

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1592 of 2024

[Arising out of order dated 01.07.2024 passed by the Adjudicating Authority
(National Company Law Tribunal, Chandigarh Bench, Chandigarh), in I.A.
294/2020 in CP (IB) No.629/Chd/HP/2019]

IN THE MATTER OF:

1. Mr. Suresh Kumar

S/o Shyam Lal
Address: Village Pandgal,
P.O.: Kothipura, Tehsil- Sadar,
District: Bilaspur-174 001
Himachal Pradesh, India.
Email: skumarsuresh1975@gmail.com
Contact: 8219506421

...Appellant No. 1

2. Mr. Raj Kumar

S/o Shyam Lal Address:
Village Pandgal,
P.O.: Kothipura Tehsil- Sadar,
District: Bilaspur-174 001
Himachal Pradesh, India.
Email: rajkumarnoni1@gmail.com
Contact: 9857051224

...Appellant No. 2

Versus

Central Bank of India

Through its Authorized Representative
Member of SCC in Liquidation of
M/s Ram Hari Auto Pvt. Ltd.
Reg. Add: Combermere Complex,
The Mall, Shimla,
Himachal Pradesh- 171 001.
Email: reevshimro@centralbank.co.in,
bmshim1002@centralbank.co.in
Phone: +91 70185 39212

...Respondent

Present:

**For Appellant : Mr. Mrinal Harsh Vardhan, Mr. Iswar Mohapatra,
Mr. Markandy Singh, Mr. Kailash Ram and Mr.
Sanket Ranjan, Advocates.**

**For Respondents : Mr. Brijesh Kumar Tamber, Mr. Prateek
Kushwaha, Mr. Vinay Singh Bist, Arani**

Mukherjee, Ms. Sahas Bhasin and Mr. Yashu Rustagi, Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed challenging the Order dated 01.07.2024 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh in I.A. No. 294/2020 in C.P. (IB) No. 629/Chd/Hp/2019. The I.A. No. 294/2020 filed by the Central Bank of India, Respondent herein, has been allowed directing re-constitution of the Committee of Creditors (CoC) by excluding Appellants herein. Aggrieved by the Order dated 01.07.2024, this Appeal has been filed.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:

- i. Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor, M/s. Ram Hari Auto Private Ltd., commenced on an Application filed by an Operational Creditor vide Order dated 14.02.2020.
- ii. Public announcement was made on 17.02.2020 in which 02.03.2020 was the last date for submission of the claims.
- iii. Interim Resolution Professional (IRP) constituted the CoC of only Unsecured Financial Creditors and held first CoC Meeting on 16.03.2020.
- iv. Central Bank of India filed its claim of ₹12,15,30,369/- as Secured Creditors on 09.03.2020.

- v. On 19.03.2020, IRP informed Central Bank of India about admission of its claim and its eligibility to become Member of the CoC.
- vi. The 2nd CoC Meeting was convened on 28.05.2020. Central Bank of India was conveyed that its vote share is 51.37%. Central Bank of India vide email dated 22.05.2020 and 24.05.2020, asked several information from the IRP regarding admission of the claims of Unsecured Creditors.
- vii. Resolution Professional (RP) vide email dated 08.06.2020, sent a Report on the reconstitution of the CoC by adding two more Unsecured Financial Creditors who had given Personal Guarantee to the Applicant Bank to secure the loan taken by the Corporate Debtor, namely Suresh Kumar and Rajesh Kumar, who are Appellant in these Appeals.
- viii. The claim of the Appellants were admitted on basis of Recovery Certificate RC No. 40/2020 issued upon them by the Debt Recovery Tribunal (DRT) Chandigarh in Original Application filed by Central Bank of India.
- ix. I.A. No. 294/2020 was filed by the Central Bank of India, praying for following reliefs:

“a. Documentary evidence to be provided by IRP/RP, based on which the claims of the Unsecured Financial Creditors were admitted and the CoC was constituted; and financials pertaining to the Corporate Debtor to the Applicant Bank in pursuance of Section 21(9) and 21(10) of the Code;

b. Re-constitution of the CoC after proper verification of claims and re-initiation of the CIRP in view of the fraudulent, illegal actions taken by the IRP/RP in collusion with other CoC members;

c. Release of the land/building/assets other than that in the name of the Corporate Debtor in the possession of IRP/RP, and;

d. Replacement of the current IRP/RP with another resolution professional, ensuring maximization of the value.”

- x. The Application filed by the Central Bank of India was contested by RP. The Adjudicating Authority after hearing the Parties vide Impugned Order dated 01.07.2024 allowed the I.A. filed by the Central Bank of India. Adjudicating Authority held that Appellant having not paid anything to the Creditor, they cannot be Member of the CoC. Adjudicating Authority directed reconstitution of the CoC, aggrieved by which Order, the Appellants herein have filed the Appeal.

3. We have heard Learned Counsel for the Appellant as well as Learned Counsel appearing for the Central Bank of India and Learned Counsel for the RP.

4. Learned Counsel for the Appellant challenging the Impugned Order submits that Adjudicating Authority has committed an error by misinterpreting provisions of Section 140 of the Indian Contract Act. It is submitted that statutory language of Section 140 establishes two distinct conditions for the surety to step into the shoe of the Creditor either to repaying the debt or by performing the act for which the principal debtor is liable. It is submitted that even though Appellants have not made any payment towards discharge of the guarantee, but in event the Bank proceeded to dispose of Appellant's mortgage property, whether by Auction or otherwise, the same shall continue fulfilment of performance by the Appellant in repayment of the loan. Appellant has created mortgage of the immovable assets to secure the

loan of the Corporate Debtor. By such performance, the Appellant has assumed the Creditors rights against the Corporate Debtor. In any event of the matter, the Appellants claim ought to have been recognised as contingent or other Creditors. Learned Counsel further submitted that in the Application filed by the Central Bank of India, Appellants were not heard and the Order passed by the Adjudicating Authority is in violation of principle of natural justice.

5. Learned Counsel for the Central Bank of India, refuting the submission of the Counsel for the Appellant contends that Appellant who had given Personal Guarantee to the loan obtained by the Corporate Debtor from the Central Bank of India, have not paid any amount, even though Decree has been issued by the DRT, hence they cannot claim to become Financial Creditor of the Corporate Debtor. The claim filed by the Appellant as Financial Creditor was wholly unsustainable. It is submitted that the IRP has admitted the claim of the Central Bank of India and allocated 51.37% voting shares subsequently by admission of claim of the above Appellant on basis of Personal Guarantee, the vote shares of the Central Bank of India has been reduced to 26.86%, which is wholly illegal. IRP has allocated vote shares of 23.85% to each of the Appellants, which shows illegalities committed by the IRP and allotting vote shared to the Appellant.

6. Learned Counsel for the Parties have also relied on Judgments of this Tribunal and Supreme Court in support of their submission, which we shall refer to while considering the submissions in details.

7. The Appeal having been filed by the Appellant challenging their exclusion from CoC as Financial Creditor, our consideration in this Appeal is

confined to the consideration as to whether the Appellant are the Financial Creditor of the Corporate Debtor and they are entitled to be part of the CoC as has been allowed by the RP, which inclusion has been set aside by the Adjudicating Authority by the Impugned Order. From the materials on the record, following are undisputed fact:

- i. Appellant are the Personal Guarantor of the financial facilities which was extended by the Central Bank of India to the Corporate Debtor in the year 2012;
- ii. On an Application filed by the Central Bank of India, Recovery Certificate was issued on 28.01.2020 by the DRT against the Corporate Debtor and the Appellants herein;
- iii. In pursuance of the Recovery Certificate, the Appellants have not paid any amount. Appellants were initially not Member of the CoC and were subsequently included by the IRP by allocating 23.85% vote shares, respectively by reducing the vote shares of the Central Bank of India from 51.37% to 26.86%.

8. Adjudicating Authority while passing the Impugned Order relied on Section 140 of the Indian Contract Act, 1872 and has returned following findings in Para 8:

“8. We have perused the documents filed by the Applicant Bank as well as Respondent RP and have heard the arguments made by the counsels appearing for both parties. The basic argument involved in the case in hand is whether the two personal guarantors against whom guarantees have been invoked and a decree/a Recovery certificate has been obtained by the Applicant Bank can be made part of the CoC. The Ld.

Counsel relied upon Section 140 of the Indian Contract Act, 1872, which states as under:

*140. Rights of surety on payment or performance - Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, **the surety upon payment or performance of all that he is liable for**, is invested with all the rights which the creditor had against the principal debtor.”*

(Emphasis placed)

9. To answer the question as to whether the Appellant has been treated the Financial Creditor of the Corporate Debtor on basis of Personal Guarantee extended by them to the Central Bank of India, we need to look into the Statutory Scheme of the IBC. Section 3(6) defines the claim which means right to payment, which is as follows:

“3. Definitions. *In this Code, unless the context otherwise requires,–*

(6) "claim" means –

(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;”

10. Expression “debt” has been defined in Section 3(11) which is as follows:

“3. Definitions. *In this Code, unless the context otherwise requires,–*

(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;”

11. Section 5(8) defines the Financial Debt in following manner:

“5. Definitions. *In this Code, unless the context otherwise requires,–*

(8) financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes–

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis; (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

[Explanation----For the purposes of this sub-clause,–

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, allottee and real estate project shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) 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 this clause;”

12. When we look into the provisions of Section 5(8)(i), the amount of any liability in respect of any of the guarantee or indemnity is also a Financial Debt.

13. The plain language of Section 5(8)(i) clearly indicates that any of the Guarantee or indemnity for any of the items referred to in sub-Clauses (a) to (f) may also be Financial Debt. In event, there is any “amount of any liability in respect of”. Thus, by giving Guarantee to a transaction referred to in (a) to (i) will not be covered by Financial Debt unless there is any liability in respect of the Guarantee. Thus, Guarantee given by a Guarantor plain and simple cannot be basis for a Financial Debt, unless there is an amount of any liability in respect of such Guarantee. Thus, a Financial Debt will arise only when in respect to Guarantee as covered by Section 5(8)(i) any liability has arisen which is the Statutory Scheme of the IBC. The above can be explained by an illustration. A Corporate Debtor has been extended financial facility of an amount of ₹10 Crores by a Bank. To secure the Financial Debt Guarantees have been given by 4 Personal Guarantors of the said amount against 1 Personal Guarantor, Bank had been able to realise an amount of ₹25 Lakhs but against 3 other Personal Guarantors, no amount has been realized. CIRP commenced against the Corporate Debtor, the Bank who has extended ₹10 Crores financial facility filed the claim. All the 4 Personal Guarantors, including one against whom the amounts have been realised filed claim in the CIRP of the Corporate Debtor. In event, the interpretation which is put by the Appellant is accepted all 4 Personal Guarantors shall be treated as Financial Creditor and the claim of all Personal Guarantors need to be accepted. Hence, Personal Guarantors claim which obviously will be ₹10 Crore each is accepted

the Bank's voting share shall be reduced to only 20% and 3 Guarantors shall be given 20% vote shares each and 1 Guarantor against whom ₹25 Lakhs have been realised, his claim shall be entitled to be accepted, and he shall also be entitled for voting shares of 2.5%. The above interpretation shall lead to reducing the Bank's share to minority, which cannot be the scheme of IBC.

14. The Statutory Scheme is thus clear that for accepting transaction as a Financial Debt, in addition of establishing a Guarantee or indemnity liability in respect of Guarantee has also to be established. When we refer to the definition of claim under Section 3(6) claim can be filed only when there is a right of payment or right to remedy for breach of Contract, if such breach gives right of him, thus right of payment is essential element for a constituting a claim. A Guarantor shall have right of payment against the principal borrower only when it has made payment in discharge of the Guarantee which is a Statutory Scheme under Section 140 of the Contract Act. The expression used in Section 140 is "*the surety upon payment or performance of all that is liable for*". The Personal Guarantor while giving the Guarantee for Guarantee of repayment to the loan has guaranteed for repayment of the loan, in event, principal failed to make a payment to the Guarantor. Thus, Guarantor in the present case has to make payment and performance of all that is liable for is payment to the Bank none-else.

15. The submission of the Counsel for the Appellant that even the Guarantor has not made any payment, it has made performance of all that is liable for cannot be accepted. The Guarantor is liable for payment of the debt of the Bank, hence Appellant cannot contend that he has any right of payment

against the Principal Borrower so that its claim may be accepted as Financial Debt.

16. Now we come to the Judgment relied by the Counsel for the Appellant in support of his submissions. Counsel for the Appellant has relied on the Judgment of the Hon'ble Supreme Court in '**Amrit Lal Govardhan Lalan (Dead) by his Legal Representative' Vs. 'State Bank of Travancore & Ors.'**, reported in **(1968) SCC OnLine SC 246**. Hon'ble Supreme Court in the above case had occasion to consider Section 140 of the Indian Contract Act. Hon'ble Supreme Court has held that surety is therefore on payment of the amount due by the principal debtor entitled to be put in the same position in which the Creditors is in relation to the principal debtor. In Para 7 while considering Section 140 of the Indian Contract Act following was held:

"...In this connection it is necessary to consider the provisions of Section 140 of the Indian Contract Act, 1872 which states:

"Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor(s)."

This section embodies the general rule of equity expounded by Sir Samuel Romilly as counsel and accepted by the Court of Chancery in Crawthorne v. Swinburne, namely:

"The surety will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor; not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor. This right

of a surety also stands, not upon contract, but upon a principle of natural justice.”

The language of the section which employs the words “is invested with all the rights which the creditor had against the principal debtor” makes it plain that even without the necessity of a transfer, the law vests those rights in the surety. Section 141 of the Indian Contract Act, 1872 states;

“A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

“As pointed out by this Court in State of Madhya Pradesh v. Kaluram the expression “security” in this section is not used in any technical sense; it includes all rights which the creditor has against the property at the date of the contract. The surety is entitled on payment of the debt or performance of all that he is liable for to the benefit of the rights of the creditor against the principal debtor which arise out of the transaction which gives rise to the right or liability. The surety is therefore on payment of the amount due by the principal debtor entitled to be put in the same position in which the creditor stood in relation to the principal debtor...”

17. In the above case, Hon’ble Supreme Court had also occasion to consider Section 141 of the Indian Contract Act which Section 141 is not attracted in the facts of the present case. The above Judgment in no manner supports the submission of the Appellant.

18. Another Judgment on which reliance has been placed is the Judgment of the Calcutta High Court in the matter of **‘Sm. Mamta Ghosh’ Vs. ‘United Industrial Bank Limited & Ors.’** reported in **(1987) SCC OnLine Cal 72** where the Calcutta High Court held that even before payment of the debt by

the Guarantor to the Creditor Guarantor by invoking the equitable doctrine of subrogation can apply for temporary injunction. In the above case, the Plaintiff Bank had filed suit against the Defendants praying for declaration that the land and properties are security against the loan payment by the Defendants No. 1 to 3. In the above suit, Guarantor Defendant No. 4 filed the Petition for temporary injunction restraining the Defendant No. 3 from disposing of his personal properties till the disposal of the Suit. Trial Court rejected the Petition for temporary injunction holding that Defendant No. 4 had no right to claim injunction as prayed. In the above context while affirming the rejection of temporary injunction following observations was made in Paragraph 18:

“18. The mortgaged immovable properties wherever they do go either by transfer or assignment or by virtue of any partition, would remain always as the first charge for satisfaction of the decretal amount. It could not be prima facie shown before us that the mortgaged properties with such a considerable quantity of land even in the share of defendant No. 3 and the hypothecated movables taken together would not be sufficient to satisfy the dues of the decree if any. Such being the position, even if the defendant No. 4 may have the right to claim for temporary injunction by invoking the equitable doctrine of subrogation, the facts and circumstances of the present case as already discussed do not make out any prima facie case and do not indicate any balance of inconvenience or the chance of irreparable injury in favour of the defendant No. 4 to get the temporary injunction as prayed for.”

19. The above observation of the Calcutta High Court in no manner supports the submissions of the Appellant. Present is the case regarding the “Financial Debt” in IBC proceeding. The Judgment of Calcutta High Court has no bearing on the issue which is involved in the present case.

20. Another Judgment of the Hon'ble Bombay High Court relied by the Appellant is in the matter of '**Jugalkishore Rampratapji Rathi' Vs. 'Brijmohan Rampratapji Rathi & Anr.'**', reported in **1992 SCC OnLine BM 433**. In the above case, it was held that in a Suit filed by Creditor against principal Debtor and surety, the surety can apply for attachment before Judgment of property of principal debtor or seek injunction to protect his interest in Suit by Bank for recovery. Following was held in Paragraph 8:

"8. In view of the aforesaid observations, and especially in view of the provisions of Order 38, Rule 5 read with sections 94(b) and (e) and 151 of the Code of Civil Procedure, in order to protect the interest of the surety and in view of the peculiar circumstances of the facts in the present matter, I am of the opinion that the present applicant, who is the surety, is entitled to apply under Order 38, Rule 5 of the Code of Civil Procedure for attachment of the property of the principal debtor, i .e., the present non-applicant No. 1, before judgment, or even he can apply under Order 39, Rules 1 and 2 read with sections 94 and 151 of the Code of Civil Procedure, to protect his interest and in the ends of justice."

The above Judgment has no Application in the facts of the present case.

21. In view of the forgoing discussions, we are of the view that Personal Guarantors who have not made any payment in discharge of their Guarantee given to the Central Bank of India cannot be accepted as Financial Creditor of the Corporate Debtor, nor any voting share can be allocated to them in the CIRP of the Corporate Debtor. We do not find any error in the Order of the Adjudicating Authority holding that Appellants who have not made any payment to the Creditor cannot be treated to be a Financial Creditor. There is no infirmity in the Order passed by the Adjudicating Authority allowing I.A. No. 294/2020 filed by the Bank.

22. In so far as the submissions of the Counsel for the Appellant that in any view of the matter, Appellant's claim shall be treated as contingent claim. We only observe that in event any amount is recovered from the Appellant before the close of the CIRP, it is always open for the Appellant to bring the such material before the RP to be placed before the CoC to take a decision regarding contingent claim of the Appellant.

With the above observations, we dismiss the Appeal.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

27th November, 2024

himanshu