

Maitreya Doshi vs Anand Rathi Global Finance Ltd. & Anr on 25 August, 2021

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 191 of 2021

[Arising out of Order dated 19th February, 2021 passed by the Adjudicating Authority (National Company Law Tribunal), Court 5, Mumbai Bench in C.P. (IB) No. 1220/MB/2020]

IN THE MATTER OF:

Maitreya Doshi
Ex-Director of Doshi Holdings Pvt. Ltd.
6, Neela House, Dhanukar Marg,
Mumbai - 400 026.

...Appellant

Versus

Anand Rathi Global Finance Ltd.
Express Zone, A wing, 10th Floor,
Western Express Highway,
Goregaon (E),
Mumbai - 400 063.

...Respondent No. 1

Kanak Jani
The Interim Resolution Professional
of Doshi Holdings Pvt. Ltd.,
58, Nariman Bhavan, Nariman Point,
Mumbai - 400 021.

...Respondent No. 2

For Appellant: Mr. Krishnendu Datta, Sr. Advocate with Ms. Pooja Batra, Ms. Dhanyashree Jadeja, Mr. Ankit Lohia and Mr. Manas Kotak, Advocates.

For Respondents: Ms. Smriti Churiwal, Mr. Prateek Seksaria, Mr. Vishesh Kalra and Mr. Jaiveer Kant, Advocates for Respondent No.1.
Mr. Anshula Grover, Advocate with Mr. Kanak Jani, IRP in person for Respondent No.2.

Cont'd.... /

J U D G M E N T

[25.08.2021] A. I. S. Cheema, J.

The Appellant, Maitreya Doshi is Suspended Director of 'M/s Doshi Holdings Pvt. Ltd.' (the Corporate Debtor). Respondent No.1 - 'Anand Rathi Global Finance Ltd.' filed application under Section 7 of Insolvency and Bankruptcy Code, 2016 ('IBC' in short) being C.P. (IB) No. 1220/MB/2020 against the Corporate Debtor before the Adjudicating Authority (National Company Law Tribunal), Court No. 5, Mumbai Bench. The Adjudicating Authority after hearing the parties admitted the application under Section 7 of IBC and CIRP was initiated, by impugned order dated 19th February, 2021. Thus, the present Appeal.

2. The Appeal claims and it has been argued on behalf of the Appellant that Respondent No. 1 an NBFC disbursed loan to the tune of Rs.6 Crore to M/s Premier Ltd. under three separate Loan cum Pledge Agreements dated 29.06.2015, 04.05.2016 and 05.10.2016. The terms of the said loans were extended by way of various addendums. According to Appellant, in the amounts disbursed to M/s Premier Ltd., the Corporate Debtor - Doshi Holdings had pledged shares held by the Corporate Debtor in M/s Premier Ltd in favour of the Respondent No. 1 - Financial Creditor. According to the Appellant, under the Company Appeal (AT) (Insolvency) No. 191 of 2021 Loan cum Pledge Agreement, the amounts were disbursed by the Respondent No. 1 - Financial Creditor solely to M/s Premier Ltd. as can be seen from the Bank Statement of the Financial Creditor as annexed with Section 7 petition which was filed (Annexure A-5 at page 130 of Appeal).

3. Appellant claims that in the Loan cum Pledge Agreements although Corporate Debtor has been referred as 'Borrower 2/Pledgor', the intent of parties was clear as can be seen from agreements that as far as regards Doshi Holdings (Corporate Debtor), its sole obligation under the Loan cum Pledge Agreements was limited to only pledging shares held by it in M/s Premier Ltd. and that Doshi Holdings was not liable and/or obliged towards Respondent No.1 for the amounts disbursed to M/s Premier Ltd. The Appellant claims that the Corporate Debtor - Doshi Holdings is not a beneficiary from the loan disbursed to M/s Premier Ltd. and is not liable to pay the amounts. When default occurred, it is claimed that the Appellant sought payment of the amount defaulted from M/s Premier Ltd. and not from the Corporate Debtor - Doshi Holdings.

4. Appeal claims that the Adjudicating Authority erred in holding that the amounts under Loan cum Pledge Agreements were disbursed by Respondent No.1 in favour of both M/s Premier Ltd. and M/s Doshi Holdings. It is argued (in substance) that Doshi Holdings was merely a Pledgor of shares and for Doshi Holdings it cannot be said to be a Financial Debt; and that for the loan issued to Premier Ltd., CIRP had already started and so for same debt CIRP could not be initiated against Doshi Holdings, especially when Adjudicating Authority earlier Company Appeal (AT) (Insolvency) No. 191 of 2021 observed in its order initiating CIRP against Premier Ltd., that after CIRP starts against Premier Ltd., claim against Doshi Holdings would not be maintainable.

5. In Written Submissions filed by the Appellant and oral arguments, the Learned Counsel for the Appellant claimed that by order dated 29.01.2021 passed in C.P. No. (IB) 1224/MB/2020 application under Section 7 which was filed against M/s Premier Ltd. (Annex A-11 of the Appeal), the Adjudicating Authority in earlier order relied on the decision of this Tribunal in the case of 'Dr. Vishnu Kumar Agarwal Vs. M/s Piramal Enterprises Ltd.', (2019) SCC Online NCLAT 542 and had observed while admitting application under Section 7 against M/s Premier Ltd. that if the claim against Premier Ltd. was admitted then for the same set of loans, arising under the same loan documents, the same debt/claim against Doshi Holdings would not be permissible. It is argued that if the Adjudicating Authority which had heard both the Applications pending against M/s Premier Ltd. and M/s Doshi Holdings had made such observations by now in the earlier order of admission with regard to Premier Ltd., the Adjudicating Authority while passing present impugned order went back from those observations relying on judgment of this Tribunal in the matter of 'State Bank of India vs. Athena Energy Ventures Pvt. Ltd.', (2020) SCC Online NCLAT 774. Thus, according to the Appellant, this was breach of judicial discipline.

The Appellant claims that there is no financial debt in existence against Doshi Holdings as the disbursement was to Premier Ltd. and no amount was Company Appeal (AT) (Insolvency) No. 191 of 2021 disbursed to Doshi Holdings. According to the Appellant, liability of Doshi Holdings was only as a Pledgor of the shares and that Hon'ble Supreme Court held in the matter of 'Phoenix ARC Pvt. Ltd. vs. Ketulbhai Ramubhai Patel', (2021) SCC Online SC 54, relying on judgment in the matter of 'Anuj Jain vs. Axis Bank Ltd.', (2020) 8 SCC 401, "where a Corporate Debtor has only extended a security by pledging shares, the Applicant will "at best be secured debtor qua above security but shall not be a financial creditor within the meaning of Section 5 sub-sections (7) and (8)". It is also claimed that Respondent No. 1 cannot claim to be Financial Creditor with regard to the Corporate Debtor. It is also argued that pledging of shares would not amount to guarantee or indemnity. It is argued that the Adjudicating Authority interchangeably used the words "Co-borrower/ Guarantor/Pledgor" and wrongly relied on the judgment in the matter of 'State Bank of India vs. Athena Energy Ventures Pvt. Ltd.'. Relying on the judgment in the matter of 'Dr. Vishnu Kumar Agarwal Vs. M/s Piramal Enterprises Ltd.', it is argued that when for the same debt an Application under Section 7 had been admitted against the M/s Premier Ltd., another proceeding against the Corporate Debtor - Doshi Holdings could not have been admitted.

6. Against this, Respondent No.1 has filed reply and written submissions and orally argued pointing out the various loan documents for the three facilities which were provided to the Corporate Debtor - Doshi Holdings alongwith M/s Premier Ltd. Respondent No.1 claims that Doshi Holdings was Company Appeal (AT) (Insolvency) No. 191 of 2021 the Co-borrower with M/s Premier Ltd. and by way of three loan transactions Rs.6,00,00,000/- (Rupees Six Crore) was advanced as loan by the Financial Creditor to these entities. The Learned Counsel for Respondent No.1 referred to the contents of the loan documents to submit that the loans were sanctioned to both these entities and they were joint loan agreements which were signed for both the entities by the same Appellant - Maitreya Doshi. It is argued that there were joint loan receipts as well as loan documents executed by both the companies and the receipt of the money on behalf of both the companies was accepted by this very Appellant. The argument is that only because the Appellant let the amounts be received in the loan transaction be deposited in the account of M/s Premier Ltd. would not make any

difference and the Corporate Debtor is as much a borrower and loan was disbursed also to the Corporate Debtor as a Co-borrower and it cannot be said that there was no consideration or no time value for the money was involved. M/s Premier Ltd. as well as Doshi Holdings executed the documents through the Appellant who was the authorized signatory of M/s Premier Ltd. as well as Authorized Signatory and Chairman of the Corporate Debtor - Doshi Holdings. Learned Counsel for the Respondent No. 1 thus claims that if these two companies as sister concerns under the agreements as Co-borrowers took loan and let the money be deposited in account of one of the companies, the consideration was clearly there as both entities were acting in tandem due to their intimate connection. Corporate Debtor joined the Agreements to loan as Co-borrower for consideration of time value for the money to get the same deposited in Company Appeal (AT) (Insolvency) No. 191 of 2021 account of M/s Premier Ltd. That, Doshi Holdings additionally pledged shares also.

7. Counsel for Respondent No.1 submits that judgment in the matter of 'Dr. Vishnu Kumar Agarwal Vs. M/s Piramal Enterprises Ltd.' (Supra) is not good law considering the judgment of this Tribunal in the matter of 'State Bank of India vs. Athena Energy Ventures Pvt. Ltd.' and recent judgment of Hon'ble Supreme Court in the matter of 'Lalit Kumar Jain vs. Union of India & Ors'- Civil Original Jurisdiction, Transferred Case (Civil) No.245/2020, where it has been held that approval of the Resolution Plan in relation to Corporate Debtor does not discharge Guarantor of the Corporate Debtor. The argument is that there is no bar in IBC to file separate applications against two entities liable to pay same debt. It is argued that the contention raised by the Appellant that the debt amount of Rs.8,35,25,398/- should stand reduced considering the value of pledged shares is irrelevant, as even if the said amount is reduced, the default is of more than Rupees One Crore. It is stated by the Respondent No. 1 that the claim was rightly admitted by the Adjudicating Authority and the Appeal deserves to be dismissed.

8. Although the parties have raised various grievances, the dispute gets narrowed down if documents are perused. Before considering the arguments, it would be appropriate to first refer to documents executed between the Corporate Debtor and M/s Premier Ltd. with Respondent No. 1 - Financial Creditor so as to have a clear picture regarding the legal relations between the Company Appeal (AT) (Insolvency) No. 191 of 2021 parties. This will curtail need to refer to detailed arguments which have been made without connecting to facts of the case.

9. Execution of the documents is not in dispute. It is a matter of looking into the documents and applying law to the parties. By way of three separate Loan cum Pledge Agreements thrice loan facilities were extended by the Financial Creditor. We will refer to one set for convenience of reading. Counsel for Respondent No.1 has filed written submissions with Convenience Compilation - Dy. No. 28041 and argued from the same also. We are referring to the documents as filed from this Convenience Compilation.

10. Firstly, there is Sanction Letter dated 27.06.2015 issued by Respondent No. 1 to (i) M/s Premier Ltd. (ii) M/s Doshi Holdings Pvt. Ltd. By this letter dated 27.06.2015, Respondent No.1 conveyed to M/s Premier Ltd. and M/s Doshi Holdings sanction of financial facilities extended to them and that the facility was subject to the terms and conditions contained in the Loan Agreement. The loan

sanctioned as per this document was of Rs.3 Crore to these parties. The document bears stamp of "Accepted" with signature and stamps of M/s Premier Ltd. as well as Doshi Holdings. As authorized signatory the same present Appellant signed separately for both the entities.

11. Then there is Loan cum Pledge Agreement dated 29.06.2015 (page 170). Part of the first page of document may be reproduced:

Company Appeal (AT) (Insolvency) No. 191 of 2021 "LOAN CUM PLEDGE AGREEMENT THIS AGREEMENT is made at Mumbai this, 29th June 2015 between Anand Rathi Global Finance Ltd., a Non Banking Finance Company registered with Reserve Bank of India and incorporated under the Companies Act, 1956, having its registered office at 4th Floor, Silver Metropolis, Jnl Conch Compound, Opp. Bimbisar Nagar, Goregaon (East), Mumbai- 400 063 (hereinafter called the "Lender" or "Pledgee" which expression shall unless repugnant to the meaning or context thereof, shall be deemed to mean and include its successors in title and permitted assigns) of the ONE PART;

and Premier Limited, a company incorporated under Companies Act 1956, having its registered office at- Mumbai- Pune Road, Chinchwad, Pune, Maharashtra 411019 (hereinafter referred to as the "Borrower 1"

which expression shall, unless it be repugnant to the meaning or context thereof, mean and include its successor in title and permitted assign appointed or co-opted of the SECOND PART:

and Doshi Holdings Pvt. Ltd., a company incorporated under Companies Act 1956, having its registered office at 58, Nariman Bhavan Nariman Point, Mumbai, Maharashtra- 400021 (hereinafter referred to as the Borrower(s) 2" or "Pledgor" which expression shall, unless it be repugnant to the meaning or context thereof, mean and include its successor in title and permitted assign appointed or co-opted of the THIRD PART; Borrower 1 and Borrower 2/ Pledgor are collectively referred to as "Borrower(s)" and individually as a "Borrower or Pledgor" (as the case may be) Whereas;

A. ARGFL as part of its business provides loans against the deposit of securities such as shares, mutual funds and other financial instruments; B. Borrower(s) is desirous of availing of a loan facility for a sum of Rs.30000000 (Rs. Rupees Three Company Appeal (AT) (Insolvency) No. 191 of 2021 Crores Only) at an interest rate of 16% p.a. for the period of _____ days from _____ to _____ C. The Lender in lieu of granting such loan facility, has requested a Master Agreement to be entered into between both the parties concerned, for the loan facility to be so granted to the Borrower(s), and also the pledge which shall be provided by the Borrower(s)/ Pledgor to the Lender;

D. In consideration of the Lender granting or agreeing to grant the loan facilities to the Borrower(s), the Borrower(s) is/are desirous of executing this Agreement which sets out the general terms and conditions (so far as they may be applicable) with regard to both the aforementioned. The special terms and conditions governing the Facility and the pledge (are set forth in their respective schedules to this Agreement) as executed between the Parties from time to time.

NOW THIS AGREEMENT WITNESS AND THE PARTIES HERETO AGREE AS UNDER;

xxx xxx xxx"

12. In this Loan cum Pledge Agreement, it is clear that the Premier Ltd. is the Borrower 1 and Doshi Holdings is Borrower 2/ Pledgor and collectively they are referred as "Borrower(s)" and individually as "Borrower or Pledgor", as the case may be. In Article 1 where definition and interpretations is mentioned definition of 'disbursement' is as follows:

"Disbursement' means every amount advanced to the Borrower(s) under each facility"

In this Loan cum Pledge Agreement Clauses 2.6 and 2.8 read as follows:

"2.6 Repayments:

The Borrower(s) undertakes to repay to the Lender, each "Facility Balance" in accordance with the provision in the relevant Schedules(s) of Terms. On occurrence of Company Appeal (AT) (Insolvency) No. 191 of 2021 any Event of Default in accordance with the provisions of Article 2, the loan Balance shall become payable. Further on Recall of the loan or one or more facilities, the loan Balance or the Facility Balance(s) shall become payable in accordance with the provisions of Article 2.12."

"2.8 Demand Promissory note:

The Borrower(s) shall execute Demand Promissory note and/or continuity note for the respective Facility and/ or individual or aggregate amount, for which facility is extended before availing any facility granted by the Lender which shall be treated as part & parcel of the agreement entered into between Borrower(s) and the Lender."

13. Going through the recitals it is clear to us that in addition to Premier Ltd. the present Corporate Debtor also had undertaken to repay the lender i.e. Respondent No.1. The Loan cum Pledge Agreements have various clauses binding Premier Ltd. and Doshi Holdings to repay the loan and the Appellant signed this Agreement on behalf of Premier Ltd. as well as separately for Doshi Holdings as Authorized Signatory. There is loan receipt (at page 188 of Dy. No. 28041) where the

endorsement is:

"Received with thanks a Loan of Rs.3,00,00,000/- (Rupees Three Crores) from M/s Anand Rath Global Finance Ltd. vide RTGS drawn on HDFC Bank, as loan @16% p.a. for _____ days from _____ 2015 to _____ 2015"

The loan received has been signed by the Appellant as Chairman and Authorized Signatory on behalf of M/s Doshi Holdings and separately as Authorized Signatory/Pledgor of M/s Premier Ltd.

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14. At page 189, there is 'Demand Promissory Note' executed by M/s Premier Ltd. as well as M/s Doshi Holdings. It may be copied:

15. It is apparent that M/s Premier Ltd. and M/s Doshi Holdings unconditionally promised to pay Respondent No.1 - Financial Creditor the amount mentioned "for value received".

16. In the Loan Agreement-2 and Loan Agreement-3 there are similar documents and we are not burdening this judgment with reference to them, Company Appeal (AT) (Insolvency) No. 191 of 2021 which will be repetition. The relationship between the parties reveals their connection. The Premier Ltd. and Doshi Holdings were jointly sanctioned loan by Respondent No.1 and they executed Tripartite Agreements and documents in favour of Respondent No.1 admitting value received and were joint promisors for paying back the loan. The documents make it clear that Doshi Holdings was not only Co-borrower but also pledged shares.

17. Considering the documents executed between the parties, perusal of the documents shows that M/s Premier Ltd. and M/s Doshi Holdings were Co- borrowers and promised to pay back the loan with interest. Their liability to pay is joint and several liability. The Promisee may recover the amounts jointly or severally. Here we are not concerned with rights and liabilities inter-se between the Co-borrowers when debt is enforced against one or the other or both of them.

18. A Co-borrower is as much a Borrower like the other entity and is fully liable to repay the loan taken and it is immaterial as to in which account Co- borrowers received the money, when receipt is an admitted position.

19. Learned Counsel for Appellant has relied on judgment of this Tribunal in the matter of 'Dr. Vishnu Kumar Agarwal Vs. M/s Piramal Enterprises Ltd.' (Supra) in which it was observed in Paras 31 and 32 as under:

"31. The matter can be looked from another angle. The question arises whether the 'Financial Creditor'- ('M/s. Piramal Enterprises Ltd.') can claim same amount Company Appeal (AT) (Insolvency) No. 191 of 2021 of Rs. 40,28,76,461/- from the 'Resolution Professional' appointed pursuant to the 'Corporate Insolvency Resolution Process' against the 'Corporate Guarantor No.1' ('Sunrise Naturopathy and Resorts

Pvt. Ltd.'), as also from the 'Resolution Professional' appointed pursuant to 'Corporate Insolvency Resolution Process' initiated against 'Sunsystem Institute of Information Technology Pvt. Ltd.' - ("Corporate Guarantor No.2")? Admittedly, for same set of debt, claim cannot be filed by same 'Financial Creditor' in two separate 'Corporate Insolvency Resolution Processes'. If same claim cannot be claimed from 'Resolution Professionals' of separate 'Corporate Insolvency Resolution Processes', for same claim amount and default, two applications under Section 7 cannot be admitted simultaneously. Once for same claim the 'Corporate Insolvency Resolution Process' is initiated against one of the 'Corporate Debtor' after such initiation, the 'Financial Creditor' cannot trigger 'Corporate Insolvency Resolution Process' against the other 'Corporate Debtor(s)', for the same claim amount (debt).

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

[Emphasis supplied] Company Appeal (AT) (Insolvency) No. 191 of 2021

20. Relying on the above observations, the Appellant is arguing that for same debt two proceedings could not be maintained. Piramal's Judgment was matter relating to filing of proceeding against Principal Borrower as well as Corporate Guarantor and in that context this Tribunal had held that for same debt there could not be two separate proceedings and that in one proceeding filed under Section 7 of IBC action against two Corporate Debtors was not contemplated.

21. Firstly, the judgment would not apply to present set of facts where it is not a matter of Principal Borrower and Corporate Guarantor. This is a matter of Co-borrowers jointly applying and receiving loan in account of one of them who executed documents jointly with promise to pay. With regard to Judgment in the matter of 'Dr. Vishnu Kumar Agarwal Vs. M/s Piramal Enterprises Ltd.', on subsequent occasion, this Tribunal has distinguished the judgment in the matter of 'State Bank of India vs. Athena Energy Ventures Pvt. Ltd.'. In Athena, this Tribunal discussed the judgment of Hon'ble Supreme Court in the matter of 'State Bank of India vs. V. Ramakrishnan & Anr.', (2018)17 SCC 394 and provisions of Section 60(2) and (3) of IBC. We had noticed that in the matter of 'Dr. Vishnu Kumar Agarwal Vs. M/s Piramal Enterprises Ltd.', Sub-section (2) and (3) of Section 60 of IBC as they stood at relevant time were not noticed. Thus, the finding in matter of 'Piramal' was per

incurium, that for same set of claim and default second application against other debtor cannot be maintained. Now, Hon'ble Supreme Court has in the matter of 'Lalit kumar Company Appeal (AT) (Insolvency) No. 191 of 2021 Jain vs. Union of India' held that Resolution Plan in relation to a Corporate Debtor does not ipso facto discharge Guarantor of a Corporate Debtor. We have made this brief reference to these judgments with regard to matters where Principal Borrower and Guarantor are involved for the limited purpose to observe that IBC does not have any aversion to more than one proceeding against different Debtors even if they are arising out of one debt and one default. The Appellant has heavily relied on judgment in the matter of 'Dr. Vishnu Kumar Agarwal Vs. M/s Piramal Enterprises Ltd.', to say that for same claim amount and default two applications cannot be maintained. However, as we have already seen and which law has now become quite clear there can be separate proceedings for the same debt and default against Principal Borrower as well as Guarantor, when we peruse Section 60(2) and (3), which reads as under:

"60. (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate persons located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or 1[liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor] shall be filed before such National Company Law Tribunal."

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22. No doubt in Section 60 reference is with regard to proceeding against Corporate Debtor as well as Corporate Guarantor or Personal Guarantor in which contingency, if there are two proceedings, the same have to be brought before the same Adjudicating Authority. Now, Legislature has even enforced Part III of IBC to the extent of proceedings for Insolvency Resolution Process against Personal Guarantors to the Corporate Guarantors. Thus, considering the aims and objects of IBC, we do not wish to take a technical view only due to the observations made in judgment of 'Dr. Vishnu Kumar Agarwal Vs. M/s Piramal Enterprises Ltd.', which were made without considering Section 60 of IBC as it then stood. If we do so, the present Co-borrower will walk away without liability even after execution of so many documents and having jointly received the loan from Respondent No.1 - Financial Creditor. The Respondent No. 1 has to be treated as Financial Creditor who had extended loan to these joint Borrowers and we find no bar in IBC to proceed against both the Co- borrowers when the debts are outstanding, as has been found by the Adjudicating Authority. In the set of facts, we need not enter into the question if in Pledgor-Pledgee relationship would it be Financial Debt. Doshi Holdings, in addition to stepping into the shoes of Co-borrower, which is financial debt, additionally pledged shares. The liability invoked by Financial Creditor is on the basis of Corporate Debtor being Co-borrower and not merely Pledgor. It is surprising to find that the

Appellant is denying liability on account of Doshi Holdings when the Appellant has signed joint documents after documents in favour of Respondent No.1 as Authorised Signatory for both the Companies.

Company Appeal (AT) (Insolvency) No. 191 of 2021 The Corporate Debtor cannot be permitted to back out from the documents and promises made.

23. It is stated that in the present matter proceedings were before the same Adjudicating Authority with regard to Premier Ltd. and Doshi Holdings. As such, the requirement to have both the proceedings before the same Adjudicating Authority is already there. Recovery of debt in one of the proceedings can always be taken note of and set off in the other proceeding so that the Co-borrowers are not put to disadvantage.

24. The Learned Counsel for the Appellant argued that the Adjudicating Authority has wrongly used the terms 'Co-borrower/Guarantor' interchangeably. It is argued that considering the documents it cannot be said to be a case of a Principal Borrower and Guarantor of the Borrower. The Learned Counsel referred to judgments in the matter of 'R.M.M.S.T. Vyravan Chettiar vs The Official Assignee of Madras', 1932 SCC Online Mad 54 and 'M. Venkataramanaiah vs Margadarsi Chit Fund Limited and Ors.' 2009(4) ALD 300. It does appear that this is not a case of Borrower and its Guarantor. This is a case of Co-borrowers for the amount received by them in joint documents executed, as have been referred. It additionally happens that the Corporate Debtor - Doshi Holdings has also pledged shares.

25. The Learned Counsel for the Appellant referred to judgment in the matter of 'Phoenix ARC Pvt. Ltd. vs. Ketulbhai Ramubhai Patel', (2021) SCC Online SC Company Appeal (AT) (Insolvency) No. 191 of 2021 54 and added that the Hon'ble Supreme Court in this judgment relied on judgment in the matter of 'Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Ltd. ', (2020) 8 SCC 401, where it was held that in case Corporate Debtor has only extended a security by pledging shares, the Applicant will at best be Secured Debtor qua the security but shall not be a Financial Creditor within the meaning of Section 5 sub-sections (7) and (8). When judgment in the matter of 'Phoenix ARC Pvt. Ltd.' (supra) is perused brief facts referred by the Hon'ble Supreme Court show that in that matter 'L&T Infrastructure Finance Company Ltd.' advanced financial facility to 'Doshion Ltd.' for which a Facility Agreement dated 12th May, 2011 was executed between them. 'Doshion Ltd' was the Borrower and 'L&T Infrastructure Finance Company Ltd.' was the Lender. Subsequently, on 10th January, 2012, a Pledge Agreement was executed between 'Doshion Veolia Water Solutions Pvt. Ltd.' and 'L&T Infrastructure Finance Company Ltd.' by which agreement 40,160 shares of 'Gondwana Engineers Limited' were pledged as a security. On the same date, a Deed of Undertaking was also executed by 'Doshion Veolia Water Solutions Pvt. Ltd.' in favour of 'L&T Infrastructure Finance Company Ltd.'. Thus, the facts involved in the matter of 'Phoenix ARC Pvt. Ltd.' (supra) were different. It was in the context of facts which were before Hon'ble Supreme Court in the matter of 'Phoenix ARC Pvt. Ltd.' that the Hon'ble Supreme Court observed in Para 24 of the Judgment that Pledge Agreement and Undertaking given between Assignor and Corporate Debtor cannot be termed as contract of guarantee under Section 126. The Hon'ble Supreme Company Appeal (AT) (Insolvency) No. 191 of 2021 Court discussed the

judgment in the matter of 'Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Ltd.' (supra) in Para 29 of the judgment and referred in detail to the findings in that judgment of 'Jaypee Infratech Limited' and observed in Para 30 of the judgment as under:

"30. This Court held that a person having only security interest over the assets of corporate debtor, even if falling within the description of 'secured creditor' by virtue of collateral security extended by the corporate debtor, would not be covered by the financial creditors as per definitions contained in sub-section (7) and (8) of Section 5. What has been held by this Court as noted above is fully attracted in the present case where corporate debtor has only extended a security by pledging 40,160 shares of GEL. The appellant at best will be secured debtor qua above security but shall not be a financial creditor within the meaning of Section 5 sub-sections (7) and (8)."

[Emphasis supplied]

26. In judgment in the matter of 'Anuj Jain vs. Axis Bank Ltd.' (supra), the issue before the Hon'ble Supreme Court was whether the Respondents (Lenders of Jai Prakash Associate Ltd. - JAL) could be recognized as Financial Creditors of the Corporate Debtor - Jaypee Infratech Limited (JIL) on the strength of the mortgage created by the Corporate Debtor, as collateral security of the debt of its holding company JAL. In Para 33.2 of the judgment, Hon'ble Supreme Court referred to Para 13 and 14 of the judgment of NCLT in that matter where Resolution Professional had pointed out contents of the mortgage deed concerned to submit that Corporate Debtor had only agreed to create the mortgage in favour of the Applicant towards the financial assistance granted to Company Appeal (AT) (Insolvency) No. 191 of 2021 the holding company JAL. On facts in that matter it was pointed out before NCLT that perusal of the mortgage made it clear that the Corporate Debtor had neither given any guarantee to repay or any indemnity qua the repayment of loans granted by the Applicant to JAL. With such and other facts discussed by the Hon'ble Supreme Court, Hon'ble Supreme Court in Para 47.2 of the judgment concluded the question of law as under:

"47.2. Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third party securities), even if falling within the description of 'secured creditor' by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of 'financial creditors' as per the definitions contained in subsections (7) and (8) of Section 5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of 'debt' under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a 'financial debt' within the meaning of Section 5(8) of the Code.

The respondent mortgagees are not the financial creditors of corporate debtor JIL"

[Emphasis supplied]

27. Thus on facts the matter is different here. If there had been 'only a security interest' like pledging of shares, it would have been different. However, in the present set of facts considering the documents executed between the parties, apart from the pledging of shares, the Corporate Debtor -

Company Appeal (AT) (Insolvency) No. 191 of 2021 Doshi Holdings entered into agreement with the Financial Creditor as Co- borrower and as the Co-borrower a loan was received.

28. We thus, agree with the Adjudicating Authority when the Adjudicating Authority admitted the Application under Section 7 of IBC although there was error in observations where reference is made interchangeably to Co-borrower and Guarantor. The Adjudicating Authority at the same time dealt with the case as a matter of Co-borrower. It is a case of Co-borrower and for reasons recorded by us in this judgment we decline to interfere with the impugned order admitting the Application.

29. There is no substance in the Appeal. The Appeal is dismissed. No costs.

[Justice A.I.S. Cheema] The Officiating Chairperson [V. P. Singh] Member (Technical) Archana Company Appeal (AT) (Insolvency) No. 191 of 2021