

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL
BENCH, NEW DELHI**

Comp. App. (AT) (Ins) No. 851 of 2023 & I.A. No. 2904, 2905 of 2023

IN THE MATTER OF:

Piramal Capital & Housing Finance Ltd

...Appellant

Versus

Hydric Infrastructure Pvt. Ltd.

...Respondent

Present

For Appellant : Mr. Jayant K Sud, Sr. Adv. with Bihu Sharma, Kartik
Jasra, Prannit, Shivam, Akash, Advocates

For Respondents : Mr. Kunal Godhwani, Adv.

With

Comp. App. (AT) (Ins) No. 852 of 2023 & I.A. No. 2908, 2909 of 2023

IN THE MATTER OF:

Piramal Capital & Housing Finance Ltd.

...Appellant

Versus

Hydric Town Planners Pvt. Ltd.

...Respondent

Present

For Appellant : Mr. Jayant K Sud, Sr. Adv. with Bihu Sharma, Kartik
Jasra, Prannit, Shivam, Akash, Advocates

For Respondents : Mr. Kunal Godhwani, Adv.

O R D E R

(Per: Justice Rakesh Kumar Jain) (Oral)

02.02.2024: This order shall dispose of two appeals bearing CA (AT) (Ins) No. 851 of 2023 titled as 'Piramal Capital & Housing Finance Ltd. Vs. Hydric Infrastructure Pvt. Ltd.' (hereinafter referred to as 'first appeal') and CA (AT) (Ins) No. 852 of 2023 titled as 'Piramal Capital & Housing Finance Ltd. Vs. Hydric Town Planners Pvt. Ltd.' (hereinafter referred to as 'second appeal') because the issue involved in both the appeals is common. However,

for the sake of convenience, the facts are being extracted from the first appeal.

2. In short, the Appellant filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short 'Rules') for the initiation of Corporate Insolvency Resolution Process (in short 'CIRP') against M/s Hydric Infrastructure Pvt. Ltd. for the alleged default of Rs. 53,26,52,972/-.

3. The Corporate Debtor (Hydric Infrastructure Pvt. Ltd.) executed the deed of guarantee on 29.03.2018 for repayment of the facility extended to Crystal Facilities Management Pvt. Ltd.. The loan agreement dated 29.03.2018 was entered into between Crystal Facilities Management Pvt. Ltd. (CFMPL) and Dewan Housing Finance Corporate Limited and in furtherance of a sanction letter dated 28.03.2018, loan of Rs. 35 Crores was approved and sanctioned to CFMPL.

4. Pursuant to the approval of the resolution plan, submitted by Piramal Capital & Housing Finance Limited in the CIRP of Dewan Housing Finance Corporate Limited (DHFL) by the Adjudicating Authority, Mumbai on 07.06.2021, the Appellant has been merged into DHFL w.e.f. 30.09.2021. The certificate of incorporation pursuant to change of name has been issued by the Registrar of Companies, Mumbai on 03.11.2021 wherein the name of DHFL has been changed to the name of the Appellant.

5. It is alleged that CFMPL was to repay the loan alongwith all the amount due under the loan agreement, which was fully secured, among other things, by the corporate guarantee deed dated 29.03.2018 executed by Hydric Infrastructure Pvt. Ltd. The said guarantee deed was unconditional

and irrevocable, securing CFMPL's payment obligation in terms of the loan agreement.

6. It is further alleged that before filing the application under Section 7 of the Code, the Appellant served a notice dated 22.02.2020 to CFMPL and other guarantors including the guarantor in the second appeal, namely, Hydric Town Planners Pvt. Ltd. Since, they failed to pay the amount as claimed, the Appellant filed an application under Section 7 of the Code against the borrower i.e. CFMPL which has been admitted on 19.01.2023 and the principal borrower has now been admitted to liquidation.

7. The Appellant filed the application under Section 7 of the Code against the guarantor (Respondent herein) on 23.05.2022 simultaneously in the first appeal as well as in the second appeal.

8. Counsel for the Appellant has submitted that the application has been dismissed by the Adjudicating Authority by relying upon an order passed by this Tribunal in the case of Dr. Vishnu Kumar Agarwal Vs. M/s Piramal Enterprises Ltd., CA (AT) (Ins) No. 346 of 2018 holding that the application filed against the principal borrower is not maintainable against the corporate guarantor on the same set of debt.

9. Aggrieved against the said order, both these appeals have been filed by the Appellant.

10. Counsel for the Appellant has submitted that since the application has been dismissed only on the basis of a decision of this Tribunal rendered in the case of Dr. Vishnu Kumar Agarwal (Supra), therefore, he has confined his argument to the issue involved as to whether the application under Section 7 is maintainable, filed simultaneously, against the principal borrower as well as corporate guarantor on the same set of debt?

11. It is submitted that the view taken by the Adjudicating Authority is contrary to the view taken by the Hon'ble Supreme Court in the case of Laxmi Pat Surana Vs. Union Bank of India &Ors., Manu/SC/0221/2021 in which the Hon'ble Supreme Court has held that:

“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) of the Code. For, as aforesaid, expression "default" has also been defined in Section 3(12) of the Code 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”.

12. He has further relied upon two decisions of this Tribunal rendered in the case of 'State Bank of India Vs. Athena Energy Ventures Pvt. Ltd., CA (AT) (Ins) No. 633 of 2020 in which this Court has held that “12. *Considering the issues which were before this Tribunal when matter of Piramal was decided, it is clear that the Issue No.2 was relating to question whether CIRP can be initiated against two Corporate Guarantors simultaneously for same set of debt and default. The issue was not whether Application can be filed against the Principal Borrower as well as the Corporate Guarantor. The observations made in para – 32 of the Judgement that second application for same set of claim and default can not be admitted against the Corporate Guarantor or Principal Borrower was not an issue in the matter of Piramal.* 19.

It is clear that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as Guarantor. The law as laid down by the Hon'ble High Courts for the respective jurisdictions, and law as laid down by the Hon'ble Supreme Court for the whole country is binding. In the matter of Piramal, the Bench of this Appellate Tribunal "interpreted" the law. Ordinarily, we would respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner it was interpreted in the matter of Piramal. For such reasons, we are unable to uphold the Judgement as passed by the Adjudicating Authority." And in the case of Edelweiss Asset Reconstruction Vs. Gwalior Bypass Projects Ltd., CA (AT) (Ins) No. 1186 of 2019 the following observations have been made "For above reasons discussed by us in the matter of "Athena Energy", we find that the present Appeal is required to be allowed. We do not find that there is bar for the Financial Creditor to proceed against the principal borrower as well as Corporate Guarantor at the same time, either in CIRPs or file claims in both CIRPs".

13. Besides the aforesaid argument, Counsel for the Appellant has drawn our attention to an order dated 28.02.2023 passed by the Adjudicating Authority, New Delhi, Court IV in the matter of M/s CFM Asset Reconstruction Pvt. Ltd. Vs. M/s Nikhil Footwears Pvt. Ltd. in which reliance has been placed on the judgment of Laxmi Pat Surana (Supra). The observation made in Para 14 of the judgment read as under:-

“14. As regard to the Corporate Debtor's contention that applicant has made a malafide attempt to file duplicate claims with respect to the same debt on same facts and for the same default, it is pertinent to note that under section 128 of the Indian Contract Act, 1872 the liability of the surety is coextensive with that of the principal debtor, unless otherwise provided under the contract. Further, in relation to the aspect of Corporate Guarantee it is apt

to refer to the decision of the Hon'ble Supreme Court in the matter of Laxmi Pat Surana --Vs- Union Bank of India & Anr. in Civil Appeal No. 2734 of 2020 wherein it was held that the liability of the 'Corporate Guarantor' is 'coextensive' with that of the 'Principal Borrower' and that acknowledgment given by the 'Principal Borrower' also binds the 'Corporate Guarantor'."

14. It is submitted that the said application was admitted and against the order of admission dated 28.02.2023, an appeal i.e. CA (AT) (Ins) No. 470 of 2023 titled as 'Naresh Kumar Aggarwal Vs. CFM Asset Reconstruction Pvt. Ltd. & Anr. was filed before this Tribunal which was dismissed on 16.05.2023.

15. It is submitted that though the composition of the bench in the case of M/s CFM Asset Reconstruction Pvt. Ltd. Vs. M/s Nikhil Footwears Pvt. Ltd. was different but author of the judgment in both the cases was the same who has dismissed the application of the Appellant on 26.05.2023 after passing the order on 28.02.2023 in the case of M/s CFM Asset Reconstruction Pvt. Ltd. Vs. M/s Nikhil Footwears Pvt. Ltd. holding that the application filed under Section 7 is maintainable both against the borrower as well as guarantor on the same set of debt even is filed simultaneously.

16. In reply, Counsel for the Respondent has submitted that the CIRP against the borrower was admitted on 19.01.2023 and the Appellant has also filed its claim which was admitted to the tune of Rs. 15,99,37,500/- and the claim has also been filed and the said facts were not disclosed anywhere by the Appellant, therefore, the application has rightly been dismissed by the Adjudicating Authority.

17. We have heard Counsel for the parties and perused the record with their able assistance.

18. The issue involved in this case is as to whether the application filed under Section 7 of the Code is maintainable, having been filed by the Financial Creditor against the Corporate Debtor as well as the Corporate Guarantor simultaneously on the same set of debt?

19. Answer to the question has already been given by the Hon'ble Supreme Court in the case of Laxmi Pat Surana (Supra) which has been followed by this Court in the case of Naresh Kumar Aggarwal (Supra) in which this Court has held that *"the scheme of IBC, in view of law laid down by the Hon'ble Supreme Court in 'Laxmi Pat Surana Vs. Union of India & Anr., we are not persuaded to follow judgment of this Tribunal in Dr. Vishnu Kumar Agarwal (Supra)'"*.

20. Thus, in view of the aforesaid facts and circumstances, the order passed by the Adjudicating Authority is patently illegal and the same is set aside.

21. Before parting with this order, we are at pain to observe that the Adjudicating Authority, while deciding the matter of M/s CFM Asset Reconstruction Pvt. Ltd. (Supra) on 28.02.2023 has though rightly followed the decision of the Supreme Court in the case of Laxmi Pat Surana (Supra) but in the case of the present Appellant which has been decided by the same presiding judge on 26.05.2023 i.e. after three month of the decision rendered in the case of M/s CFM Asset Reconstruction Pvt. Ltd. (Supra) on 28.02.2023, has not followed the same and rather relied upon a decision rendered by this Tribunal in the case of Dr. Vishnu Kumar Agarwal (Supra) about which the observation has been made by this Court in the order dated 16.05.2023 i.e. much prior to the order dated 26.05.2023 that the judgment

rendered by this Tribunal in the case of Dr. Vishnu Kumar Agarwal (Supra) is not to be followed.

22. In view of the aforesaid discussions, the original applications in both the appeals filed by the Appellant bearing IB-440/ND/2022 and IB-441/ND/2022 are hereby restored and the matter is remanded back to the Tribunal to decide it again in accordance with law. The parties are directed to appear before the Tribunal on **12.02.2024**.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

Sheetal/Ravi