

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS) No. 284 of 2023

**(Under Section 61 of the Insolvency and Bankruptcy Code, 2016,
read with Rule 11 of the NCLAT Rules, 2016)**

**(Arising out of the 'Impugned Order' dated 15.06.2023 in
CP / IB / 140 (CHE) 2022, passed by the
'Adjudicating Authority', (National Company Law Tribunal',
Division Bench – II, Chennai)**

In the matter of:

Noil Christuraj
Suspended Director of
M/s. Fossil Logistics Private Ltd.
Having Address at:
141, Thomothira Nagar Main Road,
New Colony, Tuticorin
Tamil Nadu – 628003

.... Appellant

V.

State Bank of India
Stressed Assets Management Branch
Red Cross Building, 2nd Floor,
No. 32, Red Cross Road,
Egmore, Chennai - 600008

.... Respondent No. 1

Radhakrishnan Dharmarajan
No. 31, 3rd Floor, Krishna 1st Avenue,
100 Feet Road, Ashok Nagar,
Chennai - 600083

.... Respondent No. 2

Present:

For Appellant : Mr. Anant Merathia, Advocate

For Respondent No. 1 : Mr. Pranava Charan, MG, Advocate

For Respondent No. 2 / : Mr. T. Ravichandran, Advocate
Resolution Professional

J U D G M E N T **(Hybrid Mode)**

Justice M. Venugopal, Member (Judicial):

Background:

The Appellant / Suspended Director of the Corporate Debtor (Fossil Logistics Private Ltd., has preferred the instant Comp. App (AT) (CH) (INS.) No. 284 of 2023, on being dissatisfied, with the 'Impugned Order', dated 15.06.2023 in CP / IB / 140 (CHE) 2022 (Filed by the 'Respondent No. 1 / Petitioner / State Bank of India (Financial Creditor)', under Section 7 of the I & B Code, 2016, r/w. Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016), passed by the 'Adjudicating Authority', 'National Company Law Tribunal', Division Bench - II, Chennai, in admitting the Section 7 Application of the 'Financial Creditor', appointing the 'Respondent No. 2' as 'Interim Resolution Professional' and declaring 'Moratorium', etc.

Appellant's Contentions:

2. The Learned Counsel for the Appellant, submits that the 'Impugned Order', dated 15.06.2023, in CP / IB / 140 (CHE) 2022, passed by the 'Adjudicating Authority', 'National Company Law Tribunal', Division Bench, Chennai, suffers from 'Legal Infirmary', and that the 'Adjudicating Authority' / 'Tribunal', has over looked to consider the Judgment of this 'Tribunal', dated

08.01.2019, in the matter of Dr. Vishnu Kumar Agarwal v. M/s. Piramal Enterprises Ltd. (vide Comp. App (AT) (INS) No. 346 & 347 / 2018), wherein, it is observed and held that `once for a same set of claim(s) an Application under Section 7 filed by a Financial Creditor is admitted against one of the Corporate Debtors be it, the `Principal Borrower` or a `Corporate Guarantor`, a second Application, by the very same `Financial Creditor`, for the very same set of claim(s), cannot be admitted against the other `Corporate Debtor` be it, the `Principal Borrower` or the `Corporate Debtor`, as the case may be.”

3. The Learned Counsel for the Appellant, points out that its `Logistical Business`, in the last nine years, had relatively performed well in the `Market`, and had a good `Turnover`, and the same is shown, in `Tabular Form`, as under:

<i>Period</i>	<i>Tonnage Handled (in Million Metric Tons)</i>	<i>Turn over Amount (Rupees in Crores)</i>
<i>2014-15</i>	<i>1.13</i>	<i>Rs.34.16</i>
<i>2015-16</i>	<i>0.58</i>	<i>Rs.12.09</i>
<i>2016-17</i>	<i>1.76</i>	<i>Rs.100.30</i>
<i>2017-18</i>	<i>1.96</i>	<i>Rs.119.95</i>
<i>2018-19</i>	<i>1.88</i>	<i>Rs.91.91</i>
<i>2019-20</i>	<i>1.80</i>	<i>Rs.84.85</i>
<i>2020-21</i>	<i>1.51</i>	<i>Rs.49.45</i>
<i>2021-22</i>	<i>0.75</i>	<i>Rs.17.86</i>
<i>2022-23</i>	<i>1.46</i>	<i>Rs.33.21 (Unaudited)</i>

4. It is represented on behalf of the Appellant, that the `Corporate Insolvency Resolution Process`, cannot be initiated, against the `Corporate Guarantor`, if `CIRP`, had already been initiated, against the `Principal

Borrower', by the same 'Financial Creditor', for the same 'set of Claim / Default'. Apart from that, the 'Amount', claimed to be in 'Default', by the 'Corporate Debtor', in Section 7 Application of the I & B Code, 2016', is an 'incorrect' one, and further that, the 'Corporate Debtor', has not committed 'any Default', on its own.

5. The Learned Counsel for the Appellant, takes a stand that the 'Adjudicating Authority' / 'Tribunal', had committed a mistake, in relying upon the 'Judgment', dated 24.11.2020, in the matter of State Bank of India v. Athena Ventures Private Ltd. (vide Comp. App (AT) (INS) No. 633 of 2020), to conclude that the 'National Company Law Appellate Tribunal', had overruled the decision in the matter of 'Piramal Enterprises Limited'.

6. The Learned Counsel for the Appellant, points out that the 'Deed of Guarantee', executed by the 'Corporate Debtor' / 'Corporate Guarantor', in favour of the 'Trustee', acting as an 'Agent', for the 'Consortium of Lenders', had limited the 'Liability', of this 'Corporate Debtor', to an extent of the 'value of Lands', provided as 'Security', to the 'Consortium of Lenders', for the 'Loans', availed by the 'Coastal Energen Private Ltd. ('Principal Borrower').

7. In this connection, the Learned Counsel for the Appellant, refers to Clause 22 of the 'Guarantee Deed', dated 05.07.2016, between the Respondent /

Corporate Debtor, to and in favour of 'SBICAP Trustee Company Limited', which proceeds, as under:

“ ...

22. This Guarantee shall be a continuing one and shall be valid and in full force till the Debt to Equity Ratio is reduced to 80:20 (eighty to twenty). The liability of the Guarantor under this Guarantee shall not exceed the value of the land (i) admeasuring in aggregate approximately 300.52 acres situate at Dalavaypuram and Vellam villages, Ottapidaram Taluk, Tuticorin District, in the State of Tamilnadu (worth Rs.200,00,00,000/- as on date of this Guarantee); and (ii) admeasuring in aggregate approximately 200 acres situate at Kumarreddiapuram, Vallaram, Kutcheri Dalavaypuram and Eeppodum villages, Ottapidaram Taluk, Tuticorin District, in the State of Tamilnadu (worth Rs.153,00,00,000/- as on date of this Guarantee).

... ”

8. According to the Appellant, the total Sum in 'Default', as on 20.09.2018 to the '1st Respondent / Bank / Financial Creditor', in the instant case, was Rs.2,932,69,53,916.57, that the 'Date of Default', was mentioned, in the main CP (IB) / 140 (CHE) / 2022, by the Bank, as 27.09.2018. Further the Accounts were classified as 'Non-performing Asset', on 31.03.2017. A 'Recall Notice', was issued on 20.09.2018, to the 'Coastal Energen Private Ltd.' and the 'Corporate Debtor', herein.

9. The Learned Counsel for the Appellant, brings to the notice of this 'Tribunal' that as per entry at Serial No. 2 in Part IV of Form 1, Filed by the 1st Respondent / Bank / Petitioner (Financial Creditor), before the 'Adjudicating Authority' / 'Tribunal', in CP (IB) / 140 (CHE) / 2022, 'the total Amount

claimed to be in 'Default' as on 31.08.2021, was Rs.3292,35,84,386/-, together with 'Interest' and 'other Charges', with effect from 01.09.2021, till its full realisation.

10. According to the Appellant, the aforesaid Sums, in 'Default', were the 'Outstanding Amounts', due by Coastal Energen and not by this 'Corporate Debtor'. Further, it is the plea of the 'Appellant', that as per the Claim of the 1st Respondent / Bank (Financial Creditor), the amount, to be in 'Default', is more than the 'Actual Amount', said to be in 'Default', as per the 'Deed of Guarantee', dated 05.07.2016, executed by the 'Corporate Debtor', to and in favour of SBICAP Trustee Company Limited, based on which, the impugned Section 7 Application of the I & B Code, 2016, was filed by the 1st Respondent / Bank in CP / IB / 140 (CHE) / 2022, on the File of the 'Adjudicating Authority' / 'Tribunal', and hence, the same is liable to be 'dismissed', for the reason that 'there exists a 'Discrepancy', in the Amount, Claimed to be in 'Default'.

11. The Learned Counsel for the Appellant, submits that the 'Corporate Debtor', had not availed any 'Loans', from any 'Financial Institutions', and their commitment as 'Guarantor', is only to the extent of 'Security', provided to 'Coastal Energen Pvt. Ltd.' and 'Coastal Energy Pvt. Ltd. Also that, the 'Corporate Debtor', is a 'Solvent Company', and is capable of servicing all its 'Debt' obligations as and when they arise.

12. The Learned Counsel for the Appellant, cites the Judgment dated 12.07.2022 of the Hon'ble Supreme Court of India, in 'Vidarbha Industries Power Limited v. Axis Bank Limited (vide Civil Appeal No. 4633 of 2021), wherein, it is observed and held that the 'Insolvency and Bankruptcy Code, 2016', was promulgated to tackle 'Issues of Insolvency and Bankruptcy', and is not a statute, to penalise 'Solvent Companies', who are capable of repaying the 'Debt' obligations. It was further, observed by the Hon'ble Supreme Court that initiating 'CIRP', against a Company for its 'temporary default', in repayment, is not a solution and will go against the 'intent' of the 'Code'.

13. The Learned Counsel for the Appellant, points out that the 'Adjudicating Authority' / 'Tribunal', is conferred with a 'Discretionary Power', either to 'Admit' or 'Reject', a 'Section 7 Application' (filed under the I & B Code, 2016), after appreciating all 'Question of Laws and Facts', involved in that particular case.

14. Added further, the Hon'ble Supreme Court of India, in 'Vidarbha Industries case', while examining the ambit of Section 7 (5) (a) of the I & B Code, 2016, had clarified that a 'Discretionary Power', is conferred upon the 'Tribunal', and stated that such 'Discretion', shall be used based on the facts and circumstances of a case, which warrants, such an exercise of 'Discretion'.

15. According to the Appellant, the 'Default', on the part of 'Coastal Energen', which has led to the filing of this 'Application', is primarily, because of the 'Defaults', on the part of 'TANGEDCO', in releasing 'Timely Payments', against the power supplied by 'Coastal Energen' and secondarily, because of the delay in sanction of the 'Loans', by the 'Consortium of Lenders', which resulted in the 'exponential rise', in the costs of the Project.

16. The Learned Counsel for the Appellant, takes a stand that with a view to cover the 'Additional Loan', sanctioned by the 'Banks', which required a 'Guarantee', the same was provided by the 'Respondent / Corporate Debtor'. In fact, the said 'Guarantee', provided by the 'Respondent / Corporate Debtor', formed the basis, on which, the instant Section 7 Petition, was filed by the 'Applicant' / 'Financial Creditor', before the 'Adjudicating Authority' / 'Tribunal'.

17. It is the contention of the Appellant, the 'Adjudicating Authority' / 'Tribunal', had failed to appreciate that the 'Guarantee', was furnished in favour of SBICAP Security Trustee for the benefit of all the 'Lenders' of 'Coastal Energen'. Therefore, even if the enforcement, of the 'Guarantee', has to be performed, it ought to have been done by the 'person', to whom the 'Guarantee', was issued, i.e. SBICAP Security Trustee and not by the 1st Respondent / Bank (Financial Creditor), who has initiated this 'Recovery Process', without any 'Notice', to the 'Guarantor'.

18. The Learned Counsel for the Appellant, contends that the reliance placed by the Respondent's side in regard to the Judgment of the Hon'ble Supreme Court of India, in Laxmi Pat Surana's case (vide Civil Appeal No. 2734 of 2020 dated 26.03.2021), is a misplaced one, since, in the said Judgment, it was not discussed as to whether, the same 'Financial Creditor', can initiate a 'Second Petition', against the 'Guarantor', for the same Amount, when a 'Corporate Insolvency Resolution Process', was already initiated against the 'Principal Borrower' for the same 'Debt' / 'Claim'.

19. The other contention of the Learned Counsel for the Appellant is that the issue of 'whether, the same Financial Creditor, can initiate a 'Second Petition', against the 'Guarantor', for the same Amount, when a 'Corporate Insolvency Resolution Process', was already initiated against the 'Principal Borrower' for the same 'Debt' / 'Claim', remains 'inconclusive' and is currently 'pending', before the Hon'ble Supreme Court of India, in the matter of Piramal Enterprises and further that the 'Question of Law', discussed in the Laxmi Pat Surana's case is different and the said Judgment does not overrule the Judgment, passed by the 'Appellate Tribunal', in the matter of 'Piramal Enterprises'.

20. According to the Appellant, in terms of the 'Third Amended and Re-stated Common Loan Agreement', dated 05.07.2016, a Sum of Rs.1139 Crores, was sanctioned additionally by the 'Lender Consortium and the Guarantee', was provided by the Corporate Debtor in regard to the 'Additional Loans', availed

by the 'Principal Borrower', Viz. Coastal Energen Private Limited.

21. The Learned Counsel for the Appellant, points out that the 'Second Respondent / Resolution Professional, has conducted '9 Committee of Creditors' Meetings, and the 'Committee of Creditors', are in the process of 'negotiating / deliberating on the 'Resolution Plans', and serious 'prejudice', will be caused, to the 'Corporate Debtor', if further action, is taken in the matter, through a 'Resolution Plan process' or if the 'Corporate Debtor', is forced to undergo 'Liquidation', for 'no Defaults', committed by it.

1st Respondent / Bank's Submissions:

22. The Learned Counsel for the 1st Respondent / Bank (Financial Creditor), contends that the Respondent / Corporate Debtor, (as per the 'Application', filed under Section 7 of the I & B Code, 2016), is liable to pay an 'amount of Rs.3292,35,84,386/-', together with 'Interest', and other 'Charges', payable from 01.09.2021, till 'full realisation' (the 'Statement of Account', indicating the 'Debt', is at Vol. 5, Page 788 of the 'Appeal Paper Book').

23. Furthermore, the 'Principal Borrower', Viz 'Coastal Energen Private Ltd', as on December 2022, is liable to pay a total amount of Rs.4,101.28 Crores to the Respondent and a total amount of Rs.11,449 Crores to the 'Consortium of Lenders'.

24. It is represented on behalf of the 1st Respondent / Bank (Financial Creditor), the 'Principal Borrower's Account' ('M/s. Coastal Energen Private Ltd.'), was classified as 'Non-performing Account', and that the 'Recall Notice', was issued on 20.09.2018 (vide at Page 226 of Vol II of the 'Appellant's Paper Book').

25. It is the stand of the 1st Respondent / Bank (Financial Creditor) that Section 7 Application of the I & B Code, 2016, to initiate 'CIRP', was filed on 17.09.2021, before the 'Adjudicating Authority' / 'Tribunal'.

26. As a matter of fact, the 'Corporate Debtor' / 'Fossil Logistics Private Limited', is the 'Corporate Guarantor', for the 'Loan', availed by 'Coastal Energen Private Ltd.'. An 'Order of Admission', was passed on 04.02.2022 in IBA No. 757 of 2019, against the 'Principal Borrower' ('Coastal Energen Private Ltd.'), by the 'Adjudicating Authority' / 'Tribunal'.

27. The Learned Counsel for the 1st Respondent / Bank, refers to Section 6 of the I & B Code, 2016, under the caption 'Persons who may initiate corporate insolvency resolution process', which reads as under:

“Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner, as provided under this Chapter.”

28. The Learned Counsel for the 1st Respondent / Bank, takes a stand that there is absolutely no bar, envisaged under I & B Code, 2016, that only certain 'Financial Creditors' / 'Class of Financial Creditors', who have not initiated 'Corporate Insolvency Resolution Process', can file an 'Application', against the 'Corporate Guarantor'.

29. According to the 1st Respondent / Bank the 'Liability' of the 'Guarantor', is 'co-extensive' to that of the 'Principal Borrower', and that 'Corporate Insolvency Resolution Process', can be initiated simultaneously against both.

30. The Learned Counsel for the 1st Respondent / Bank, relies upon the Judgment of this 'Tribunal', dated 16.05.2023 in Naresh Kumar Aggarwal v. CFM Asset Reconstruction Private Limited, reported in MANU / NL / 0458 / 2023 (Comp. App (AT) (INS) No. 470 / 2023), wherein, at Paragraph Nos. 14 to 16, it is observed as under:

14. "Now, we come to last submission of learned counsel for the Appellant that application under Section 7 having admitted against the Principal Borrower, it was not open for the Respondent No.1 to file application against the Corporate Guarantor since two simultaneous proceedings under Section 7 cannot be proceeded with. Learned counsel for the Appellant has placed reliance on judgment of this Tribunal in "MANU/NL/0003/2019, Dr. Vishnu Kumar Agarwal vs. Piramal Enterprises Ltd.", where in Para 32 following observations have been made by this Tribunal:

"32. There is no bar in the 'I&B Code' for filing simultaneously two applications under Section 7 against the 'Principal Borrower' as well as the 'Corporate Guarantor(s)' or against both the 'Guarantors'. However, once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' or 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the

other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower'). Further, though there is a provision to file joint application under Section 7 by the 'Financial Creditors', no application can be filed by the 'Financial Creditor' against two or more 'Corporate Debtors' on the ground of joint liability ('Principal Borrower' and one 'Corporate Guarantor', or 'Principal Borrower' or two 'Corporate Guarantors' or one 'Corporate Guarantor' and other 'Corporate Guarantor'), till it is shown that the 'Corporate Debtors' combinedly are joint venture company.”

15. The above judgment was delivered by this Tribunal on 08.01.2019. We may notice a subsequent judgment of Hon’ble Supreme Court in “Laxmi Pat Surana vs. Union of India & Anr., MANU/SC/0221/2021 : (2021) 8 SCC 481”. The Hon’ble Supreme Court had occasion to consider the right to proceed against Guarantor in aforesaid case. Hon’ble Supreme Court has held in the above judgment that 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 as well as the Corporate Guarantor. The Hon’ble Supreme Court held that right or cause of action would enure to the lender to proceed against the Principal Borrower, as well as the guarantor in equal measure referred to in Para 23, which is to the following effect:

“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) 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.”

16. The scheme of I&B Code, 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).”

31. The Learned Counsel for the 1st Respondent / Bank, adverts to the Judgment of this `Tribunal', dated 24.11.2020 (in the matter of State Bank of India v. Athena Energy Ventures Private Limited (vide Comp. App (AT) (INS) No. 633 of 2020), wherein, at Paragraph Nos. 15, 16 & 19, it is observed as under:

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

16. We find substance in the arguments being made by the learned Counsel for Appellant which are in tune with the Report of ILC. The ILC in para - 7.5 rightly referred to subsequent Judgement of "Edelweiss Asset Reconstruction Company Ltd. v. Sachet Infrastructure Ltd. and Ors." dated 20th September, 2019 which permitted simultaneously initiation of CIRPs against Principal Borrower and its Corporate Guarantors. In that matter Judgment in the matter of Pirmal was relied on but the larger Bench mooted the idea of group Corporate Insolvency Resolution Process in para - 34 of the Judgement. The ILC thus rightly observed that provisions are there in the form of Section 60(2) and (3) and no amendment or legal changes were required at the moment. We are also of the view that simultaneously remedy is central to a contract of guarantee and where Principal Borrower and surety are undergoing CIRP, the Creditor should be able to file claims in CIRP of both of them. The IBC does not prevent this. We are unable to agree with the arguments of Learned Counsel for Respondent that when for same debt claim is made in CIRP against Borrower, in the CIRP against Guarantor the amount must be said to be not due or not payable in law. Under the Contract of Guarantee, it is only when the Creditor would receive amount, the question of no more due or adjustment would arise. It would be a matter of adjustment when the Creditor receives debt due from the Borrower/Guarantor in the respective CIRP that the same should be taken note of and adjusted in the other CIRP. This can be conveniently done, more so when IRP/RP in both the CIRP is same. Insolvency and Bankruptcy Board of India may have to lay down regulations to guide IRP/RPs in this regard.

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.''

32. The Learned Counsel for the 1st Respondent / Bank, falls back upon the Judgment dated 26.03.2021 of the Hon'ble Supreme Court of India, in Laxmi Pat Surana v. Union Bank of India (vide Civil Appeal No. 2734 of 2020), reported in MANU / SC / 0221 / 2021, wherein, at Paragraph Nos. 18 to 20 & 41, it is observed as under:

18. "The term "financial creditor" has been defined in Section 5(7) read with expression "Creditor" in Section 3(10) of the Code 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) of the Code 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 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.

19. 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.

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

41.The financial creditor has not only the right to recover the outstanding dues by filing a suit, but also has a right to initiate resolution process against the corporate person (being a corporate debtor) whose liability is coextensive with that of the principal borrower and more so when it activates from the written acknowledgment of liability and failure of both to discharge that liability.''

33. The Learned Counsel for the 1st Respondent / Bank, seeks in aid of the Judgment, dated 18.08.2009 of the Hon'ble Supreme Court of India in Industrial Investment Bank of India Ltd. v. Bishwanath Jhunhunwala (vide Civil Appeal No. 4613 of 2000), reported in 2009, 9 SCC 478, wherein, at Paragraph Nos. 14, 15, 18 & 20, it is observed as under:

14. ``Mr. Gupta, in support of his submission, placed reliance on a judgment of this Court in Bank of Bihar Ltd. v. Dr. Damodar Prasad & Another (1969) 1 SCR 620, AIR p. 298, Para 5, in that case, the court referred to a judgment in Lachhman Joharmal v. Bapu Khandu (1869) 6 Bom HCR 241, in which the Division Bench of the Bombay High Court, held as under (Lachhman case, Bom HCR p. 242):

"The court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt."

15. *This Court, while approving the said judgment, observed that, (Damodar Prasad case (1969) 1 SCR 620, AIR p. 299, para 6);*

6. ``... *The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down.*

18. *The term "co-extensive" has been defined in the celebrated book of Pollock & Mulla on Indian Contract and Specific Relief Act, 10th Edition, at page 728 as under:*

"Co-extensive. - Surety's liability is co-extensive with that of the principal debtor.

A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued."

20. *In Halsbury's Laws of England, 4th Edition, Vol. 20, paragraph 159 at page 87 it has been observed that;*

159. *".....It is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for."*

34. The Learned Counsel for the 1st Respondent / Bank, refers to the Judgment dated 06.09.2022, of the Hon'ble Supreme Court of India in the matter of K. Paramasivam v. Karur Vysya Bank Limited and Another, reported in 2022, SCC OnLine SC 1163 (vide Civil Appeal No. 9286 of 2019), wherein, at Paragraph No. 23, it is observed as under:

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.’’

35. The Learned Counsel for the 1st Respondent / Bank, points out that in Clause 22 of the ‘Deed of Guarantee’ dated 05.07.2016 (vide Vol. I, Page 145 of the ‘Appeal Paper Book’), executed by ‘Fossil Logistics Private Limited’ (‘Guarantor’), to and in favour of ‘SBICAP Trustee Company Ltd.’, wherein, the ‘Corporate Debtor’, had ‘unequivocally and unconditionally’, guaranteed to discharge and fulfill the obligations of the ‘Guarantee’.

36. The Learned Counsel for the 1st Respondent / Bank, adverts to Clause 3 & 5 of the ‘Deed of Guarantee’, dated 05.07.2016, executed by the ‘Guarantor’ (‘Corporate Debtor’), wherein, it is mentioned that the ‘Guarantor’, i.e. ‘the Corporate Debtor’, shall ‘Indemnify’ and keep ‘Indemnified’, the ‘Secured Party’, Viz. the 1st Respondent / Bank, against ‘Losses’, ‘Damages’, ‘Costs’, ‘Claims’, and ‘Expenses’, whatsoever, which the ‘Secured Parties’, would suffer.

37. The clear cut stand of the 1st Respondent / Bank is that the ‘Corporate Debtor’, being the ‘Corporate Guarantor’, in the instant case, has defaulted in its

obligations, under the 'Corporate Guarantee'. Furthermore, the 'Corporate Debtor' / 'Guarantor', having not repaid / fulfilled the 'obligations' of the 'Coastal Energen Private Ltd.', is deemed to have committed 'Default'.

38. As a matter of fact, the Form No. CHG – 1, dated 11.08.2016 (vide Vol. VI of Appellant's Appeal Paper Book), submitted by the 'Corporate Debtor', before the 'Registrar of Companies' (pursuant to Section 77, 78, 79 & Section 384 r/w. 77, 78, 79 of the Companies Act, 2013 & Rule 3 (1) of the Companies (Registration of Charges) Rules, 2014, and the 'Indenture' of the 'Simple Mortgage', dated 11.08.2016 (vide Registered Doc. No. 1819 of 2016) – at Page 1018 of Vol. VI of Appeal Paper Book), will substantiate that the 'Charge', was created for the 'entire Debt', and not for a 'limited portion of the Debt'.

39. The Learned Counsel for the 1st Respondent / Bank, adverts to Form No. CHG – 1, dated 11.08.2016 and 'Indenture' of 'Simple Mortgage', dated 11.08.2016 (vide Registered Doc. No. 1820 of 2016 at Page 1053 – Vol. VII of the Appellant's Appeal Paper Book), will substantiate that the 'Charge', was created for the 'whole Debt', and not for a 'limited portion of the Debt', the 'relevant crucial Clause 3', in 'Simple Mortgage', being 'Clause 1.1 – Additional Mortgage Debt', 'Clause 3 Schedule 1' – 'State Bank of India'.

40. The Learned Counsel for the 1st Respondent / Bank, points out that the 'Principal Borrower' ('Coastal Energen Private Ltd.' – Respondent in IBA No.

757 / 2019, filed by the State Bank of India as 'Applicant', before the 'Adjudicating Authority' / 'NCLT', Chennai Bench), in its submissions (vide Paragraph 18), relating to the 'reasons', for the 'delay in completion of OTS' (vide Vol VI at Pages 981, 982, 983 & 986 of the Appellant's Appeal Paper Book, at Paragraph 18, 19, 23 & 33, had observed the following:

18. "It is submitted that the Applicant is well aware of the fact that the OTS has been obtained from 15 out of 17 banks in the Consortium. It is submitted that the Applicant is also aware of the fact that the OTS has been accepted by 93% of the Consortium and pursuant to the same, the Respondent herein was in the process of entering into a formal agreement for completion of OTS. It is submitted that when the Respondent was in the process of arranging funding from the two investors as mentioned in the earlier paragraphs.

19. It is submitted that as a well-known fact, the unprecedented COVID- 19 pandemic, has caused huge disruptions to the world economy and that the funding from the aforesaid investors were hugely affected as a result of the pandemic. It is submitted that the investors who have accepted to fund the OTS are foreign based investors and it would not be out of place to mention that the world economy has been severely affected by Covid 19 pandemic. It is submitted that one of the investors, Deutsche Bank, one of the leading banks in Europe has released their Interim Report as of Jan 2020, wherein the effect of Covid-19 pandemic on the global market and economy is explained in detail.

23. It is submitted that one of the major contributing factors for the defaults on the part of the Respondent is that there are receivables to the credit of the Respondent from Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) to the tune of about Rs.1,050 Crores. Copy of the statement maintained by the Respondent is annexed herein as Annexure – 14.

33. It is submitted that a few operational creditors of the Respondent herein had approached this Hon'ble Tribunal on occasions and had preferred Applications under Section 9 of the Insolvency and Bankruptcy Code, 2016. It is submitted that the Respondent herein had provided a settlement schedule to the said operational creditors and had duly adhered to the same."

41. The Learned Counsel for the 1st Respondent / Bank, submits that while the `exposure of the `1st Respondent / Bank`, is `more than Rs.4,000 Crores`, the `exposure` of the `Financial Creditors`, is about Rs.11,000 Crores. Furthermore, the `Corporate Insolvency and Resolution Process`, is not only `beneficial`, to the `Creditors`, at large, but also to the `Corporate Debtor`, to `Revive`. In fact, the Appellant has filed the instant `Appeal`, to procrastinate the `Resolution`, which ought not to be encouraged by this `Tribunal`.

42. While concluding, the Learned Counsel for the 1st Respondent / Bank, submits that the instant `Appeal`, filed by the Appellant, is neither `maintainable in Law` nor on `facts`. Also, there cannot be any `plausible defence`, for this `Tribunal`, to even consider, taking back, the `Order` of initiation of `CIRP`, against the `Corporate Debtor`, and hence, prays for `dismissal` of the instant `Appeal`.

2nd Respondent / Resolution Professional's Pleas:

43. The Learned Counsel for the 2nd Respondent / Resolution Professional, contends that as on date, the settled Law is that there is no embargo, under the I & B Code, 2016, to initiate `CIRP` proceedings (under Section 7 of the I & B Code, 2016), by a `Financial Creditor`, against the `Corporate Debtor` and the `Corporate Guarantor`, in a simultaneous fashion.

44. The Learned Counsel for the 2nd Respondent, refers to the decision of the Hon'ble Supreme Court of India in Laxmi Pat Surana's case, reported in (2021) ibclaw.in 53 SC, wherein, at Paragraph Nos. 18 & 38, it is observed as under:

18. ``The term "financial creditor" has been defined in Section 5(7) read with expression "Creditor" in Section 3(10) of the Code 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) of the Code 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 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.

38. In the present case, the NCLT as well as the NCLAT have adverted to the acknowledgments by the principal borrower as well as the corporate guarantor – corporate debtor after declaration of NPA from time to time and lastly on 08.12.2018. The fact that acknowledgment within the limitation period was only by the principal borrower and not the guarantor, would not absolve the guarantor of its liability flowing from the letter of guarantee and memorandum of mortgage. The liability of the guarantor being coextensive with the principal borrower under Section 128 of the Contract Act, it triggers the moment principal borrower commits default in paying the acknowledged debt. This is a legal fiction. Such liability of the guarantor would flow from the guarantee deed and memorandum of mortgage, unless it expressly provides to the contrary.”

45. The Learned Counsel for the 2nd Respondent, adverts to the Judgment of this 'Tribunal' dated 08.01.2019, in the matter of Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd. (vide Comp. App (AT) (INS) Nos. 346 & 347 of 2018), wherein at Paragraph No. 32, it is observed as under:

32. "There is no bar in the 'I & B Code' for filing simultaneously two applications under Section 7 against the 'Principal Borrower' as well as the 'Corporate Guarantor(s)' or against both the 'Guarantors'. However, once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' or 'Corporate Guarantor(s)', second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower'). Further, though there is a provision to file joint application under Section 7 by the 'Financial Creditors', no application can be filed by the 'Financial Creditor' against two or more 'Corporate Debtors', on the ground of joint liability ('Principal Borrower' and one 'Corporate Guarantor', or 'Principal Borrower' or two 'Corporate Guarantors' or one 'Corporate Guarantor' and other 'Corporate Guarantor'), till it is shown that the 'Corporate Debtors', combinedly are joint venture Company."

46. The Learned Counsel for the 2nd Respondent, cites the Judgment dated 25.04.2022 of this 'Tribunal', in S. Elangovan v. ASREC (India) Ltd. & Anr. (Comp. App (AT) (CH) (INS) 102 / 2022), wherein at Paragraph Nos. 47 & 48, it is observed as under:

47. "In the decision of Hon'ble Supreme Court in Central Bank of India and Others V C.L. Vimala and Others, etc., decided on 28.04.2015, reported in AIR (SCW) 3240, wherein it is observed that the 'liability' of the 'Guarantor' is coextensive with that of 'Principal Debtor', unless it is otherwise provided by the 'Contract'. It is the prerogative of the 'Creditor' alone to move against the 'Principal Debtor' or the 'Surety'. 'Clauses' in the 'Letter of Guarantee' are binding on the 'Guarantor'. Ignorance is not a valid ground."

48. It is relevantly pointed out that the term 'Guarantee' is a continuous one and therefore, the 'right to sue accrues' when the 'Guarantee Agreement' was invoked and the date when the 'Corporate Debtor' had failed to discharge its obligation, in terms of 'Guarantee'.

and ultimately, the 'Order', initiating 'CIRP', against the 'Guarantor' / 'Corporate Debtor', was upheld.

Corporate Debtor:

47. Section 3(8) of the I & B Code, 2016, defines 'Corporate Debtor', meaning 'a corporate person who owes a debt to any person'.

Debt:

48. 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:

49. Section 3(12) of the Code, 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 repaid by the debtor or the corporate debtor, as the case may be'.

Corporate Guarantor:

50. Section 5-A of the 'Code', defines 'corporate guarantor', meaning 'a corporate person who is the surety in a contract of guarantee to a corporate debtor'.

Financial Creditor:

51. The term 'Financial Creditor', is defined under Section 5(7) of the 'Code', meaning 'any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to'.

Financial Debt:

52. The term 'Financial Debt', is defined under Section 5 (8) of the I & B Code, 2016, which includes 'Debt', owed to the 'Creditor', by both the 'Principal Borrower' and the 'Guarantor' / 'Surety', as the case may be.

Section 7 of the I & B Code, 2016:

53. Undoubtedly, the 'right', to 'apply', under Section 7 of the I & B Code, 2016, accrues to a 'Person' / 'Financial Creditor', when the 'Code', came in to force.

Limited Role:

54. It must be borne in mind that it is not the 'Property', which is at the base of the I & B Code, 2016. In reality, it is the 'Liquidity', which is the basis for triggering the 'Corporate Insolvency Resolution Process'.

55. It is relevantly pointed out that an 'Adjudicating Authority' / 'Tribunal'. is having a limited / restricted role, to determine, whether the 'Application', is 'complete' and whether, there is 'any Debt' or 'Default'.

Adjudicating Authority / Tribunal:

56. An 'Adjudicating Authority' / 'National Company Law Tribunal', in a 'Proceeding', under Section 7 of the I & B Code, 2016, is not deciding a 'Money Claim' or 'Suit'. For triggering the 'Insolvency Resolution Process', an 'Adjudicating Authority' / 'Tribunal', is not to decide the 'Claim' of 'Interest'.

57. The 'proceedings', under the I & B Code, 2016 are 'summary in character'. In fact, the said proceedings, are not like 'Civil Litigation', to be determined by a 'Competent Court of Law'. Ofcourse, the 'Corporate Debtor', is entitled to point out in a 'CIRP' proceedings, before the 'Adjudicating Authority' / 'Tribunal', that the 'Default', has not occurred. A 'Debt', may not be due, if it is 'not payable in Law' or 'on facts'.

Proof of Debt & Default:

58. In order to maintain an 'Application', under Section 7 of the I & B Code, 2016, the Petitioner, before the 'Adjudicating Authority' / 'Tribunal', must be able to establish the 'Existence of Debt', which is due, from a 'Corporate Debtor'.

59. It is vital that the 'Stakeholders' / 'Parties', in IBC Proceedings, are not permitted, to abuse, the legal process, by indulging in dilatory tactics. No wonder, the 'Speed', is the essence of I & B Code, 2016. For an 'Admission' of an 'Application / Petition', in a given 'Legal Proceedings', initiated by the 'Petitioner' / 'Financial Creditor' (u/n 7 of the 'Code'), the two qualifications are required to be seen by the 'Adjudicating Authority' / 'Tribunal' (1) 'Existence of Debt' and (2) 'Date of Default'.

Guarantor's Liability:

60. The 'Liability' of a 'Guarantor', is 'coextensive', with the 'Liability' of the 'Principal Debtor'. In 'Law', the 'Creditor', need not necessarily exhaust the remedy available, against the 'Guarantor', whether the 'Principal Borrower', pays the 'Debt' or not.

Implied Promise:

61. As per Section 145 of the Indian Contract Act, 1872, in every 'Contract of Guarantee', there is an 'Implied Promise', by the 'Principal Debtor', to 'Indemnify' the 'Surety'.

62. Failure by a 'Guarantor', to pay the 'Financial Creditor', when the 'Principal Debt Sum', is demanded, will clearly amount to 'Default', as per definition Section 3(12) of the I & B Code, 2016.

63. A 'Financial Creditor' who has a 'Guarantee' on the 'Debt Due', can initiate 'Proceedings', under Section 7 of the 'Code', against the Guarantor's for failure to 'Repay the Money Borrowed by a Principal Borrower'.

No prohibition:

64. There is no 'Law', which prohibits the 'Creditor', to proceed, against the 'Principal Borrower' and the 'Guarantor', independently. There is no two opinion of a prime fact that the 'Liability of a Guarantor', is 'coextensive', with the 'Liability' of the Principal Debtor'.

65. This 'Tribunal', has heard the Learned Counsels, appearing for the 'Parties', and noticed their contentions.

Discussions:

66. Admittedly, in the instant case on hand, the 'Loans', were given by the 'Financial Creditor' / 'Bank' to the 'Principal Borrower' ('Coastal Energen Private Limited') and the 'Corporate Debtor' ('Fossil Logistics Private Limited'), is the 'Corporate Guarantor', for the 'Loans', availed by the 'Coastal Energen Private Limited', as against the 'Coastal Energen Private Limited' / 'Principal Borrower', an 'Application IBA No. 757 / 2019, for initiating 'CIRP', was filed by the 1st Respondent / Bank, before the 'Adjudicating Authority' / 'Tribunal', and an 'Order of Admission', was passed on 04.02.2022 and later, as against the above Order, the Company Appeal (AT) (CH) (INS) No. 89 of 2022, filed by the 'Shareholder Cum Investor', before this 'Appellate Tribunal', came to be dismissed.

67. In present Comp. App (AT) (CH) (INS.) No. 284 of 2023, the Appellant is the 'Suspended Director' of 'Fossil Logistics Private Limited' ('Corporate Debtor'), being the 'Corporate Guarantor', for the 'Loans', availed by 'M/s. Coastal Energen Private Limited' ('Principal Borrower').

68. A perusal of the contents of Application (filed by the 1st Respondent / Bank, under Section 7 of the I & B Code, 2016), against the 'Corporate Debtor' / 'Guarantor', the amount mentioned to be in 'Default', was Rs.2,932,69,53,916.57, as on 27.09.2018.

69. The 1st Respondent / Bank, in its Section 7 Application (before the 'Adjudicating Authority' / 'National Company Law Tribunal', Division Bench – II, Chennai), in CP / IB / 140 (CHE) 2022, had claimed a Sum of Rs.3292,35,84,386/- (Rupees Three Thousand Two Hundred Ninety Two Crores Thirty Five Lakhs Eighty Four Thousand Three Hundred and Eighty Six only), along with 'Interest' and other 'Charges', payable from 01.09.2021 till full realisation (vide Statement of Account of the Bank in Vol. V of the Appellant's Appeal Paper Book at Page 788).

70. It transpires that the Account of the 'Principal Borrower' ('M/s. Coastal Energen Private Limited') was classified as 'Non-performing Asset' on 31.03.2017, and a 'Recall Notice', on 20.09.2018, was issued by the 1st Respondent / Bank (Financial Creditor) to the 'Corporate Debtor' (Fossil Logistics Private Limited), being the 'Guarantor', in respect of the 'Loan', availed by the 'Principal Borrower' ('M/s. Coastal Energen Private Limited'). In terms of Section 128 of the Indian Contract Act, 1872, the 'Corporate Debtor', being the 'Guarantor', in respect of the 'Loan', availed by M/s. Coastal Energen Private Limited ('Principal Borrower'), is liable to pay the 'Due' amounts.

71. In the present 'Appeal' on hand, before this 'Tribunal, although, a 'plea', is taken by the 'Appellant', that 'Corporate Insolvency Resolution Process', cannot be initiated against the 'Guarantor', if 'CIRP', against the 'Principal

Borrower', was already initiated by the same 'Financial Creditor', for the same 'set of Claim' / 'Default', this 'Tribunal', unhesitatingly points out that the 'Liability' of the 'Corporate Debtor' / 'Guarantor', is 'coextensive' and that the 'Corporate Debtor', having executed a 'Deed of Guarantee' dated 05.07.2016, to and in favour of the '1st Respondent / Bank (Financial Creditor)', is bound to act, as per terms and conditions of the 'Guarantee'. In reality, the 'Corporate Debtor' / 'Guarantor', having not 'repaid' the 'obligations' of the 'Principal Borrower' ('M/s. Coastal Energen Private Ltd.') in 'Law', is deemed to have committed 'Default'.

72. In the instant 'Appeal', as per Clause 22 of the 'Deed of Guarantee', dated 05.07.2016, executed by the 'Corporate Debtor / Corporate Guarantor' ('Fossil Logistics Private Ltd.') and the 'SBICAP Trustee Company Ltd.', the 'Respondent / Corporate Debtor ('Corporate Guarantor), in unequivocal terms, had guaranteed to discharge and fulfill the obligations of the 'Guarantee'.

73. In this connection, it cannot be brushed aside that Clause 3 & 5 of the 'Deed of Guarantee', dated 05.07.2016, unerringly, mentions that the 'Guarantor' ('Corporate Debtor'), shall 'Indemnify', and keep indemnified the 'Secured Parties' Viz. '1st Respondent / Bank', against 'Losses', 'Damages', 'Costs', 'Claims', and 'Expenses', whatsoever which the 'Secured Parties', would suffer.

74. To put it precisely and succinctly in Law, as on date, there is no 'embargo', under the I & B Code, 2016, to initiate 'simultaneous / independent proceedings', under Section 7 of the I & B Code, 2016, by a 'Financial Creditor', against the 'Principal Borrower' and the 'Corporate Debtor' / 'Guarantor', in the considered opinion of this 'Tribunal'.

75. In terms of Section 7(4) of the I & B Code, 2016, an 'Adjudicating Authority' / 'Tribunal', is to ascertain an 'Existence of a Debt', within 14 days. In reality, as per Section 7(5) (a) of the Code, an 'Adjudicating Authority' / 'Tribunal', is either to admit an 'Application' or 'reject', the 'Application', as per Section 7(5)(b) of the 'Code'.

76. Ordinarily, the 'Adjudicating Authority' / 'Tribunal', is to exercise its 'Discretion', in admitting an 'Application', as per Section 7 and initiate 'Corporate Insolvency Resolution Process', on satisfaction of the existing 'Financial Debt and Default', on the part of 'Corporate Debtor', in payment of the 'Debt'. An 'Adjudicating Authority' / 'Tribunal', cannot exercise its 'Discretionary Power', as per Section 7(5)(a) of the 'Code', in an 'arbitrary' and 'whimsical' manner.

77. In view of the foregoing detailed qualitative and quantitative discussions, this 'Tribunal', on a careful consideration of respective contentions, advanced on either side, and considering the facts and surrounding circumstances of the

instant case, in a holistic fashion, comes to a consequent conclusion that the 'observations', made by the 'Adjudicating Authority' / 'National Company Law Tribunal', Division Bench - II, Chennai, in the 'Impugned Order', dated 15.06.2023 in CP / IB / 140 (CHE) 2022 (Filed by the 'Respondent No. 1 / Petitioner / State Bank of India (Financial Creditor)', under Section 7 of the I & B Code, 2016, r/w. Rule 4 of the I & B (AAA) Rules, 2016), that it 'does not find any merit', in the contention of the 'Corporate Debtor' ('Corporate Guarantor') that 'Corporate Insolvency Resolution Process', cannot be initiated against the 'Guarantor', if 'CIRP', against the 'Principal Borrower', was already initiated, by the same 'Financial Creditor' for the same 'set of Claim' / 'Default', are free from any 'Legal Infirmities'. Viewed in that perspective, the 'Impugned Order' of the 'Adjudicating Authority' / 'Tribunal', in 'admitting' the 'Section 7 Application' of the '1st Respondent / Bank', for initiating 'Corporate Insolvency Resolution Process', against the 'Corporate Debtor' ('Guarantor'), is perfectly in order. Accordingly, the instant 'Appeal' sans merits and it fails.

Conclusion:

In fine, the instant Comp. App (AT) (CH) (INS.) No. 284 / 2023 is Dismissed. No costs. The 'Impugned Order', dated 15.06.2023, in CP (IB) / 140 (CHE) / 2022, passed by the 'Adjudicating Authority' / 'NCLT', Division Bench – II, Chennai, is affirmed, by this 'Tribunal', ofcourse, for the reasons,

ascribed in the present 'Appeal'. The connected pending IA No. 867 / 2023 is Closed.

[Justice M. Venugopal]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

18 / 04 / 2024

SR / TM