

# **Bijay Kumar Agarwal vs State Bank Of India & Anr on 23 January, 2020**

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) Insolvency No. 993 of 2019

[Arising out of Order dated 02.08.2019 passed by the Adjudicating Authority (National Company Law Tribunal) Kolkata Bench in Company Petition (I.B.) No. 353/KB/2018]

IN THE MATTER OF:

Bijay Kumar Agarwal, Ex-Director of  
M/s Genegrow Commercial Pvt. Ltd.

.....Appellant

Vs.

State Bank of India and Anr.

.....Respondents

Present :

For Appellants: Mr. Soumya Dutta, Advocate For Respondent: Mr. Avinesh Mohapatra, Advocate Mr. Kanishk Khetan, Advocate for IRP J U D G M E N T VENUGOPAL M. J.

The Appellant / Ex-Director of M/s. Genegrow Commercial Pvt. Ltd. has focussed the instant appeal as an 'Aggrieved person' in respect of the order dated

02.08.2019 passed by the Adjudicating Authority ('National Company Law Tribunal') Kolkata Bench wherein the application filed by the 1st Respondent / Company Appeal (AT) Insolvency No. 993 of 2019 1 Bank / 'Financial Creditor' on 02.08.2019 at para 34 and 35 had observed the following:-

"34 Having heard the Ld. Counsel for the parties and on perusal of the records containing documents filed by the rival parties, we are of the considered view that since the Financial Creditor has rightly filed this petition under section 7 of the Insolvency & Bankruptcy Code against M/s. Genegrow Commercial Pvt.

Ltd., the present Corporate Guarantor having executed the deed of guarantee and Supplementary Deed of guarantee, ensuring and guaranteeing the repayment of loan facilities/total outstanding as on 31st January, 2018 to the tune of Rs. 162,62,23,609.63 outstanding against Gee Pee Infotech Pvt. Ltd., the Principal Borrower, both the deed of guarantees being irrevocable and unconditional and shall

be enforceable. The Financial Creditor has also placed on record the balance confirmation by the Company Appeal (AT) Insolvency No. 993 of 2019 2 Principal Borrower admitting the default to the tune of Rs. 84,53,923.50 as on 7th April, 2014 which is also reflected in the CIBIL Report. Since the accounts of the Principal Borrower was classified as an NPA, the Financial Creditor had to file O.A. No. 493/2015 before the DRT, which was never objected to by the Principal Borrower and the liability of the Corporate Guarantor is coextensive with the Principal Debtor and even the Financial Creditor is free to sue and proceed against the Principal Debtor or the Guarantor or both, as per its choice and discretion. The Corporate Debtor has no defence at all in this matter as the amount of Rs. 162,62,23,609.63 is admitted and acknowledged by the Principal Borrower, thereby making the Guarantor/the present Corporate Debtor equally liable.

35. In view of all the arguments advanced by the parties and documents Company Appeal (AT) Insolvency No. 993 of 2019 3 placed on record, we are of the considered view that the Corporate Debtor/Guarantor has no case and the judgement cited in Dharam Sugars and Chemicals limited Vs. Union of India and others, reported in (2019) 5 Supreme Court Cases 480 cited above or the Circular dated 12th February, 2018 of Reserve Bank of India cited above or the Circular dated 12th February, 2018 of Reserve Bank of India cited above, have no relevance and cannot be relied upon by the Corporate Debtor in this matter. The facts of this case are quite distinguishable from those of Dharani Sugars and Chemicals Limited Vs. Union of India and others. Therefore, the Financial Creditor has been able to make out a good case in its favour and against the Corporate Debtor/Guarantor."

and finally admitted the Application on being satisfied that the default was established in repayment.

Company Appeal (AT) Insolvency No. 993 of 2019 4

2. The Learned Counsel for the Appellant submits that the Deed of Guarantee for overall limit was executed by M/s. Genegrow Commercial Pvt. Ltd. on 05.10.2009 as 'Guarantor' and that the account of the 'Corporate Debtor' 'Gee Pee Infotech Pvt. Ltd.' (Principal Borrower) was declared 'Non Performing Asset' (NPA) on 10.01.2014 and that the 1st Respondent Bank/ Applicant /'Financial Creditor' filed O.A. No. 493/2015 against the 'Gee Pee Infotech Pvt. Ltd.' (Principal Borrower) before the Debt Recovery Tribunal - 1, Kolkata for recovering a sum of Rs. 84,53,923.50/-.

3. The Learned Counsel for the Appellant points out that the 1st Respondent / Bank filed an application u/s 7 of the 'I&B' Code before the Adjudicating Authority('National Company Law Tribunal') against the Principal Borrower ('Gee Pee Infotech Pvt. Ltd.') as well as the 'Corporate Debtor M/s. Genegrow Commercial Pvt. Ltd. for the same set of 'Claim and Default' primarily committed by the Principal Borrower.

4. The Learned Counsel for the Appellant contends that the Learned Adjudicating Authority ('National Company Law Tribunal') Kolkata had admitted the claim based on the fact that the 'Principal Borrower' had admitted the claim and had no defence, initiated 'Corporate Insolvency Resolution Process' against the 'Principal Borrower' and Corporate Guarantor. In this connection, it is the stand of the Appellant that the Learned Adjudicating Authority while admitting the claim had failed to appreciate that the liability of the 'Principal Borrower' and the 'Guarantor' is co-extensive for the purpose of recovery.

Company Appeal (AT) Insolvency No. 993 of 2019 5

5. The Learned Counsel for the Appellant point out that the 'I&B' proceedings is not a recovery proceedings and relies upon the decision 'Binani Industries Limited' Vs. 'Bank of Baroda & Anr.' (CA)(AT)(Ins.) No. 82/2018 at para 17 wherein it is observed that the IBC is not a Recovery proceeding.

6. The Learned Counsel for the Appellant cites the decision 'Dr. Vishnu Kumar Agarwal Vs. M/s. Piramal Enterprises Ltd. in Company Appeal (AT)(Ins.) No. 346 and 347 of 2018 (reported in MANU/NL/0003/2019) wherein at para 32 and 33 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').

Company Appeal (AT) Insolvency No. 993 of 2019 6 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.

33. For the reasons aforesaid, while we uphold the initiation of the 'Corporate Insolvency Resolution Process' initiated under Section 7 of the 'I&B Code' against 'Sunsystem Institute of Information Technology Pvt. Ltd.' -

("Corporate Guarantor No. 2") by impugned order dated 24th May, 2018, we hold that the impugned order dated 31st May, 2018 initiating 'Corporate Insolvency Resolution Process' under Section 7 against the 'Sunrise Naturopathy and Resorts Pvt. Ltd.' -

Company Appeal (AT) Insolvency No. 993 of 2019 7 ('Corporate Guarantor No. 1') for same very claim/debt is not permissible and the application under Section 7 was not maintainable.

7. The Learned Counsel for the Appellant contends that the Adjudicating Authority had failed to take into account with the application filed under Section 7 of 'I&B' Code against the 'Corporate Debtor' is barred by limitation and in this regard cites the decision of Hon'ble Supreme Court in 'B.K. Educational Services Private Limited Vs. Parag Gupta and Associates' (MANU/SC/1160/2018) wherein at para 27 it is observed as under:-

"27. It is thus clear that since the Limitation Act is applicable to applications filed Under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred Under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act Company Appeal (AT) Insolvency No. 993 of 2019 8 may be applied to condone the delay in filing such application."

8. The Learned Counsel for the Appellant refers to the decision of Hon'ble Supreme Court in the case of Gaurav Hargovindbhai Dave Vs. Asset Reconstruction Company (India) Ltd. & Anr. (in Civil Appeal No. 4952/2019 dated 18.09.2019) wherein at para No.6 it is observed and held as under:-

"6. Having heard the learned counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being "an application" which is filed under Section 7, would fall only within the residuary article 137. As rightly pointed out by learned counsel appearing on behalf of the appellant, time, therefore, begins to run on 21.07.2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr. Banerjee's reliance on para 7 of B.K. Educational Services Private Limited (supra), suffice it to say that the Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time- barred."

Company Appeal (AT) Insolvency No. 993 of 2019 9

9. Contending contra it is the submission of Learned Counsel for the 1st Respondent/Bank/Financial Creditor that the liability of the 'Principal Debtor and Guarantor' is co-extensive as per Section 128 of Indian Contract Act, 1872 and relies on the decision of Hon'ble Supreme Court in the matter of Ram Kishun Vs. State of U.P. (2012) 11 SCC, 511 wherein at para 23 it is observed as under:-

"23.....the law can be summarised to the effect that the recovery of the public dues must be made strictly in accordance with the procedure prescribed by law. The liability of a surety is co- extensive with that of principal debtor. In case there are more than one surety the liability is to be divided equally among the sureties for unpaid amount of loan. Once the sale has been confirmed it cannot be set aside unless a fundamental procedural error has occurred or sale certificate had been obtained by misrepresentation or fraud."

10. The Learned Counsel for the 1st Respondent/Bank refers to the decision of Hon'ble Supreme Court in the matter of Industrial Investment Bank of India Ltd. Vs. Bishwanath Jhunjhunwala Civil Appeal No. 4613 of 2000 wherein at para 30 it is observed as under:-

"The legal position as crystallized by a series of cases of this Court is clear that the Company Appeal (AT) Insolvency No. 993 of 2019 10 liability of the guarantor and principle debtors are co-extensive and not in alternative. When we examine the impugned judgment in the light of the consistent position of law, then the obvious conclusion has to be that the High Court under its power of superintendence under Article 227 of the Constitution of India was not justified to stay further proceedings in O.A. 156 of 1997."

11. The Learned Counsel for the 1st Respondent takes a plea that the Appellant's argument that the co-extensive liability of the 'Principal Borrower' and the 'Guarantor' is only for the purpose of recovery is mis-conceived and in fact, the 'Guarantor' and the 'Corporate Debtor' sail in the same boat, since the loan was granted to the 'Corporate Debtor' on the very basis of 'Guarantee' and the proposition of choosing between the 'Guarantor' and the 'Corporate Debtor' would defeat the intent of 'I&B' Code.

12. The Learned Counsel for the 1st Respondent contends that the 'issue of Limitation' was neither raised by the 'Corporate Debtor' nor by the Appellant before the Adjudicating Authority ('National Company Law Tribunal') Kolkata and, therefore, the Appellant is estopped from taking this plea before this Tribunal.

Company Appeal (AT) Insolvency No. 993 of 2019 11

13. The Learned Counsel for the 1st Respondent cites the judgement dated 22.11.2019 in Company Appeal (AT)(Ins.) No. 672/2019 reported in MANU/NL/0558/2019 in the matter of Sesh Nath Singh and Ors. Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd. & Ors. wherein at para 10 it is observed as under:-

"10. A notice was issued on 20.03.1997 to the respondent invoking the personal guarantee given by him and calling upon him to pay the sum of Rs. 5.40 crores together with further interest and liquidated damages from 1.1.1997 till repayment."

14. The Learned Counsel for the 1st Respondent relies on the order dated 06.09.2017 Sanjeev Shaye & Ors. V. State Bank of India & Ors. reported in MANU/UP/2243/2017 wherein it is reiterated that "the rights of the surety is co- extensive with that of Principal Debtor.

15. A perusal of the application by the 1st Respondent/Bank/Financial Creditor (filed u/s 7 of 'I&B' Code read with Rule 4 of 'I&B' application to Adjudicating Authority Rules, 2016) part IV points out that the principal sum due as on 31.01.2018 was Rs. 81,92,38,508.50/-. The facility cc(AUCA) sanctioned was Rs. 320000000(Rupees thirty two crores) and IBD, sanctioned was of Rs. 500000000(Rupees fifty crores). The total sanctioned amount was Rs. 820000000(Rupees Eighty two crores). The Principal outstanding was Rs.

Company Appeal (AT) Insolvency No. 993 of 2019 12 81,92,38,508.50. A sum of Rs. 80,69,85,101.13 was due towards interest. The name of the Creditor in part-I of the application is mentioned as State Bank of India and in part II, the 'Corporate Debtor' is mentioned as M/s. Genegrow Commercial Pvt. Ltd.

16. It is to be noted that the date of 'Non Performing Asset' was 10.01.2014. As a matter of fact, the total outstanding amount as on 31.01.2018 was Rs. 162,62,23,609.63. The Appellant before the Adjudicating Authority in reply to the application filed by the 1st Respondent/Bank had taken a plea that the application u/s 7 of 'I&B' Code filed by the 1st Respondent/Bank is not maintainable in law. Further, the 'Corporate Debtor' had taken a stand that there was no debt due or payable by it as on 31.1.18 or any other date as alleged to the 'Financial Creditor' etc. Besides this, the 'Corporate Debtor' took a stand that the application filed by the Bank before the Adjudicating Authority was incomplete non-compliance of the provisions of 'I&B' Code and the provisions of the Banking Regulation Act, 1949 and the amendments thereof and the guidelines and / or Circulars issued by the Reserve Bank of India.

17. The Learned Adjudicating Authority while passing the impugned order dated 02.08.2019 at para 28 and 29 had observed the following:-

"28. According to the Learned Sr. Counsel appearing for the applicant, RBI has not yet announced the time bound resolution of defaulted accounts falling Company Appeal (AT) Insolvency No. 993 of 2019 13 under the category of clause 12 of the circular dated 12th February, 2018 so far and none of the clauses referred to in the circular which has been declared as non-est by the Hon'ble Supreme Court, is applicable to the Corporate Debtor in the case in hand.

29. In view of the above said reason, the contention that the applicant has initiated Insolvency proceedings under the Insolvency and Bankruptcy Code by not complying with the Press Release dated 13th June, 2018 is arbitrary, besides being contrary to law and statute and is devoid of any merits. So also we do not find any merit in the contention that the applicant filed the instant application on the strength of a circular which was declared as non-est by the Hon'ble Supreme Court and therefore initiating CIRP as against the corporate debtor is against the proposition held in the above

cited decision is found devoid of any merit."

Company Appeal (AT) Insolvency No. 993 of 2019 14

18. It is not in dispute that the 'Corporate Debtor' (Being Corporate Guarantor of the Principal Borrower 'Gee Pee Infotech Pvt. Ltd.) had executed the Guarantee Deed on 05.10.2011 in respect of overall Limit and sanctioned in favour of the 'Financial Creditor'. Also that a supplementary Guarantee Deed was executed between 'Corporate Guarantor' & and the 'Financial Creditor'.

19. 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'. This court pertinently points out that a 'Financial Debtor' includes Debt owed to the Creditor by both the Principal and the Guarantor. Section 3(11) of 'I&B' Code refers to a sum that it is due from any person including 'Corporate Debtor'. A mere failure of the Guarantor to pay the 'Financial Creditor' when the principal sum is demanded will come within the purview of default u/s 3(12) of the Code. A 'Financial Creditor' who has a 'Guarantee' on the Debt due can commence proceedings u/s 7 of 'I&B' Code against the 'Guarantor' for failure to repay the sum borrowed by the Principal Borrower.

20. It is to be remembered that if the 'Contract of Guarantee' itself mentions that the liability of a Guarantor will be independent and separate than that of 'Principal Debtor's liability, then an application against the Guarantor as per Section 7 is maintainable. The only rider will be that a Creditor is not permitted to do the same, sue the principal Debtor and claim in the Guarantor's Insolvency at the same time.

Company Appeal (AT) Insolvency No. 993 of 2019 15

21. A contract of Guarantee is a contract to perform the promise or discharge the liability of 3rd party, in case of his default. In this connection, it is to be pointed out that it may not be necessary to start 'Corporate Insolvency Resolution Process' against the 'Principal Borrower' before initiating against the 'Corporate Debtor'. Even without resorting to 'Corporate Insolvency Resolution Process' against the 'Principal Borrower' it is always open to the 'Financial Creditor' to commence 'Corporate Insolvency Resolution Process' u/s 7 of the 'I&B' Code against the 'Corporate Debtor' / Guarantor.

22. There is no two opinion of a prime fact that there is no fetter in 'I&B' for projecting simultaneously two applications u/s 7 of IBC against (i) the Principal Borrower as well as (ii) the Corporate Guarantor(s) or against both the Guarantors but if, for the same set of claim, when an Application filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor'/'Principal Borrower' or Corporate Guarantor, the second application filed by the same 'Financial Creditor' for the same set of claim and default is not to be admitted against the other 'Corporate Debtor' (The Corporate Guarantor(s) or the Principal Borrower.

23. As far as the present case is concerned, the Learned Adjudicating Authority had admitted the application u/s 7 of the 'I&B' filed by the Principal Borrower on 02.08.2019 in CP(IB)No.353/KB/2018. Also, on 02.08.2019 itself, the Learned Adjudicating Authority had

admitted an application filed u/s 7 of the 'I&B' Code filed by the 'Financial Creditor' against the 'Corporate Debtor' Company Appeal (AT) Insolvency No. 993 of 2019 16 'Gengrow Commercial Pvt. Ltd. being the 'Corporate Guarantor' of the 'Principal Borrower' viz. 'Gee Pee Infotech Pvt. Ltd.' for the very same debt/claim it is impermissible. Viewed in that perspective, this Tribunal comes to a consequent conclusion that the Application u/s 7 of the 'I&B' Code filed by the 1st Respondent/Bank/'Financial Creditor' against the 'Corporate Debtor' Gengrow Commercial Pvt. Ltd. is not maintainable in law and the same is accordingly dismissed but without costs.

24. The order passed by the Adjudicating Authority in appointing the 'Interim Resolution Professional', declaring moratorium etc. and actions, if any, taken by the 'Interim Resolution Professional' against the present Appellant/'Corporate Debtor' namely M/s. Gengrow Commercial Pvt. Ltd. are declared illegal and they are set aside. The 'Resolution Professional' is directed to hand over the Records and Assets of the 'Corporate Debtor' to the 'Promoter'/'Directors' of the 'Corporate Debtor' immediately.

25. The Learned Adjudicating Authority namely 'National Company Law Tribunal', Kolkata will now close the proceeding of the case in CP (IB) No. 353/KB/2018 and that the 'Corporate Debtor' M/s. Genegrow Commercial Pvt. Ltd.' is released from all the rigour of law and is permitted to function independently. The Adjudicating Authority will determine the fee of 'Interim Resolution Professional' and that the 1st Respondent/Bank/Applicant will pay the fees of the 'Interim Resolution Professional' for the period he had functioned.

Company Appeal (AT) Insolvency No. 993 of 2019 17 Before parting, it is made clear that this Tribunal has not gone into the aspect of limitation since it found that the Application filed by the 1st Respondent / Bank / Financial Creditor is not maintainable against the Appellant.

The present Appeal is allowed with aforesaid observations but without costs. IA No. 3003/19 and IA No. 3005/19 are closed. However, the Appellant is directed to file certified copy of the impugned order of the Adjudicating Authority within a week from today.

[Justice Venugopal M.] Member (Judicial) [Balvinder Singh] Member (Technical) [Dr. Ashok Kumar Mishra Member (Technical) New Delhi 23rd January, 2020 ss Company Appeal (AT) Insolvency No. 993 of 2019 18