

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1541 of 2022
& I.A. No. 4921, 4922 of 2022 & 3112 , 3255, 3263 of 2023

(Arising out of the Order dated 01.12.2022 passed by the National Company Law Tribunal, Indore Bench in TP 12 of 2019 [CP (IB) 10 of 2019])

IN THE MATTER OF:

Shri Prem Prakash Bansal

Ex- Director of M/s. B.P. Bansal Agritech Private Limited

Residing at: 401, Rajanigandha Apartment, Green Gardon, City Centra, Gird, R.K. Puri,
Gwalior Madhya Pradesh 474011.

...Appellant

Versus

1. M/s. IDBI Bank Limited

NPA Management Group,
IDBI Complex , Near Lal Bungalows,
Ahmedabad, Gujarat.

...Respondent No. 1

2. Shri Keyur Shah

Interim Resolution Professionals of
M/s. B.P. Bansal Agritech Private Limited
408, ChitraRath Complex, B/h. President Hotel,
Off C.G. Road, Navrangpur,
Ahmedabad 380009.

...Respondent No. 2

Present

For Appellant:

Mr. Krishnendu Datta, Sr. Adv. with Mr. Rajat Sinha, Adv.

For Respondents:

Ms. Shivangi Ghosh, Mr. Rajendra Beniwal,
Mr. Saksham Solanki & Mr. Vishal Rawal, for R-1.

Ms. Shilpi Chowdhry, for R-2/ RP.

Mr. Harshit Khare & Mr. Prafful Saini, for
Intervenor, SBI, Kotak, UVARC.

J U D G E M E N T
(10.04.2024)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present Appeal has been filed by the Appellant herein i.e., Shri Prem Prakash Bansal Ex- Director of M/s. B.P Bansal Agritech Private Limited (in short '**Corporate Debtor**') in Company Appeal (AT) (Insolvency) No. 1541 of 2022 against the Impugned Order dated 01.12.2022 passed by the National Company Law Tribunal, Indore Bench (in short '**Adjudicating Authority**') in TP 12 of 2019 [CP (IB) 10 of 2019] .
2. M/s IDBI Bank Limited is the Respondent No. 1 and Mr. Keyur Shah is the Respondent No. 2 who is the Interim Resolution Professional of the Corporate Debtor who is Respondent No. 2 herein.
3. Heard the Counsel for the Parties and perused the records made available including the cited judgements.
4. It has been submitted that the Corporate Debtor was incorporated on 17.05.2012 and Corporate Debtor was engaged in the business of millers for which the Appellant has set up mills for milling wheat, gran and other grains and also engaged in the business of flours of all kinds.

5. It has been submitted that between 20.03.2014 to 13.04.2017, M/s. BP. Food Products Private Limited (in short '**Principal Borrower**') was granted various financial facilities worth Rs. 181.29 Crores by consortium banks comprising of IDBI Bank Ltd., State Bank of India, RBL Bank Limited (who later assigned loan to M/s. UVARC) and Kotak Mahindra Bank Limited (in short '**Consortium of Lenders**').

6. It has been stated that against the said financial facilities, certain securities were executed and for this process, a security trustee agreement dated 10.06.2016 was executed between the Consortium of Lenders and IDBI Trusteeship Services Limited (in short '**Trusteeship**').

7. It has been informed that deed of guarantee dated 10.06.2016 was executed between the Corporate Debtor and the Trusteeship to secure the loan taken up the principal borrower from the Consortium of Lenders.

8. It has been submitted that the accounts of principal borrowers became over due on account of default and was declared NPA on 29.10.2019 therefore the Respondent No. 1 issued notice dated 21.03.2018 to the principal borrower recalling credit facilities and called upon him to discharge the entire liability.

9. The Appellant further stated that a notice dated 04.04.2018 was also issued by the Respondent No. 1 to the Corporate Debtor invoking the corporate guarantee dated 10.06.2016.

10. It is noted that after following due process, the principal borrower was admitted into the Corporate Insolvency Resolution Process (in short '**CIRP**') on 08.08.2018 based on an application filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (in short '**Code**') filed by an Operational Creditor - M/s. Mansarovar Agro Sacks Private Limited.

11. The Respondent No. 1 filed an application under Section 7 of the Code against the Corporate Debtor on 16.11.2018 for Rs. 48,16,75,872/- pertaining to fund facility and Rs. 1,34,15,589/- pertaining to bank guarantee before the Adjudicating Authority.

12. The Appellant admitted having given the corporate guarantee against the financial facilities obtained by the principal borrower after approval of the same by the board of director of the Corporate Debtor. However, the Appellant submitted that the statutory approval as required under Section 186 of the Companies Act, 2013 was not obtained by the Corporate Debtor. The Appellant also admitted that corporate guarantee was executed on 10.06.2016 between the Corporate Debtor and the trusteeship.

13. The Appellant submitted that in terms of Section 186 of the Companies Act, 2013, No company can give loan to any person or body corporate or give guarantee or provide security in connection with loan exceeding 60% of its paid up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, which is more

14. It is the case of the Appellant that independent auditors during audit for the financial year 2016-17, recorded that the corporate guarantee given by the Corporate Debtor to the tune of Rs. 181.29 Crores to the principal borrower has been given in contravention to Section 186 of the Companies Act, 2013.

15. The Appellant also submitted that as per the financial statement of 2016-17, cumulative amount of paid up capital, free reserve and security premium of the Corporate Debtor was only Rs. 6,80,44,959/- and cumulative amount of the free reserves and securities premium of the Corporate Debtor was only Rs. 5,79,43,959/- and therefore, the Corporate Debtor could have furnish the corporate guarantee of only Rs. 6.80 Crores (approximately) against the corporate guarantees given by the Corporate Debtor of Rs. 181.29 Crores.

16. The Appellant pleaded that based on Independent Auditor Report, the shareholders of the company specially Mrs. Chandra Prakash Bindal and Mr. Rakesh Bindal addressed a letter dated 04.10.2017 to the Directors of the Corporate Debtor showing their concern about such wrong corporate guarantees given by the Corporate Debtor. The Appellant also submitted that such corporate guarantee was given by the Corporate Debtor in haste due to constant pressure by the consortium of lenders. The Appellant also stated that the Corporate Debtor filed a petition before Regional Director, Ahmedabad on 10.10.2017 to declare a corporate guarantee given by them as null & void.

17. The Appellant also placed on record that the Adjudicating Authority vide his order dated 26.05.2020 approved the Resolution Plan by M/s Om Shri Shubh Labh Agritech Private Limited for amount of Rs. 18,90,59,537/- for making payments to the secured financial creditors of the principal borrower including Respondent No. 1.

18. The Appellant also submitted that an Intervention Application No. 01 of 2021 was filed by the shareholders of the Corporate Debtor before the Adjudicating Authority, for declaring the corporate guarantee given by the Corporate Debtor to the trusteeship as a void, which was dismissed by the Adjudicating Authority vide its order dated 07.01.2022 on ground of maintainability and the same was challenged before this Appellate Tribunal vide CA (AT) (Ins.) No. 300 of 2022 which was also dismissed by this Appellate Tribunal vide its order dated 30.03.2022.

19. The Appellant stated that after detailed hearing, the Adjudicating Authority passed an Impugned Order dated 01.12.2022, initiating the CIRP of the Corporate Debtor and appointed Respondent No. 2 as the IRP.

20. The present appeal has been filed by the Appellant based on several grounds inter-alia:-

- (i) Respondent No. 1 was not privy of the contract with the Corporate Debtor in relation to the deed of guarantee.

- (ii) There was no authority given by the trusteeship to the Respondents for initiating section 7 application.
- (iii) There was pending proceeding being OA. No. 846 of 2018 under Section 19 of the Recovery of Debts due to financial institutions, Act 1993 before the Debt Recovery Tribunal, Jabalpur.
- (iv) Deed of Guarantee was void under Section 186 of the Companies Act, 2013.

21. The Appellant cited the judgment of this Tribunal delivered in the case of ***Rakshit Doshi Vs. IDBI Bank***, Company Appeal (AT) (Ins.) No. 658 of 2022 where it was held that the event of default cannot be declared by any individual bank in case of consortium. It has also been submitted that in the matter of ***IDBI Bank Limited Vs. Rakshit Doshi***, Civil Appeal No. 129 of 2023, the Hon'ble Supreme Court of India dismissed the Civil Appeal preferred against the judgement of this Tribunal in ***Rakshit Doshi (Supra)***.

22. It is the case of the Appellant that under Financing documents of participating banks in the consortium, the recourse must be taken as per the security trustee agreement.

23. The Appellant highlighted Clause 6 & 7 in interse agreement dated 10.06.2016; Clause E, Clause 4.1 (A), Clause 6.1, Clause 25 in Deed of Guarantee dated 10.06.2016; and Clause C, 2 and 2.1, Clause 2.4, Clause 2.9, Clause 2.9.5

(a), Clause 2.9.5(b), Clause 2.9.5 (c) & Clause 4 in Security Trustee Agreement in support of his case.

It is the case of the Appellant that based on these relevant clauses, the Respondent No. 1 was required to convene meeting of all the lenders, to declare event of default and to communicate to the trusteeship for further necessary action and therefore the unilateral action taken by the Respondent No. 1 is in contravention of these agreements and therefore the Respondent No. 1 could not have filed any application under Section 7 of the Code.

24. It is further the case of the Appellant that in absence of valid event of default, the Respondent No. 1 could not invoke the corporate guarantee given by the Corporate Debtor or even file the Section 7 application against the Corporate Debtor .

25. The Appellant also pleaded that since there is no contract or agreement between the Respondent No. 1 and the Corporate Debtor, the Respondent No. 1 could not have invoked the corporate guarantee and cited the judgment of *Vodafone International Holdings BV Vs. Union of India & Anr.* [(2012) 6 SCC 613] rendered by Hon'ble Supreme Court of India where it was held that company is separate legal persona and in view of the invocation letter dated 04.04.2018 sent by the Respondent No. 1 to the Corporate Debtor was illegal and could not have been basis for initiating application under Section 7 of the Code.

26. It is also the case of the Appellant that Respondent No. 1 has not placed on record any resolution passed by the trusteeship permitting the Respondent No. 1 to initiate action against the Corporate Debtor under Section 7 of the Code and therefore the action is illegal for want of authority.

27. The Appellant submitted that the rights and liabilities of the borrower and lenders regarding invocation of guarantee given are governed by the Deed of Guarantee and a perusal of the Deed of guarantee would reveal that the guarantee was executed by M/s. B.P. Bansal Agritech in favour of the Trusteeship and therefore it is only Trusteeship who is authorized to invoke the guarantee and the Respondent No. 1 has no locus standi to initiate action pursuant to the corporate guarantee against the Corporate Debtor.

28. The Appellant again pleaded that although the deed of guarantee was executed by the Appellant as Suspended Director of the Corporate Debtor, the same is required to be treated as illegal and void since the Corporate Debtor itself could not have been given such guarantee in view of Section 186 of the Companies Act, 2013.

29. The Appellant also submitted that the Corporate Debtor is a going concern and the purpose of the Code is not meant for recovery purpose and rather only for sustaining the corporate entities and therefore, the Impugned Order is against the spirit of the Code.

30. The Appellant submitted that he has all intention to settle its financial commitment to the extent as feasible. The Appellant submitted that in this background in the present appeal when the case was listed for the first time on 28.12.2022 before this Appellate Tribunal, the Appellant gave the statement before this Appellate Tribunal about its willingness to approach the Financial Creditor, for the settlement and requested the Appellate Tribunal that the formation of the CoC may be stayed and this Appellate Tribunal stayed formation of CoC vide its order dated 28.12.2022. The Appellant stated that the Corporate Debtor wrote letters to Respondent No. 1 regarding its willingness to submit the OTS amount to Rs. 1 Crores vide letter dated 28.12.2022 which was later enhanced to Rs. 1.25 Crores vide its letter dated 24.01.2023 which was again enhanced to Rs. 1.32 Crore vide letter dated 14.04.2023 and finally offered Rs. 1.85 Crore on 14.06.2023 vide Appellant letter dated 14.06.2023.

31. The Appellant alleged that no valid reasons have been submitted by the Respondent No. 1 in rejecting his offer of Rs. 1.85 Crores of OTS against the corporate guarantee given by him amount to Rs. 181.29 Crores, although legally the Corporate Debtor is not obliged to pay anything to the Consortium of Lenders for various reasons explained earlier. The Appellant further alleged that the Respondent No. 1 is under immense pressure from the other three lenders of the Consortium not to accept the OTS proposal from the Appellant.

32. Concluding his remarks, the Appellant submitted that the Impugned Order is illegal and perverse and has been initiated only to kill a running company under undue pressure of the Consortium of Lenders and requested this Appellate Tribunal to allow his appeal.

33. Per contra, the Respondent No. 1 denied all the averments made by the Appellant treating these to be misleading, mischievous, devoid of any merit and only to derail the process of resolution of the Corporate Debtor.

34. The Respondent No. 1 submitted that the Corporate Debtor is a group company of the principal borrower and the shareholding pattern clearly reflect that the principal borrowers and the Corporate Debtor are fully owned and controlled by the same family members and in this background the Corporate Debtor stood as corporate guarantor for the entire financial facilities of Rs. 181.29 Crores of the principal borrower and deed of guarantee dated 10.6.2016 was executed for the benefit of the banks/consortium of lenders consisted of IDBI Bank i.e., Respondent No. 1 as lead bank along with three other lenders, namely, State Bank of India, RBL Bank Limited and Kotak Mahindra Bank Limited.

35. The Respondent No. 1 also elaborated several provisions of the deed of guarantee including provisions where it has been held that the guarantee shall be valid and binding on all the guarantor and shall remain until repayment of full monies due to the banks are satisfied or settled with the banks.

36. The Respondent No. 1 also highlighted that security trustee agreement was signed amongst the principal borrower BP Food Products Private Limited, the banks and the IDBI Trusteeship Services Limited, where it has been clearly elaborated that any duty or obligation of the security trustee contemplated there in, may be performed by the lenders and in consequence any such action taken by lenders shall not be constituted as revocation of trust created.

37. The Respondent No. 1 submitted that the account of the principal borrower became NPA on 29.10.2017 and date of default was 31.07.2017 which is 90 days prior to date of NPA and the Respondent No. 1 recalled the entire outstanding liability of the principal borrower on 21.03.2018. The Respondent No. 1 also issued a notice to the Corporate Debtor dated 04.04.2018 invoking the deed of guarantee given by the Corporate Debtor.

38. The Respondent No. 1 further submitted that the Resolution Plan w.r.t. CIRP of the Principal Borrower was approved by the Adjudicating Authority vide its order dated 08.08.2018 whereby the Respondent No 1 received only Rs. 18,58,60,479/- against the total claim of the Respondent No. 1 of Rs. 47,02,44,204/- and as per approved Resolution Plan the rights and claims of the lenders against respective guarantors and shareholders were kept alive and liberty was granted to lenders to proceed against the guarantors which has clearly been stipulated in the Impugned Order i.e., guarantees provided by existing shareholder/ promoters in respect of debts shall not be extinguished by virtue of

this Resolution Plan and lenders will retain their rights and claims on the guarantee given by personal/ corporate guarantors of the principal borrowers.

39. The Respondent No. 1 elaborated dubious attempts of the Promoters including the Appellant herein in derailing the resolution process of the Corporate Debtor and the Adjudicating Authority dismissed of the objections taken by the Promoters and the CIRP was admitted on 01.12.2022 almost after four years of filing Section 7 application on 15.01.2018 and the same has now being challenged by the Promoters before this Appellate Tribunal on the various grounds including ground they have approached IDBI Bank for settlement (OTS).

40. As regards, so-called alleged settlement offer by the Appellant, the Respondent No. 1 submitted that against the corporate guarantee of Rs. 181.29 Crores and against the huge outstanding liability of the Corporate Debtor towards Respondent No. 1, the Corporate Debtor made a meagre offer of Rs. 1 Crore initially which was enhanced after four further offers to final offer of only Rs. 1.85 Crores which cannot be accepted by the lender and this clearly shows the malicious tactics of the corporate guarantors just to delay which has already been delayed by more 4 years.

41. The Respondent No. 1 emphasised that the issue of validity of the deed of guarantee dated 10.06.2016 has already attained finality since the application filed for seeking declaration of said deed of guarantee as null & void was dismissed by the Adjudicating Authority and the same was challenged before this Appellate

Tribunal which also dismissed vide order dated 30.03.2022 and therefore, the Appellant is barred under principal of res-judicata.

42. The Respondent No. 1 elaborated the logic of using trusteeship and submitted that as per prevalent commercial practice in case of multiple lenders/ consortium, deed of guarantee is signed by the security trustee, who acts of behalf of all the lenders and the prime objective of such agreement is to secure financial facilities on behalf of multiple lenders.

43. The Respondent No. 1 refuted the claims of the Appellant in taking shelter of the judgment rendered by this Appellate Tribunal in case of ***Rakshit Doshi (Supra)*** and stated that the facts of the cases are entirely different since in case of ***Rakshit Doshi (Supra)***, the Section 7 was initiated by one bank which took unilateral action for declaring an event of default and who was also not lead banker of the consortium, whereas in the present appeal the Respondent No. 1 is the lead banker of the consortium and all other lenders have endorsed the action of the Respondent No. 1 which was demonstrated before this Appellate Tribunal where proposed intervenors / other three bankers supported the claims of the Respondent No. 1 in open court.

The Respondent No. 1 submitted that in view of these facts, the judgment of ***Rakshit Doshi (Supra)*** is just not applicable in the present appeal.

44. The Respondent No. 1 highlighted the significant clauses of the deed of guarantee dated 10.06.2016, namely, Clause 3, 4, 6.2, 10,14, 18 and 20.

45. The Respondent No. 1 also highlighted the various section clause giving protection to the lenders in the security trustee agreement vide clause 'D', Clause 2.3(c), Clause 2.1.3 and Clause 15.10. These clauses categorically records liability of the guarantors and right and claim of the banks to proceed against the guarantor and therefore, the contention of the Appellant that deed of guarantee cannot be enforced against the Corporate Debtor by the Respondent No. 1 is baseless.

46. The Respondent No. 1 also refuted the allegations regarding lack of privity of contract between the Respondent No. 1 and the Corporate Debtor and stated that it is a settled principals of law that a person for whose benefit the trust is created by a contract, the beneficiary (in present case the lenders) may enforced rights where the trust has been created for their benefits.

47. The Respondent No. 1 also cited the judgment of this Appellate Tribunal given in the case of *Naresh Kumar Aggarwal Vs. CFM Asset Reconstruction Pvt. Ltd.* passed in Company Appeal (AT) (Ins.) No. 470 of 2023 based on identical facts wherein it was held that the lenders are entitled to initiate and file an application under Section 7 of the Code despite there being a security trustee.

48. The Respondent No. 1 highlighted and emphasised that other lenders of the consortium i.e, State Bank of India, Kotak Mahindra Bank Limited, UVARC (earlier RBL Bank) also filed Interlocutory Applications for intervention in the present appeal i.e, Comp. appeal (AT) (Ins.) No. 1541 of 2022, whereas one of

the prayer of proposed Intervenor Bank is dismissal the present appeal of the Corporate Debtor and all the lender of the consortium has agreed and given the consent for CIRP of the Corporate Debtor.

49. The Respondent No. 1 refuted the plea taken by the Appellant regarding deed of guarantee being void under section 186 of the Companies Act, 2013 as the plea that the Corporate Debtor was not entitled to give guarantee of the amount given and submitted that failure to comply the provisions does not absolve the corporate guarantors/ Corporate Debtor from its liability towards 3rd party and at the best the Corporate Debtor was liable for penalty of Section 186 (13) of the Companies Act, 2013.

50. As regards, the plea of the Appellant is that he has filed the application before the Regional Director, Ahmedabad for declaration of deed of guarantee dated 10.06.2016 vide its petition dated 10.10.2017, the Respondent No. 1 stated that no order whatsoever has been passed by the Regional Director till date and no stay has been ever considered by the Regional Director, Ahmedabad which clearly proves that the Respondent No. 1 contentions of deed of guarantee to be treated as void is devoid of any merit.

51. The Respondent No. 1 stated that there are several judgments of Hon'ble Supreme Court of India as well as this Appellate Tribunal which establishes rules regarding, co-existence of liability of the principal borrowers and the guarantors in case of default.

52. The Respondent No. 1 also denied the claims of the Appellant regarding viability of the Corporate Debtor in the guise of the judgment of the Hon'ble Supreme Court of India delivered in the case of *Vidharbha Industries Power Limited Vs. Axis Bank Limited* passed in Civil Appeal No. 4623 of 2021 and stated that *Vidharbha* was an electricity company having huge receivable of thousands of crores whereas the financial health and viability of the Corporate Debtor is extremely low and unviable to service outstanding debt of Rs. 28,82,84,667/- and hence the Adjudicating Authority correctly passed the Impugned Order for CIRP of the Corporate Debtor.

53. Concluding his arguments, the Respondent No. 1 requested this Appellate tribunal to dismiss the appeal with exemplary cost.

Finding

54. The plea taken by the Appellant can be categorised into the following categories:-

- (i) The deed of guarantee dated 10.06.2016 to be treated void in view of Section 186 of the Companies Act, 2013.
- (ii) Lack of privity of contract between the Respondent No. 1 and the Corporate Debtor.
- (iii) Only trusteeship could have initiated the application under Section 7 of the Code against the Corporate Debtor and not the lender/ Respondent No. 1.

- (iv) The Respondent No. 1 could not have initiated the action of its own of filing Section 7 application without the formal meeting held with other lenders and their consent and authorisation.
- (v) Financial viability of the Corporate Debtor and status of going concern based on the judgment of Vidharbha (Supra).
- (vi) The protection given to the corporate guarantor based on several documents including interse agreement, deed of guarantee and Security trustee agreement.

55. All these points are inter-connected and inter dependent and as such we shall examine all the issues raised by the Appellant in conjoint manner and shall dealt in following discussions:-

- (I) The deed of guarantee dated 10.06.2016 to be treated void in view of Section 186 of the Companies Act, 2013.
- As regard, the deed of guarantee dated 10.06.2016 being void of violation of Section 186 of the Companies Act, 2013, we would like to take into account the relevant portion of Section 186 of the Companies Act, 2013 which reads as under

“ No company shall give loan to any person or body corporate or give guarantee or provide security in connection with loan exceeding 60% of its paid up share capital, free reserves and securities premium account

or 100% of its free reserves and securities premium account, which is more.”

- We also note that the Corporate Debtor gave the corporate guarantee of Rs. 181.29 Crores for the credit facilities granted by the consortium of lenders in favour of the principal borrower against the eligible amount of Rs., 6.80 Crores (approx.) in terms of calculations made as per Section 186 of the Companies Act, 2013.
- We also observe that the Appellant is the majority shareholder the Corporate Debtor and he signed the corporate guarantee on behalf of the Corporate Debtor, after the board of directors of the Corporate Debtor passed suitable resolution in this regard.
- A pointed query was raised by this Tribunal regarding shareholding and patterns of the Corporate Debtor and the principal borrower and it was confined by the Appellant that 100% shareholding of these group companies are owned by the Appellant, his wife, his brother in law, son, daughter, daughter in law, etc., i.e., family members.
- The alleged shareholders who raise the issue based on the auditors report are also close relatives and family members of the Appellant.
- It is noted that deed of guarantee was given on 10.06.2016 on the financial facilities taken by the principal borrowers i.e. M/s B.P. Food Products Private Limited which is owned by the Appellant's own son.

- In such circumstances, it is clearly established that both the principal borrower and the Corporate Debtor are family owned group companies which are owned and controlled by the same set of family member.
 - In this background, it will be travesty of justice to even consider the arguments of the Appellant to treat the deed of guarantee as void just in order to avoid the financial obligations towards the consortium of lenders. In any case we also observe that at the best the Corporate Debtor was liable for punishment under Section 186 (13) of the Companies Act, 2013 and the Corporate Debtor is not entitled for any illegal enrichment for its own illegal and malafide acting.
 - In view of this we are unable to accept the intentions of the Appellant on this point.
- (II) Lack of privity of contract between the Respondent No. 1 and the Corporate Debtor.
- As regard lack of privity of contracts, we have to understand the context in which the deed of guarantee has been executed through independent trusteeship, in the present case through IDBI Trusteeship Services Limited (in short '**Trusteeship**').
 - Normally for huge funding, the banks join hands and form a consortium of lenders, like in the present case, where four lenders formed a

consortium of lenders and for smooth process. Consortium availed the facility of trusteeship who can act on their behalf.

- In this background, three agreements become the relevant in the present appeal, namely, interse agreement, Deed of Guarantee and Security Trustee Agreement.
- Interse agreement was signed amongst the IDBI Bank Ltd., State Bank of India, RBL Bank Limited and Kotak Mahindra Bank Limited and IDBI Trusteeship Services Limited to define the rights and obligations interse the lenders in the manner and as per conditions stipulated therein which was signed on 10.06.2016.
- The Security Trustee Agreement was also signed on 10.06.2016 amongst the principal borrower i.e., M/s BP. Food Products Private Limited, the banks/ lenders and IDBI Trusteeship Services Limited wherein the trusteeship agreed to act as trustee for the benefit of the lenders and, inter-alia, hold the security interest created in accordance with the terms contained in this agreement for the benefit of the lenders.
- The deed of guarantee was also signed on 10.06.2016 between the Corporate Debtor and the IDBI Trusteeship Services Limited where it has been clearly indicated that the principal borrower M/s BP Food Products Private Limited has approached the banks for various credit facilities which have been agreed by the IDBI Consortium comprising

of IDBI Bank as lead bank, SBI, RBL Bank Limited and Kotak Mahindra Bank Limited as other consortium members and one of the conditions precedent was corporate guarantee by the Corporate Debtor for these financial facilities of the Principal Borrower in favour of the trusteeship for the benefit of all lenders including IDBI Bank/ Respondent No. 1.

- The Corporate Debtor gave the corporate guarantee in favour of the lenders for the credit facilities being given to the principal borrower and for carrying out transactions and securing the rights of the lenders, the trusteeship agreement was signed accordingly. Hence, it is very clear that all these agreements were executed primarily to protect the financial interest of the lenders and significantly on the same date i.e., 10.06.2016.
- On the issue of the privity of contract, we note that the clause F of the deed of guarantee specifically provides that "the Security Trustee acting for the benefit of the IDBI Consortium has called upon the Guarantor to execute this Guarantee in favour of the Security Trustee in favour of the Banks." This makes it clear that security trustee was to act for the benefit of IDBI Consortium consisting of all four lenders.
- We also observe that when the trust is created for the benefit of the beneficiary parties party, such parties are no more strangers to the

contract and can step in shoes, to pursue their legal remedies on their own rights. .

- We also keep in mind the fact that the lenders have already been protected and given their rights to pursue against the Promoters and the corporate guarantors as independent rights which does not get extinguished with the approval of resolution plan by the Adjudicating Authority as clearly stipulated in the Impugned Order.
- Through several judgments of the Hon'ble Supreme Court and this Appellate Tribunal, the co-existence of the liability of the corporate guarantors and the principal borrower has been established.
- In this regard, the judgment has been rendered by the Hon'ble Delhi High Court in the case of ***Madhav Trading Company vs. Union of India and others***, ILR (1978) 2 Delhi 74, where the Hon'ble Delhi High Court held that:

"if the contract has the effect of creating a trust in favor of a third person such person may sue to have the obligation arising for his benefit fulfilled....."

(Emphasis Supplied)

In the case of ***Jnan Chandra Mukherjee VS Manoranjan Mitra And Ors.***, AIR 1942 Cal 251, the Division Bench of Calcutta High Court:-

"A stranger to a contract which reserves a benefit for him cannot sue upon it either in English or in Indian

law even though in India the consideration need not move from the promisee. There are two well-recognised exceptions to this doctrine. The first is where a contract between two parties is so framed as to make one of them a trustee for a third; in such cases the latter may sue to enforce the trust in his favour and no objection can be taken to his being a stranger to the contract. The other exception covers those cases where the promisor, between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party."

(Emphasis Supplied)

- Thus, in light these judgements of the Hon'ble Supreme Court of India and two different High Courts, the Adjudicating Authority has rightly affirmed the Respondent's right to invoke the Deed of Guarantee against the Corporate Debtor.
 - In view of this we hold that the corporate guarantor is liable to meet its financial obligations.
- (III) Only trusteeship could have initiated the application under Section 7 of the Code against the Corporate Debtor as guarantor and not the lender.
- As regards who could initiate the Section 7 of the Code against the corporate guarantor i.e., by trusteeship or by the lenders following clause of the relevant agreements need to be taken into consideration.

**The Security Trustee agreement dated 10.06.2016 signed by the Borrower,
Lenders, and Security Trustee :-**

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D. At the request of the Borrower and with the concurrence of the lenders, the Security Trustee has agreed to act as trustee for the benefit of the Lenders and to, inter alia, hold the Security Interest created / to be created pursuant to the Security Documents in accordance with the respective terms thereof, for the benefit of the Lenders.

E. The Parties have therefore agreed to enter into this Agreement.

NOW, THEREFORE, in consideration of the mutual agreements herein contained and other good and valuable consideration, receipt of which is hereby acknowledged, the Parties hereto agree as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement, unless there is anything repugnant to the subject or context thereof, the expressions listed below shall have the following meanings:

Agreement shall mean this Joint Security Trustee Agreement and shall, unless it be repugnant to the subject or context thereof, include all amendments thereto.

Borrower shall have the meaning ascribed thereto in the array of parties.

Common Facility Agreement shall mean the Joint Working Capital Facility Agreement dated June 10, 2016 and the Joint Rupee Term Loan Agreement dated June 10, 2016 entered into inter alia by the Borrower & Lenders in relation to the Facilities provided to or amended from time to time.

Facility shall mean the rupee facilities provided by the Lenders to the Borrower as per the terms and conditions under the Financing Documents.

Financing Documents shall have the meaning ascribed to the term "Financing Documents" under the Joint Working Capital Facility Agreement dated June 10, 2016 and the Joint Rupee Term Loan Agreement dated June 10, 2016.

Lenders shall mean the banks and financial institutions providing credit facilities to the Borrower as per the terms and conditions under the Common Agreement.

Fee shall mean fee(s)/remuneration payable to the Security Trustee by the Borrower as may be agreed between the Security Trustee and the Borrower.

Initial Corpus shall have the same meaning as ascribed thereto in Section 2.2 hereof.

Obligors shall mean the Borrower, the Sponsor and the Corporate Guarantor.

B. P. Food Products Pvt. Ltd.

BPFFPL Director/Manager	IDBI	HSBC
BEI	KMBL	SBI

Director/Manager

CAD

SCG, BHOPAL

The Borrower hereby settles with the Security Trustee and the Security Trustee accepts from the Borrower, in trust a sum of Rs. 1000/- (Rupees One Thousand only) ("Initial Corpus") for the benefit of the Lender, subject to the terms and conditions contained in this Agreement. The trust settled under this Agreement for the benefit of the Lenders is hereinafter referred to as the "Trust".

2.3 Security / Trust Property

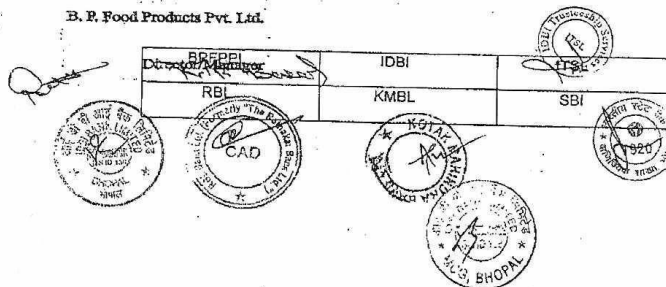
- (a) The Borrower agrees and confirms to create and cause to be created the Security in favour of the Security Trustee for the benefit of the Lenders pursuant to the terms of the Common Facility Agreements, in a form and manner acceptable to the Lenders.
- (b) The Security Trustee hereby affirms that it shall hold the Initial Corpus and all other Trust property including all the ~~assets~~ transferred and/or handed over to the Security Trustee pursuant to the terms of the Financing Documents, all the assets ("Secured Property") secured in its favour pursuant to the terms of the Facility Agreements or evidenced by the relevant Financing Documents, all rights, interests, title and benefits available to it under or pursuant to the Financing Documents, all monies received by it, whether prior to or as a result of enforcement of the Security or the exercise of rights and remedies, under the Financing Documents, in trust for the Lenders, (collectively, the "Trust Property").
- (c) The Lenders shall have beneficial interest in the Secured Property and the other Trust Property in proportion to their respective Outstanding.
- (d) No assignment or transfer, by operation of Applicable Law or otherwise, of any estate, right, title or interest of the Lenders in and to the Security and/or any other Trust Property or this Agreement or under any other Financing Documents shall operate to terminate this Agreement or the trust created hereunder or confer on any successor, transferee or assignee of the Lenders any legal title to any of the Trust Property provided that such successor, transferee or assignee of the Lenders shall have a beneficial interest in the Trust Property in proportion to their respective Outstanding.

2.4 Authority, Taking of actions

The Lenders hereby authorise the Security Trustee to and the Security Trustee shall on prior written instructions from the Lenders:

- (a) execute and deliver the relevant Financing Documents and such other documents, agreements, instruments, certificates as are required to be executed by the Security Trustee in relation to the Security, provided that such Financing Documents are on terms acceptable to the Lenders;

B. P. Food Products Pvt. Ltd.



2.10 Investments

Save as otherwise provided in the Financing Documents, all monies which are received by the Security Trustee in its capacity as such under any of the Financing Documents or otherwise, may be invested by the Security Trustee in the name of or under the control of the Security Trustee as per the approval of and for such period as the Lenders may determine. *Provided* that if the Lenders so instruct, such investments shall be liquidated and distributed in accordance with the terms of the relevant Financing Documents. Section 20 of the Indian Trust Act, 1882 shall not be applicable to the aforesaid investments.

2.11 Continuing Liability of the Borrower

Notwithstanding anything contained in this Agreement, the Borrower shall at all times be liable to perform all of its obligations (whether financial performance or otherwise) under the Transaction Documents. Nothing contained in this Agreement or in any other Financing Document shall affect or constitute or be deemed to constitute settlement of any of the obligations of the Borrower and the Obligor under the Transaction Documents.

2.12 Continuing Nature of Security

The Security is and will be a continuing security and shall remain in full force and effect, notwithstanding the insolvency or liquidation or incapacity or change in constitution or status of the Borrower or the Obligor or any other Person, or any intermediate payment or settlement of account or other matter or thing whatsoever and, in particular, the intermediate satisfaction by the Borrower or the Obligor or any other Person of the whole or any part of the Outstandings. The Security Interests constituting the Security are in addition to, and independent of, any other security interest, or any other security or right or remedy held by or available to the Secured Parties.

2.13 First Recourse Enforcement

The Security Interests created under each Financing Document may be enforced without the Security Trustee first having recourse to any other security or rights or taking any other steps or proceedings against the Borrower or the Obligor or any other Person, or may be enforced for any balance due after resorting to any one or more means of obtaining payment or discharge of the Outstandings.

2.14 Certificate of Security Trustee

A certificate from the Security Trustee acting on the instructions of any of the Lenders setting out the amounts due and payable to such Lender by the Borrower or any other Person required to create any part of the Security pursuant to the Security Documents, in the absence of any manifest error, fraud or gross negligence, shall be conclusive evidence of such amounts due and payable to such Lender by the Borrower or any other Person.

P. Food Products Pvt. Ltd.

Director/Manager

BPFBI	IDBI	
Director/Manager	KMBL	SBI



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The relevant clauses of the Deed of Guarantee dated 10.06.2016 are as below :-

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D. In view of the same, the Borrower has approached the Banks and the Banks have agreed to renew the Existing WC Facilities/ Term Loan and extend certain additional credit facilities, which are collectively listed at First Schedule hereto (collectively referred to as the "Credit Facilities"), on the terms and conditions contained in the Letters of Sanction (*defined hereunder*) and the Joint Working Capital Facility Agreement/ Joint Rupee Term Loan Agreement dated June 10, 2016 entered into amongst the Borrower and the IDBI Consortium [Comprising of IDBI Bank as Lead Bank, State Bank of India, RBL Bank Ltd [Formerly: The Ratnakar Bank Ltd] & Kotak Mahindra Bank Ltd as member Bank] (hereinafter referred to as the "Joint Working Capital Facility Agreement/Joint Rupee Term Loan Agreement").

E. One of the conditions of the Joint Working Capital Facility Agreement/ Joint Rupee Term Loan Agreement is that the WC Facilities/ Term Loan together with payment of all interest, commission, additional interest, liquidated damages, premium on prepayment, reimbursement of all costs, charges and expenses and all other obligations payable by the Borrower in respect of the Credit Facilities in accordance with the terms and conditions of the Joint Working Capital Facility Agreement/ Joint Rupee Term Loan Agreement shall, *inter alia*, be secured by the Corporate Guarantee of the Guarantor in favour of the Security Trustee for the benefit of the IDBI Consortium.

F. Pursuant to the above, the Security Trustee acting for the benefit of the IDBI Consortium has called upon the Guarantor to execute this Guarantee in favour of the Security Trustee for the benefit of the Banks.

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS;

Unless specifically defined herein, the capitalized terms used herein shall have the same meaning assigned to them under Joint Working Capital Facility Agreement/ Joint Rupee Term Loan Agreement. The Guarantor acknowledges that the Guarantor has reviewed, acclimatized to, and understood the terms and conditions of the Finance Documents (including the Joint Working Capital Facility Agreement/Joint Rupee Term Loan Agreement) and is fully aware of the implications thereof.

In consideration of the premises, the Guarantor hereby, unconditionally, absolutely and irrevocably guarantees to and agrees with the Security Trustee as follows:

1. The WC Facilities/ Term Loan will be disbursed/released by the Banks in one or more installment(s) as per the requirements and the requests of the Borrower, on terms acceptable to the Banks, subject to the Borrower complying with the provisions of the Joint Working Capital Facility Agreement/Joint Rupee Term Loan Agreement and the disbursement procedure stipulated by the Banks.
2. The Borrower shall duly and punctually repay the WC Facilities/ Term Loan, together with all interest, commission, additional interest, liquidated damages, up-front fee, premia on prepayment or on redemption, costs, expenses, and other monies in accordance with the Joint Working Capital Facility Agreement/ Joint Rupee Term Loan Agreement and perform and comply with all the other terms, conditions and covenants contained in the Joint Working Capital Facility Agreement/Joint Rupee Term Loan Agreement.
3. In the event of any default on the part of the Borrower in payment/repayment of any of the monies referred to above (whether at stated maturity, upon acceleration or otherwise), or in



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9. The Security Trustee shall have full liberty, without notice to the Guarantor and without in any way affecting this guarantee, to exercise at any time and in any manner any power or powers reserved to the Security Trustee/Banks under the Joint Working Capital Facility Agreement/ Joint Rupee Term Loan Agreement, to enforce or forbear to enforce payment of the WC Facilities/ Term Loan or any part thereof or interest or other monies due to the Banks from the Borrower or any of the remedies or securities available to the Security Trustee, to enter into any composition or compound with or to grant time or any other indulgence or WC Facilities/ Term Loan to the Borrower and the Guarantor shall not be released by the exercise by the Security Trustee of their liberty in regard to the matters referred to above or by any act or omission on the part of the Security Trustee or by any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the Guarantor and the Guarantor hereby waive in favour of the Security Trustee so far as may be necessary to give effect to any of the provisions of this Guarantee, all the suretyship and other rights which the Guarantor might otherwise be entitled to enforce.
10. This Guarantee shall be enforceable against the Guarantor notwithstanding that any security or securities comprised in any instrument(s) executed or to be executed by the Borrower in favour of the Security Trustee shall, at the time when the proceedings are taken against the Guarantor on this Guarantee, be outstanding or unrealised or lost. The Guarantor specifically waive all and any of the rights conferred on the Guarantor by Section 133, 134, 135, 139 and 141 of the Indian Contract Act, 1872 (9 of 1872).
11. The Guarantor hereby agrees and give consents to the sale, mortgage on prior, *part-passu* or subservient charge basis, release, etc., of any of the assets by the Borrower from time to time as may be approved by the Security Trustee or the transfer of any of the assets of the Borrower from one unit to the other or to the release or lease out by the Security Trustee any or whole of the assets charged to the Security Trustee on such terms and conditions as the Security Trustee may deem fit and this may be treated as a standing and continuing consent for each and every individual act of transfer, mortgage, release or lease of any of such assets of the Borrower. The Guarantor hereby declares and agrees that no separate consent for each such transfer, mortgage, release or lease any of such assets would be necessary in future.
12. The Guarantor hereby agree and declare that the Borrower will be free to avail of further loans or other facilities from the Banks or any other financial institution or Bank in addition to the WC Facilities/ Term Loan and/or to secure the same during the subsistence of this guarantee and in that event the guarantee herein contained will not be affected or vitiated in any way whatsoever but will remain in full force and effect and binding on the Guarantor only in respect of the WC Facilities/ Term Loan.
13. The rights of the Security Trustee against the Guarantor shall remain in full force and effect notwithstanding any arrangement which may be reached between the Security Trustee and the other Guarantor/s, if any, or notwithstanding the release of that other or others from liability and notwithstanding that any time hereafter the other guarantor/s may cease for any reason whatsoever to be liable to the Security Trustee, the Security Trustee shall be at liberty to require the performance by the Guarantor of their obligations hereunder to the same extent in all respects as if the Guarantor had at all times been solely liable to perform the said obligations.

Director/Manager



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Director/Manager

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14. To give effect to this Guarantee, the Guarantor hereby agrees and gives his consent that the Security Trustee/Banks may act as though the Guarantor were the principal debtors to the Banks.
15. The Guarantor hereby declare and agree that it has not received and shall not, without the prior consent in writing of the Security Trustee receive any security, fee or commission from the Borrower for giving this guarantee so long any monies remain due and payable by the Borrower to the Banks under the WC Facilities/ Term Loan.
16. The Guarantor shall not in the event of the insolvency or bankruptcy of the Borrower compete with the Security Trustee for its distribution in the insolvency or bankruptcy proceedings as long as any monies due hereunder remain outstanding.
17. A certificate in writing signed by a duly authorised official of the Security Trustee shall be conclusive evidence against the Guarantor of the amount for the time being due to the Banks from the Borrower in any action or proceeding brought on this Guarantee against the Guarantor.
18. This Guarantee shall be valid and binding on the Guarantor and operative until repayment in full of all monies due to the Banks under the WC Facilities/ Term Loan; provided however, the obligations under this Guarantee shall be satisfied only to the extent any payments are made to or settled with the Banks.
19. This Guarantee shall be irrevocable and the obligations of the Guarantor hereunder shall not be conditional on the receipt of any prior notice by the Guarantor or by the Borrower and the demand or notice by the Security Trustee as provided in Clause 25 hereof shall be sufficient notice to or demand on the Guarantor.
20. The Guarantor's liability to the Security Trustee/Banks under this Guarantee shall not be discharged, impaired or otherwise affected by reason of any of the following events or circumstances:
 - (A) Any time, forbearance or other indulgence given or agreed by the Security Trustee to or with the Borrower in respect of its obligations under the Joint Working Capital Facility Agreement/ Joint Rupee Term Loan Agreement; or
 - (B) Any legal limitation, disability or incapacity relating to the Borrower or the Guarantor; or
 - (C) Any invalidity, irregularity, unenforceability, imperfection or avoidance of any defect in any security granted by, or the obligations of the Borrower or the Guarantor or any amendment to or variation thereof or of any other document or security comprised therein; or
 - (D) Any change in the name, constitution or otherwise of the Borrower or the Guarantor or any change in the set up of the Borrower which may be by way of change in the constitution, winding up voluntary or otherwise or any merger, absorption, amalgamation or otherwise of the Borrower with any other corporate entity or concern; or
 - (E) The liquidation, bankruptcy or dissolution (or proceedings analogous thereto) of the Borrower or the appointment of a receiver or administrative receiver or administrator or trustee or similar officer of any of the assets of the Borrower and/or the Guarantor or the occurrence of any circumstances whatsoever affecting the Borrower's and/or the



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- After going through above clauses, it is clearly evident that the deed of guarantee and security trust agreement goes hand in hand which primarily provide financial security to the lenders for the credit facilities given to the principal borrower.
- These clauses which are in cross reference to each other, clearly records the rights of the lenders including rights to proceed against the guarantor.
- In this connection, we would also like to refer to the judgement renders by the Hon'ble supreme Court of India in the matter of ***M.C. Chacko vs. The State Bank of Travancore***, 1969 (2) SCC 343: AIR 1970 Supreme Court 504, where in Para 9 which reads as under :

"9. Under the English common law only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of contract: Dunlop Pneumatic Tyre Co. Vs. Selfridge and Co.. It has however been recognized that where a trust is created by a contract, a beneficiary may enforce the rights which the trust so created has given him. The basis of that rule is that though he is not a party to the contract his rights are equitable and not contractual..."

(Emphasis Supplied)

- Thus the lender is entitled to initiate and file application under Section 7 of the Code despite they have been engaged trusteeship. We also take into consideration relevant para in the matter of ***Naresh Kumar Aggarwal (Supra)***, which reads as under :-

“13. Learned counsel for the Appellant further submits that the State Bank of India could not have been filed the Section 7 application because guarantee was executed by the Corporate Debtor in favour of SBICAP. SBICAP is Trustee Company on behalf of all the lenders. State Bank of India having assigned its debt to the Respondent No.1, it was open for the State Bank of India to exercise its rights as per the financial documents including Guarantee Deed. The guarantee executed by the Corporate Debtor in favour of SBICAP as Trustee Company of all six lenders, lenders has full entitlement to initiate proceedings under Section 7. As noted above, the Section 7 proceeding has already been initiated against another Guarantor i.e. Micro Stock Holding Pvt. Ltd., which order is still subsisting. We, thus, are of the view that argument of the Appellant that application under Section 7 by Respondent No.1 – Assignee of the State Bank of India was not maintainable, cannot be accepted.”

(Emphasis Supplied)

- (IV) The Respondent No. 1 could not have initiated the action of its own of filing Section 7 application without the formal meeting held with other lenders and without their consent and authorisation.
- The allegation of the Appellant regarding want of support of other three bankers to the Respondent No. 1 are also found baseless as the proposed intervenors for three other lenders supported the CIRP proceedings of the Corporate Debtor and confirm the same during hearing before us and the same has been mentioned in their intervention applications filed in the present appeal. Thus, the contention of the Appellant on this ground stand rejected.
- (V) Financial viability of the Corporate Debtor and going concern based on the judgment of **Vidharbha (Supra)**.
- As regard, the plea of the appellant regarding going concern of the Appellant, we observe that against the huge outstanding liability of the corporate guarantor/ Corporate Debtor, they have been offering meagre settlement amount which started from Rs. 1 Crores vide their letter dated 28.12.2022 and finally offer only Rs. 1.85 on 14.06.2023 against the corporate guarantor of Rs. 181.29 Crores and the Respondent No. 1 has categorically been rejected by the Respondent No. 1.

- We also take into consideration the pleadings of the Respondent No. 1 that the financial health of the Corporate Debtor in no way can support their liability and thus we find that ***Vidharbha (Supra)*** does not come to any help to the Corporate Debtor as corporate guarantor.
- In above analysis, it become clear that the principal borrower and the Corporate Debtor are group companies which are owned and controlled by the same set of close family members and relatives and the corporate guarantee of Rs. 181.29 Cores was duly given by the Corporate Debtor. The appellant could not make any reasonable, legal and valid case to avoid such liability and the cases cited by them including of ***Rakshit Doshi (Supra)*** are clearly non applicable in the present appeal based on distinguishable facts of the cases. In the case of ***Rakshit Doshi (Supra)*** there was unilateral action taken by one of the banks out of the consortium of bankers, which incidentally was not lead banker, wherein in the present case the Respondent no. 1 is the lead banker and has been supported by all other lenders.

56. Based on above analysis and considering all legal and factual issue raised by the Appellant, we are unable to accept any of his pleas and the appeal, therefore, deserves to be rejected.

57. In fine the Appeal fails and stand dismissed. No Costs. Interlocutory Application(s), if any, are Closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indavar Pandey]
Member (Technical)

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