

Ferro Alloys Corporation Ltd vs Rural Electrification Corporation Ltd on 8 January, 2019

1

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 92 of 2017

(arising out of order dated 6th July, 2017 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in C.P. (IB) No. 251/KB/2017)

IN THE MATTER OF:

Ferro Alloys Corporation Ltd.,
D.P. Nagar,
Randia Bhadrak,
Odisha - 756135.

... Appellant

Vs.

Rural Electrification Corporation Ltd.,
Core 4, Scope Complex,
7, Lodhi Road,
New Delhi - 110 003.

... Respondent

Present:

For Appellant : Dr. Abhishek Manu Singhvi, Senior Advocate assisted by
Mr. Anish Dayal, Mr. Sumesh Dhawan, Mr. N. S. Ahluwalia,
Mr. Ashutosh Khaitan, Mr. Navpreet Ahluwalia, Ms. Vatsala
Kak, Mr. Deepak Chawla, Ms. Tannya Baranwal, Mr. A.
Sharma, Mr. Avishkar Singhvi and Mr. Salil Seth, Advocates

For Respondent: Mr. Tushar Mehta, Additional Solicitor General with
Ms. Vanita Bhargawa, Mr. Ajay Bhargawa, Mr. Aseem
Chaturvaedi, Ms. Wamika Trehan and Ms. Shweta Kabra,
Advocates for R-1

Mr. Mayank Mikhail Mukherjee, Advocate for RP

2

WITH

Company Appeal (AT) (Insolvency) No. 93 of 2017

IN THE MATTER OF:

Rai Bahadur Shree Ram & Company Pvt. Ltd.
Shreeram Bhawan, Tumsar,
Distt. Bhandara,
M.S. Bhandara,
Maharashtra - 441 9212.

... Appellant

Vs.

1. Rural Electrification Corporation Ltd.,
Core 4, Scope Complex,
7, Lodhi Road,
New Delhi - 110 003.

2. Ferro Alloys Corporation Ltd.,
D.P. Nagar, Randia Bhadrak,
Odisha - 756135.

... Respondents

Present:

For Appellant : Dr. Abhishek Manu Singhvi, Senior Advocate assisted by
Mr. Anish Dayal, Mr. N. S. Ahluwalia, Mr. Sumesh Dhawan,
Mr. Ashutosh Khaitan, Mr. Deepak Chawla, Mr. Navpreet
Ahluwalia, Ms. Vatsala Kak, Mr. Adhish Sharma, Mr. Avishkar
Singhvi and Mr. Salil Seth, Advocates

For Respondents: Mr. Tushar Mehta, Additional Solicitor General with
Ms. Vanita Bhargava, Mr. Ajay Bhargava, Mr. Aseem
Chaturvaedi, Ms. Wamika Trehan and Ms. Shweta Kabra,
Advocates

Mr. Salil Seth, Advocate for Respondent No. 2

Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017

Company Appeal (AT) (Insolvency) No. 148 of 2017

IN THE MATTER OF:

Bank of India,
(on its own behalf &
Member Bank of Consortium)
Visakhapatnam Main Branch,
47-10-23/4&5,
1st Floor, Isnar Khazana Towers,
2nd Lane, Dwarkanagar,
Visakhapatnam - 530 016.

... Appellant

Vs.

1. Rural Electrification Corporation Ltd.,
Core 4, Scope Complex,
7, Lodhi Road,
New Delhi - 110 003.
2. Ferro Alloys Corporation Ltd.,
D.P. Nagar, Randia Bhadrak,
Odisha - 756135.
3. FACOR Power Ltd.,
FACOR House, A-45 to 50,
Sector 16,
NOIDA - 201 301,
Distt. Gautam Budh Nagar.

... Respondents

Present:

For Appellant : Mr. Saran Suri, Mr. Himanshu Dubey, Mr. Kamal Sharma,
Mr. Sobit Sharma, Ms. Seema and Mr. Aakash, Advocates

Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017

For Respondent: Mr. Tushar Mehta, Additional Solicitor General with
Ms. Vanita Bhargawa, Mr. Ajay Bhargawa, Mr. Aseem
Chaturvaedi, Ms. Wamika Trehan and Ms. Shweta Kabra,
Advocates

Mr. Mayank Mikhail Mukherjee, Advocate for RP

JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

As all these appeals have been preferred by the appellant(s) against the common impugned order dated 6th July, 2017 passed by the Adjudicating Authority (National Company Law Appellate Tribunal), Kolkata Bench, Kolkata, they were heard altogether and being disposed of by this common judgment.

2. An application under Section 7 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code') was preferred by the 'Rural Electrification Corporation Limited' ('REC', for short) (Financial Creditor) against 'Ferro Alloys Corporation Ltd. (Corporate Guarantor - Corporate Debtor). The Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 application having been admitted by the impugned order dated 6th July, 2017, the same is under challenge.

'Ferro Alloys Corporation Ltd.'

3. The appeal at the instance of 'Ferro Alloys Corporation Ltd.' (Corporate Debtor) through its (suspended) Board of Directors is not maintainable in view of the decision of the Hon'ble Supreme Court in "Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407 (Civil Appeals Nos. 8337-38 of 2017)" wherein the Hon'ble Supreme Court held :

"11. Having heard the learned counsel for both the parties, we find substance in the plea taken by Mr. Salve that the present appeal at the behest of the erstwhile Directors of the appellant is not maintainable. Dr. Singhvi stated that this is a technical point and he could move an application to amend the cause-title stating that the erstwhile Directors do not represent the Company, but are filing the appeal as persons aggrieved by the impugned order as their management right of the Company has been taken away and as they are otherwise affected as shareholders of the Company. According to us, once an insolvency professional is appointed to manage the Company, the erstwhile Directors who are no longer in management, obviously Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 cannot maintain an appeal on behalf of the Company. In the present case, the Company is the sole appellant. This being the case, the present appeal is obviously not maintainable. However, we are not inclined to dismiss the appeal on this score alone. Having heard both the learned counsel at some length, and because this is the very

first application that has been moved under the Code, we thought it necessary to deliver a detailed judgment so that all courts and tribunals may take notice of a paradigm shift in the law. Entrenched managements are no longer allowed to continue in management if they cannot pay their debts."

4. According to Dr. Abhishek Manu Singhvi, learned Senior Counsel appearing on behalf of the 'Corporate Debtor' that the observation made by the Hon'ble Supreme Court at paragraph 11, and quoted above, is not a law lay down under Article 141 of the Constitution of India and thereby not a binding for this Appellate Tribunal.

5. Learned Senior Counsel referred to a decision of this Appellate Tribunal in 'Starlog Enterprises Limited Vs. ICICI Bank Limited - Company Appeal (AT)(Ins.) No. 5 of 2017' and submitted that this Appellate Tribunal held that the appeal by 'corporate debtor' is also maintainable, however, we are not inclined to accept such submission in view of the specific finding in 'Innoventive Industries Ltd. (Supra)' that the appeal at the instance of the 'Corporate Debtor' Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 through (suspended) Board of Directors is not maintainable. After admission of an application under Section 7 or 9 or 10, as 'Interim Resolution Professional' is appointed and the Board of Directors stands suspended, the (suspended) Board of Directors have no right to move an appeal on behalf of the 'Corporate Debtor' though it is open to the Director(s) or shareholder(s) to challenge the same.

6. Therefore, while we hold that the present appeal by 'Ferro Alloys Corporation Ltd.' through (suspended) Board of Directors is not maintainable, however, as the other appeal has been preferred by shareholders against the common order dated 6th July, 2017, we have noticed the submission by Dr. Abhishek Manu Singhvi, learned counsel for the 'Ferro Alloys Corporation Ltd.'

7. According to the learned Senior Counsel per se of the I&B Code does not use the concept or the phrase 'corporate guarantor'. This is in contradiction to specific inclusion of 'personal guarantor' in multiple provisions. 'Corporate Guarantor' is, therefore, conspicuous by its absence in the I&B Code. It was submitted that there is no definition of 'Corporate Guarantor' in Section 3 or 5, the two definitional provisions. However, Section 5(22) of the I&B Code defines 'personal guarantor' which means an individual who is a surety to a 'corporate debtor'. Use of the word 'individual' precludes any corporate person or entity.

8. It was further submitted that the I&B Code does not use the word 'guarantor' in a general sense in Section 31 which mandates that a resolution plan will be binding on the guarantors - this provision envisages a situation where the resolution plan has already been made for a 'principal debtor' and which is binding on the guarantor i.e. a resolution plan of a 'principal borrower' Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 is prior in time; Section 43(2) and 44 (1)(e) is giving beneficial preference by a corporate debtor to a guarantor. Therefore, according to him a combined reading of Section 3(8) - definition of 'corporate debtor' and Section 3(11) - definition of 'debt' and Section 5(8)(i) - definition of 'financial debt' would imply that a liability in respect of a guarantee would form part of financial debt, however, while this may be so, the word 'corporate guarantor' does not find mention in the I&B Code.

9. It was next contended without conceding that a 'corporate guarantor' is subsumed within the definition of a 'corporate debtor' under the I&B Code, an insolvency proceeding cannot be initiated first against the 'corporate guarantor' without having proceeded (and exhausted) against the 'principal debtor'. It was also submitted that this manner of proceeding in a bifurcated fashion against the 'corporate guarantor' on one hand and 'principal debtor' on the other hand in different fora i.e. the Adjudicating Authority & Debt Recovery Tribunal (DRT) respectively would cause an unimaginable set of inconsistencies, contradictions, errors. As an illustration while the 'principal debtor' may succeed in the proceedings before DRT, the 'guarantor' would stand wound-up in the meantime and a full insolvency framework being imposed upon it. Further, according to him, when an application under Section 7 of the I&B Code is admitted against the 'corporate guarantor', the moratorium under Section 14 shall only be against the proceedings initiated against the 'corporate guarantor', however, any proceedings going against the 'principal debtor' against the same liability/debt shall continue. This bifurcated process cannot be permitted in a suit or before Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 the DRT and proceedings against both parties would have to be suspended. Learned Senior Counsel further submitted that the 'corporate guarantor' has to be at the very least accorded a comparable treatment to that of the 'principal debtor' ('principal borrower'). If the 'principal debtor' ('principal borrower') therefore has a claim for set off or a counterclaim or a serious dispute regarding the quantification of the debt, then an insolvency process commenced only against the 'corporate guarantor' would be unjust. Reference has been placed in the decision of the Court of Appeals in England (John Rembance v. Octagon Assets - [2009] EWCA Civ 581). According to the learned Senior Counsel the principle followed and applied by the English Court is the flip side of the co- extensive liability argument. If the guarantor has co-extensive liability then the least it should have to be allowed to have similar treatment as the 'principal debtor'.

10. It was submitted that simultaneously two applications under Section 7 of the I&B Code can be filed, one against the 'principal debtor' and the other against the 'corporate debtor'. According to the learned counsel there is no provision in the I&B Code for filing a simultaneous Section 7 of the I&B Code application against a 'principal debtor' as well as a 'corporate guarantor'. Thus, Section 7 application cannot be jointly filed against both the 'principal debtor' and the 'corporate guarantor'. It was also submitted that Section 7(1) enables a financial creditor to file an application for initiating corporate insolvency resolutions against one corporate debtor. This is evident from the use of the singular article 'a' before a 'corporate debtor'. According to him the I&B Code framework, the Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 interpretation of its provisions and keeping practical considerations in mind, the correct sequence would be to first proceed against (and exhaust) the 'principal debtor', failing which proceed against the 'corporate guarantor'.

'Bank of India'

11. The Bank of India, on its behalf and on behalf of other members Banks of its association, has made wide claim that the consortium being a prior and first charge holder, its right could not be defeated by the respondent - 'Rural Electrification Corporation Limited', which not only was a subsequent guarantee-holder but even its authenticity of its guarantee was liable to be adjudicated. It was further submitted that the consortium of Banks are necessary and proper party, more so, the

terms of the scheme under Sections 27 and 28 of the I&B Code ought not to be ignored more particularly as the process was sought against the 'guarantor' and the resolution process cannot be achieved without bringing all creditors together.

12. However, aforesaid submission cannot be accepted at the stage of admission of an application under Section 7, as there is no need to implead any person or party (respondent) at the initial stage, except the 'corporate debtor', who owes the 'debt' and because of 'default' the application under Section 7 is filed.

13. The Hon'ble Supreme Court in 'Innoventive Industries Ltd. (supra)' has observed and held as follows:

"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor -- it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein.

Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

14. Therefore, it is clear that if the Adjudicating Authority is satisfied that there is a 'debt' and 'default' and otherwise if the application is in order is bound to admit the application. It is a 'corporate debtor' who can only point out that it does not owe any debt either in law or in fact, which is not the case of the 'corporate debtor'. 'Corporate debtor' can also take a plea that the application

has been filed by a person who is not a 'financial creditor' but such issue having not raised, the consortium of banks have no role to play at the time of admission of application under Section 7 of the I&B Code. The role of banks comes if they Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 file claim after the admission of an application and when they are accepted as a 'financial creditors' and made members of the 'Committee of Creditors' in terms of Sections 27 and 28 of the I&B Code. Such claims are looked into by the 'Resolution Professional' only after admission of the application under Section 7 or 9 or 10 and the order of moratorium was passed by the Adjudicating Authority.

15. Therefore, the appeal at the instance of 'Bank of India' on its behalf and member banks of the consortium being on merit is fit to be rejected.

'Raj Bahadur Shree Ram and Company Pvt. Ltd.'

16. The other appellant - 'Raj Bahadur Shree Ram and Company Pvt. Ltd.' is a promoter and shareholder of 'Ferro Alloys Corp. Ltd.' (Corporate Debtor). The appeal at his instance being maintainable, in fact we have heard Dr. Abhishek Manu Singhvi with regard to the larger issue raised by him regarding the maintainability of the petition under Section 7 against the 'corporate guarantor'.

17. In the individual appeal preferred by the promoter, the main ground taken is that there is a dispute about the amount of 'debt'.

18. According to the learned counsel for the promoter, the notice for invocation of guarantee on the basis of calculation, after which an amount of Rs.564,63,50,544 had been calculated by the 'Rural Electrification Corporation Limited'. The other ground taken is that the 'Rural Electrification Corporation Limited' (Financial Creditor) had issued notice earlier on 27th October, 2015 for invocation of 'corporate guarantee' which is also the basis of approaching the Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 Adjudicating Authority after two years. It is submitted that the 'financial creditor' approached the Adjudicating Authority resultant of failure before various other judicial forums where the amount has already been disputed by the 'corporate debtor' in pursuance to the revocation of the 'corporate guarantee' and 'financial creditor' has failed to provide the 'corporate debtor' relevant documents which were referred in their notice.

19. However, the aforesaid grounds cannot be considered at the time of an application under Section 7, in view of the decision of the Hon'ble Supreme Court in 'Innoventive Industries Ltd. (supra)' in paragraphs 28 and 29 etc. as referred to above as per which it is to be seen that there is a 'debt' or 'default' committed by the 'corporate debtor'. Mere dispute of quantum of amount cannot be a ground and that too can be taken at the stage of admission. If the 'debt' is more than one lakh and there is a 'default', the application to be admitted. The Adjudicating Authority not being a court of law or Tribunal and 'corporate insolvency resolution process' being not a litigation as held by this Appellate Tribunal in "Binani Industries Limited vs. Bank of Baroda & Anr. etc. - Company Appeal (AT)(Insolvency) No. 82 of 2018 etc.", we hold that the Adjudicating Authority has no jurisdiction to decide any disputed question or claim based on evidence and at the stage of admission is only

required to satisfy itself about existence of debt or not and if it is more than Rupees One Lakh and party has defaulted, and otherwise the application is complete, the Adjudicating Authority is required to admit the application. Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017

20. Therefore, the ground taken by Raj Bahadur Shree Ram and Co. Pvt. Ltd. (Promoter) against the order of the Adjudicating Authority dated 6th July, 2017 is fit to be rejected.

21. The only question arises for determination in this appeal is whether the application under Section 7 of the I&B Code is maintainable against the 'corporate guarantor' without initiation of 'corporate insolvency resolution process' against the 'principal borrower' ('principal debtor').

FACTS OF THE CASE

22. The respondent - Rural Electrification Corporation Limited (financial creditor) sanctioned loan aggregating Rs.517.90 crores to FACOR Power Limited (principal borrower), a company incorporate under the Companies Act, 1956 under the 'Loan Agreement' dated 22nd May, 2009 (Rs. 140 crores); on 29th October, 2010 (Rs. 257.68 crores); on 28th June, 2013 (Rs. 69.36 crores) and on 12th November, 2014 (Rs. 50.86 crores) and disbursed an amount aggregating to Rs. 510.97 crores on various dates. For securing the above mentioned loan facility extended by the 'financial creditor' to 'FACOR Power Limited' ('corporate debtor' - 'corporate guarantor') a 'Corporate Guarantee Agreement' was signed and executed guarantee documents in favour of the 'financial creditor' on 24th August, 2009, as revised on 29th October, 2010, 21st June, 2013 and again on 22nd January, 2015.

23. 'Ferro Alloys Corporation Limited' ('corporate guarantor' - 'corporate debtor') as also borrower pledged 15,10,74,299 physical shares and 4,69,85,631 Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 Demat shares of 'FACOR Power Limited' totaling to 19,80,59,930 shares through various deeds in favour of the 'financial creditor'. The case of the 'financial creditor' was that M/s. FACOR Power Limited (principal borrower) defaulted in making repayment of dues and the account of M/s. FACOR Power Limited has since been classified as Non-Performing Asset (NPA). In view of the defaults committed in the repayment of loan, as per the terms and conditions of the 'Loan Agreement' and other financing documents, the 'financial creditor' recalled the facilities on 1st October, 2015 and demanded the entire amount of loan, interest and all other amounts due in respect thereof. Despite receipt of the same, no payment was made to the 'financial creditor'. M/s. FACOR Power Limited (principal borrower) has admitted its liability to the extent of Rs. 604,99,91,539/- as on 31st March, 2016 in the audited balance-sheet for the financial year 2015-16. The 'corporate guarantor' - Ferro Alloys Corporation Limited in its audited balance-sheet for the financial year 2015-16 has acknowledged the debt to the tune of Rs.517.90 crores. The copy of the audited balance-sheet of the 'Ferro Alloys Corporation Limited' was also enclosed along with the application under Section 7 of the I&B Code (Form-1).

24. On being default in making the payment of the debt amount by the 'principal borrower', the 'financial creditor' invoked the corporate guarantee of the 'Ferro Alloys Corporation Limited' and called upon the 'Ferro Alloys Corporation Limited' ('corporate guarantor') to pay forthwith the

amount due and payable by the 'M/s. FACOR Power Limited' (principal borrower') amounting to Rs.564,63,50,544/- as on 30th September, 2015 along with future interest within Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 a period of 21 days. M/s. Ferro Alloys Corporation ('corporate guarantor') issued a reply dated 26th November, 2015 but failed and neglected to pay the above sum.

25. The 'financial creditor' pleaded that the 'corporate guarantee' furnished by 'Ferro Alloys Corporation Limited' is an unconditional, continuing and irrevocable guarantee. As per the terms of the guarantee, the obligation of guarantor is separate, independent and is that of primary obligor and not merely as surety, on a full indemnity basis to indemnify the 'financial creditor'. The 'corporate guarantee' provided by the 'Ferro Alloys Corporation Limited' is joint and several and co-extensive with that of the principal debtor and can be invoked even without exhausting the remedies against the principal debtor. Similar plea was taken before the Adjudicating Authority. The Adjudicating Authority taking into consideration the fact that there is a 'debt' and 'default' and the application under Section 7 being complete admitted the application by the impugned order dated 6th July, 2017.

26. We have heard the learned counsel for the parties and perused the record. The position of law is manifested in the I&B Code including the definitions which require harmonious and purposeful reading and reasoning.

27. The term 'corporate person', defined under Section 3(7) of the I&B Code, is as under :

"(7) "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;"

Insolvency Resolution Process under Section 7 of the I&B Code can be initiated against the guarantor who is a 'corporate person' and who by operation of law ipso facto becomes a 'corporate debtor' by satisfying the ingredients of the terms as defined under Section 3(8).

The term of 'corporate debtor' which is defined under Section 3(8) means a 'corporate person' who owes a debt to any person, as quoted below:

"(8) "corporate debtor" means a corporate person who owes a debt to any person;"

The term 'debt', as used in Section 3(8) is defined under Section 3(11) of the Code, is as under:

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

As per Section 3(8), the term 'corporate debtor' can be a debtor who may be any person. The term 'person', defined under Section 3(23), is as under:

(23) "person" includes--

(a) an individual;

Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017

(b) a Hindu Undivided Family;

(c) a company;

(d) a trust;

(e) a partnership;

(f) a limited liability partnership; and

(g) any other entity established under a statute,

and includes a person resident outside India;"

Thus, a 'corporate debtor' must be a 'corporate person', [Section 3(7)] who owes a 'debt' [Section 3(11)], to any person [Section 3(23)]. The 'debt' as used in Section 3(8) has to be a 'debt' defined under Section 3(11) as quoted above. It must be the 'liability' or 'obligation' in respect of a 'claim' [Section 3(6)] which is due from any person [Section 3(23)] - which means even a corporate entity and shall include 'financial debt' and 'operational debt' as defined under section 5(8) and 5(21) as quoted hereunder:

(6) "claim" means--

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach

Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

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

(a) money borrowed against the payment of interest;

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

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

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

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 agreement, having the commercial effect of a borrowing;

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

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

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-

clauses (a) to (h) of this clause;

(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under

any law for the time being Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 in force and payable to the Central Government, any State Government or any local authority;

'Corporate Insolvency Resolution Process' under Section 7 of the I&B Code can be initiated by a 'financial creditor'. Section 7(1) reads as under:

7.(1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation.-- For the purposes of this sub- section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor."

Section 3(10) defines 'creditor' as under :

(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decreeholder;

The term 'financial creditor' is defined under Section 5(7) which reads as under:

Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 (7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

The term 'default' is defined under Section 3(12) which encompasses default, both by principal borrower and principal guarantor, which reads as under:

(12) "default" means 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;

A guarantee becomes a debt or as soon as the guarantee is invoked against it whereinafter a guarantor ('corporate guarantor') becomes a 'corporate debtor' in terms of the I&B Code.

28. In 'Bank of Bihar Ltd. vs. Dr. Damodar Prasad & Anr. - (1969) 1 SCR 620', the Apex Court held :

"3. The demand for payment of the liability of the principal debtor was the only condition for the enforcement of the bond. That condition was fulfilled. Neither the principal debtor nor the surety discharged the admitted liability of the principal debtor in spite of demands. Under Section 128 of the Indian Contract Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 Act, save as provided in the

contract, the liability of the surety is coextensive with that of the principal debtor. The surety became thus liable to pay the entire amount. His liability was immediate. It was not deferred until the creditor exhausted his remedies against the principal debtor."

29. In 'Ram Bahadur Thakur vs. Sabu Jain Limited - [1981 (51) Comp Cas 301]', the Hon'ble High Court of Delhi relying on the decision of Hon'ble Supreme Court in 'Kesoram Mills Case - [(1966) 59 ITR 767]', held that under the 'deed of guarantee' the liability of the company to pay debt arose when the borrower defaulted in making payments and the creditor sent a demand/notice invoking the guarantee.

30. In the present case as per clause 1.2 of the 'Deed of Guarantee' dated 22nd January, 2015, "on the failure of principal borrower to pay and/or discharge the obligations, the guarantor shall, forthwith upon demand, pay to Rural Electrification Corporation Limited (Financial Creditor) without demur or protest", the amount stated in the demand made by Rural Electrification Corporation Limited to the guarantor thereby invoking the guarantee.

31. The relevant clauses of the contract of the guarantee are clause 1.2 to 1.5, clause 6, clause 7 and clauses 10 and 11.

32. Admittedly, the guarantee was invoked by 'Rural Electrification Corporation Limited' against 'Ferro Alloys Corporation Ltd.' and demand was Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 raised on 27th October, 2015 calling upon 'Ferro Alloys Corporation Ltd.' to pay the amount due within 21 days. Since then, Ferro Alloys Corporation Ltd. (Corporate Guarantor) became a 'corporate debtor' of 'Rural Electrification Corporation Limited' (Financial Creditor).

33. In its Annual Report for the year ending 2016-17, 'Ferro Alloys Corporation Ltd.' has shown a sum of Rs. 517.90 crores payable to the 'financial creditor'. Therefore, it is clear that 'Ferro Alloys Corporation Ltd.' admitted the 'debt' and in absence of payment, we hold that there is a 'default'.

34. The provision of the I&B Code do not bar a 'financial creditor' from initiating 'corporate insolvency resolution process' against the 'guarantor', who comes within the meaning of 'corporate debtor'. The aforesaid matter can be noticed from the statutory inter-se rights, obligations and liabilities of :

(i) A surety qua the creditor (the relationship as defined under the Indian Contract Act); or

(ii) Guarantor qua financial creditor.

35. The I&B Code does not exclusively delineates and/or prescribes any inter-se rights, obligation and liabilities of a guarantor qua 'financial creditor'. Thus, in absence of any express provision providing for inter-se rights, obligation and liabilities of guarantor qua 'financial creditor' under the Code, the same will have to be noticed from the provisions of the Indian Contract Act, which

exclusively and elaborately deals with the same.

36. In "Bank of Bihar v. Damodar Prasad and Anr." (1969) 1 SCR 620"

the Hon'ble Supreme Court referred to a judgment of Hon'ble Bombay High Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 Court in "Lachhman Joharimal v. Bapu Khandu and Tukaram Khandoji" (1969) 6 Bom HCR 241", in which the Division Bench of the Hon'ble Bombay High Court held as under:

"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."

37. The Hon'ble Supreme Court while approving the said judgment, observed that, "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."

38. In "State Bank of India v. Indexport Registered and Ors." (1992) 3 SCC 159", the Hon'ble Supreme Court held that the decree holder bank can execute the decree first against the guarantor without proceeding against the 'Principal Borrower'. Guarantor's liability is co-extensive with that of the principal debtor under the 'Contract Act, 1872' (Section 128), relevant of which is quoted hereunder:

Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 "10. The decree does not put any fetter on the right of the decree-holder to execute it against any party, whether as a money decree or as a mortgage decree. The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree-holder. The question arises whether a decree which is framed as a composite decree, as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of decretal amount covering mortgage decree can be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the property."

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"13 In the present case before us the decree does not postpone the execution. The decree is simultaneous and it is jointly and severally

against all the defendants including the guarantor.

It is the right of the decree-holder to proceed with it in a way he likes. Section 128 of the Indian Contract Act itself provides that "the liability of the Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract".

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22. The decree for money is a simple decree against the judgment-debtors including the guarantor and in no way subject to the execution of the mortgage decree against judgment-debtor 2. If on principle a guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgaged decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor. It appears the above-quoted observations in Manku Narayana case [(1987) 2 SCC 335 : AIR 1987 SC 1078] are not based on any established principle of law and/or reasons, and in fact, are contrary to law.

It, of course depends on the facts of each case how the composite decree is drawn up. But if the composite decree is a decree which is both a personal decree as well as a mortgage decree, without any limitation on its execution, the decree-

Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 holder, in principle, cannot be forced to first exhaust the remedy by way of execution of the mortgage decree alone and told that only if the amount recovered is insufficient, he can be permitted to take recourse to the execution of the personal decree."

39. In view of the aforesaid decision of the Hon'ble Supreme Court, we hold that it is not necessary to initiate 'Corporate Insolvency Resolution Process' against the 'Principal Borrower' before initiating 'Corporate Insolvency Resolution Process' against the 'Corporate Guarantors'. Without initiating any 'Corporate Insolvency Resolution Process' against the 'Principal Borrower', it is always open to the 'Financial Creditor' to initiate 'Corporate Insolvency Resolution Process' under Section 7 against the 'Corporate Guarantors', as the creditor is also the 'Financial Creditor' qua 'Corporate Guarantor'. The first question is thus answered against the Appellant.

40. There is nothing on record to suggest that simultaneously two proceedings of 'corporate insolvency resolution process' has been initiated one against principal borrower and another against 'Ferro Alloys Corporation Limited' (Corporate Debtor) in respect of the same claim amount and default. Therefore, we are not deliberating the issue in respect to 'corporate insolvency resolution process' against 'principal borrower' in the present appeal particularly when no order of initiating the corporate insolvency resolution Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 proceedings against the principal borrower has been brought to our notice nor is under challenge.

41. For the reasons as discussed above, the appeals fail. It is accordingly dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

New Delhi

08th January, 2019.

/ns/

Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017