi Pat Surana v. Union Bank of India and Another*¹.

¹ (2021) 8 SCC 481

A 13. Under Section 7 of the IBC, CIRP can be initiated against a Corporate entity who has given a guarantee to secure the dues of a non-corporate entity as a financial debt accrues to the corporate person, in respect of the guarantee given by it, once the borrower commits default. The guarantor is then, the Corporate Debtor.

B 14. In *Laxmi Pat Surana* (*supra*), this Court held: -

C *“19. It is no more res integra that the Code is a complete code — provisioning for actions and proceedings relating to, amongst others, reorganisation and insolvency resolution of corporate persons in a time bound manner for maximisation of value of assets of such persons, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.*

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E *22. The term “financial creditor” has been defined in Section 5(7) read with expression “creditor” in Section 3(10) IBC to mean a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. This means that the applicant should be a person to whom a financial debt is owed. The expression “financial debt” has been defined in Section 5(8). Amongst other categories specified therein, it could be a debt along with interest, which is disbursed against the consideration for the time value of money and would include the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of the same clause. It is so provided in sub-clause (i) of Section 5(8) IBC to take within its ambit a liability in relation to a guarantee offered by the corporate person as a result of the default committed by the principal borrower. The expression “debt” has been defined separately in the Code in Section 3(11) to mean a liability or obligation in respect of “a claim” which is due from any person and includes a financial debt and operational debt. The expression “claim” would certainly*

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cover the right of the financial creditor to proceed against the corporate person being a guarantor due to the default committed by the principal borrower. The expression “claim” has been defined in Section 3(6), which means a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured. It also means a 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 in respect of specified matters.

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23. Indubitably, a right or cause of action would enure to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default committed by the guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of amount of debt. For, the obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as predicated in Section 128 of the Contract Act. As a consequence of such default, the status of the guarantor metamorphoses into a debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) IBC. For, as aforesaid, the expression “default” has also been defined in Section 3(12) IBC to mean non-payment of debt when whole or any part or instalment of the amount of debt has become due or payable and is not paid by the debtor or the corporate debtor, as the case may be.

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24. A priori, in the context of the provisions of the Code, if the guarantor is a corporate person [as defined in Section 3(7) IBC], it would come within the purview of the expression “corporate debtor”, within the meaning of Section 3(8) IBC.

25. It may be useful to also advert to the generic provision contained in Section 3(37). It postulates that the words and expressions used and not defined in the Code, but defined in enactments referred to therein, shall have the meanings respectively assigned to them in those Acts. Drawing support from this provision, it must follow that the lender would be a

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- A *financial creditor within the meaning of the Code. The principal borrower may or may not be a corporate person, but if a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of the expression “corporate debtor” in Section 3(8) IBC.*
- B *26. Thus understood, it is not possible to countenance the argument of the appellant that as the principal borrower is not a corporate person, the financial creditor could not have invoked remedy under Section 7 IBC against the corporate person who had merely offered guarantee for such loan account. That action can still proceed against the guarantor being a corporate debtor, consequent to the default committed by the principal borrower. There is no reason to limit the width of Section 7 IBC despite law permitting initiation of CIRP against the corporate debtor, if and when default is committed by the principal borrower. For, the liability and obligation of the guarantor to pay the outstanding dues would get triggered coextensively.*
- C *27. To get over this position, much reliance was placed on Section 5(5-A) IBC, which defines the expression “corporate guarantor” to mean a corporate person, who is the surety in a contract of guarantee to a corporate debtor. This definition has been inserted by way of an amendment, which has come into force on 6-6-2018. This provision, as rightly urged by the respondents, is essentially in the context of a corporate debtor against whom CIRP is to be initiated in terms of the amended Section 60 IBC, which amendment is introduced by the same Amendment Act of 2018. This change was to empower NCLT to deal with the insolvency resolution or liquidation processes of the corporate debtor and its corporate guarantor in the same Tribunal pertaining to same transaction, which has territorial jurisdiction over the place where the registered office of the corporate debtor is located. That does not mean that proceedings under Section 7 IBC cannot be initiated against a corporate person in respect of guarantee to the loan amount secured by person not being a corporate person, in case of default in payment of such a debt.*
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28. *Accepting the aforementioned argument of the appellant would result in diluting or constricting the expression “corporate debtor” occurring in Section 7 IBC, which means a corporate person, who owes a debt to any person. The “debt” of a corporate person would mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. The expression “debt” in Section 3(11) is wide enough to include liability of a corporate person on account of guarantee given by it in relation to a loan account of any person including not being a corporate person in the event of default committed by the latter. It would still be a “financial debt” of the corporate person, arising from the guarantee given by it, within the meaning of Section 5(8) IBC.*

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29. *Notably, the expression “corporate guarantee” is not defined in the Code. Whereas, expression “corporate guarantor” is defined in Section 5(5-A) IBC. If the legislature intended to exclude a corporate person offering guarantee in respect of a loan secured by a person not being a corporate person, from the expression “corporate debtor” occurring in Section 7, it would have so provided in the Code [at least when Section 5(5-A) came to be inserted defining expression “corporate guarantor”]. It was also open to the legislature to amend Section 7 IBC and replace the expression “corporate debtor” by a suitable expression. It could have even amended Section 3(8) to exclude liability arising from a guarantee given for the loan account of an entity not being a corporate person. Similarly, it could have also amended the expression “financial debt” in Section 5(8) IBC, “claim” in Section 3(6), “debt” in Section 3(11) and “default” in Section 3(12). There is no indication to that effect in the contemporaneous legislative changes brought about.*

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30. *The expression “corporate debtor” is defined in Section 3(8) which applies to the Code as a whole. Whereas, expression “corporate guarantor” in Section 5(5-A), applies only to Part II IBC. Upon harmonious and purposive construction of the governing provisions, it is not possible to extricate the corporate person from the liability (of being a*

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A *corporate debtor) arising on account of the guarantee given*
by it in respect of loan given to a person other than corporate
person. The liability of the guarantor is coextensive with that
of the principal borrower. The remedy under Section 7 is not
for recovery of the amount, but is for reorganisation and
 B *insolvency resolution of the corporate debtor who is not in a*
position to pay its debt and commits default in that regard. It
is open to the corporate debtor to pay off the debt, which
had become due and payable and is not paid by the principal
borrower, to avoid the rigours of Chapter II IBC in general
and Section 7 in particular.”

C 15. The issue of whether CIRP can be initiated against the
 Corporate Guarantor without proceeding against the principal borrower
 has been answered by this Court in ***Laxmi Pat Surana*** (supra). The
 relevant paragraphs are set out hereinbelow: -

D *“21. Section 7 is an enabling provision, which permits the*
financial creditor to initiate CIRP against a corporate debtor.
The corporate debtor can be the principal borrower. It can
also be a corporate person assuming the status of corporate
debtor having offered guarantee, if and when the principal
 E *borrower/debtor (be it a corporate person or otherwise)*
commits default in payment of its debt.”

F *23. Indubitably, a right or cause of action would enure to the*
lender (financial creditor) to proceed against the principal
borrower, as well as the guarantor in equal measure in case
they commit default in repayment of the amount of debt acting
jointly and severally. It would still be a case of default
 G *committed by the guarantor itself, if and when the principal*
borrower fails to discharge his obligation in respect of amount
of debt. For, the obligation of the guarantor is coextensive
and coterminous with that of the principal borrower to defray
the debt, as predicated in Section 128 of the Contract Act. As
a consequence of such default, the status of the guarantor
metamorphoses into a debtor or a corporate debtor
 H *if it happens to be a corporate person, within the*
meaning of Section 3(8) IBC. For, as aforesaid, the expression

“default” has also been defined in Section 3(12) IBC to mean non-payment of debt when whole or any part or instalment of the amount of debt has become due or payable and is not paid by the debtor or the corporate debtor, as the case may be.

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16. The issues raised in this appeal are settled by this Court in ***Laxmi Pat Surana*** (supra). As held by this Court in ***Laxmi Pat Surana*** (supra), the liability of the guarantor is co-extensive with that of the Principal Borrower. The judgment in ***Laxmi Pat Surana*** (supra), rendered by a three-Judge Bench of this Court is binding on this Bench. It was open to the Financial Creditor to proceed against the guarantor without first suing the Principal Borrower.

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17. We find no ground to interfere with the concurrent findings of the Adjudicating Authority (NCLT) and the Appellate Authority (NCLAT).

18. The appeal is, therefore, dismissed.