NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 484 of 2023

[Arising out of Order dated 17.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-IV in I.A 2083/2021 in C.P.(IB)- 500(MB)/2019]

IN THE MATTER OF:

Ankur Kumar **...Appellant**

Versus

Sustainable Agro-Commercial Financial Ltd. **...Respondent**

Present:

For Appellant: **Mr. Shubhangda Singh and Mr. Anshuj Dhingra, Advocates**

For Respondent: **Mr. Murtaza Najmi, Mr. Vinod Sharma, Ms. Aqsa Tajuddin & Mr. Vinod Sharma, Advocates**

J U D G M E N T
(06th February, 2025)

Ashok Bhushan, J.

This Appeal has been filed challenging the order dated 17.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court IV by which order IA No.2083 of 2021 filed by the Respondent herein for accepting its belated claim has been allowed. Appellant aggrieved by the order has come up in this Appeal.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:-

2.1. The Corporate Debtor- Gangakhed Sugar & Energy Ltd. entered into Deed of Guarantee dated 13.11.2014 with the Respondent- Sustainable Agro-Commercial Financial Ltd. guaranting the loan extended by the Commercial Financial Limited to the borrower. The Commercial Financial Limited has extended different amount of term loan to the farmers. The Corporate Guarantee by the Corporate Debtor was for the amount of Rs.2 Crore. On an application filed by the UCO Bank, CIRP process against the Corporate Debtor commenced by order dated 10.10.2019. The Appellant was appointed as an IRP on 13.10.2019/16.10.2019. IRP made publication inviting claims from the creditors. Last date for receiving of the claims was 26.10.2019. The Respondent- Sustainable Agro-Commercial Financial Ltd. issued a letter dated 18.09.2020 to the Chief Executive Director of the Corporate Debtor invoking the corporate guarantee dated 13.11.2014 and asked the Corporate Guarantor to make payment of the amount. The letter dated 18.09.2020 was replied by the Corporate Debtor by letter dated 24.09.2020 informing the Commercial Financial Ltd. that Ankur Kumar Shrivastava has been appointed as IRP by order dated 10.10.2019 of the NCLT and claim form should be submitted to the IRP. After receipt of the letter dated 24.09.2020, the Commercial Financial Ltd. sent a letter dated 23.10.2020 sending the document which included the detailed chart of the names of borrowers, date of foreclosure of the amount which was 28.09.2020 and foreclosed amount. In the CIRP of the Corporate Debtor, the CoC approved the Resolution Plan on 13.09.2021. Commercial Financial Ltd. submitted a claim in Form C dated 13.10.2021 to the Resolution Professional claiming an amount of Rs.1,14,57,536/- for non-payment of agreed repayment of loan by the

corporate debtor in pursuance of the corporate guarantee dated 13.11.2014. The said letter was replied by Appellant on 12.11.2021 informing that the claim is submitted under Regulation 17 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 which is not valid. Claim is not in accordance with the Insolvency and Bankruptcy Board of India (Insolvency Resolution process for Corporate Persons) Regulations, 2016. CoC has already approved the Resolution Plan on 09.09.2021 and application was filed for approval of the plan. The claim of Commercial Financial Ltd. having not been admitted, an IA was filed by the Commercial Financial Ltd. being IA No.886 of 2022 dated 04.05.2022 seeking direction to accept the claim of the Commercial Financial Ltd. and for adding the claim in the Resolution Plan. The IA filed by the Respondent was opposed by the Resolution Professional by filing the reply to which rejoinder was also filed by the Respondent. Adjudicating Authority after hearing the parties by order dated 17.02.2023 allowed the IA No.886 of 2022. By the same order, Adjudicating Authority also approved the Resolution Plan of the Corporate Debtor and by allowing IA No.2083 of 2021 filed by the Resolution Professional for approval of the plan which was approved by 81.74% of voting share of the members of the CoC.

2.2. In paragraph 7 of the order, the Adjudicating Authority has dealt with IA No.886 of 2022. Entire order of the Adjudicating Authority in IA No.886 of 2022 is contained in paragraph 7 of the judgment which is as follows:-

> *"**7. IA-886/2022:** This Application has been filed by Sustainable Agro-Commercial Finance Limited*

seeking indulgence of this Bench against the order of Resolution Professional whereby the RP has rejected the claim of the Applicant on the ground that the Applicant has not submitted its claim in accordance with the Insolvency Bankruptcy Board of India (Insolvency Regulation Process for Corporate Persons) Regulations, 2016, instead, it has filed claim in Form-C prescribed under some other Regulations. The claim was filed vide letter dated 13.10.2021 while the last date for submission of the claim was 26.10.2019. Also, the CoC approved the Plan on 09.09.2021 and the approved Plan was before consideration of the Adjudicating Authority. The Applicant has submitted that he has sent a letter dated 23.10.2020 to the RP vide registered A.D. and has placed on record the copy of acknowledgement issued by the Post Office in this relation. After considering the facts of the case, we direct the RP to consider the claim of the Applicant under appropriate class and include him as one of the claimants under the class after verification of the amounts claimed to be due. RP shall distribute the amounts allocated to that class accordingly. With these directions, IA-886/2022 is allowed."

2.3. Aggrieved by the order passed by the Adjudicating Authority in IA No.886 of 2022, this Appeal has been filed by erstwhile Resolution Professional. In the Appeal, notices were issued. Reply affidavit as well as Additional Affidavit has been filed by the Respondent to which rejoinder has also been filed by the Appellant.

3. We have heard Shri Shubhangda Singh, Learned Counsel for the Appellant and Shri Murtaza Najmi, Learned Counsel for the Respondent.

4. Counsel for the Appellant challenging the order passed by the Adjudicating Authority submits that the Respondent having invoked the guarantee only on 18.09.2020 i.e. subsequent to initiation of CIRP on 10.10.2019, the claim filed by the Respondent could not have been entertained in the CIRP. The provision of Section 14 of the IBC prohibited the Respondent to enforce its security by invoking the guarantee. Invocation itself being in breach of Section 14 of the IBC, claim could not have been accepted by the IRP. It is further submitted that no claim was submitted by the Respondent before approval of the Resolution Plan by the CoC. Letter dated 23.10.2020 which was sent by the Respondent cannot be treated to be any claim. Claim was submitted by Respondent only on 13.10.2021 that too in incorrect form.

5. Shri Murtaza Najmi, Learned Counsel appearing for the Respondent refuting the submissions of the Counsel for the Appellant submits that the claim submitted by the Respondent could not have been adjudicated by the Resolution Professional who does not possess any adjudicatory power. It is submitted that the letter was sent by Respondent on 13.10.2020 giving the relevant details which reflected the amount which was due on different farmers for which guarantee was given by the Corporate Debtor. Further the filing of claim in incorrect form is irrelevant. Submission of claim under Regulation 17 was inadvertent mistake. Appellant having responded to the letter dated 24.09.2020, Resolution Professional was required to include the claim. Substantive claim cannot be defeated by any defect in procedure. Claim filed by the Respondent was not belated. The Resolution Professional has

taken extension of CIRP and letter by Respondent was sent on 23.10.2020 default and breach was committed by different principal borrower. The Respondent foreclosed the matter on 28.09.2020. Guarantee was invoked on 18.09.2020. It is submitted that no sooner the breaches were committed by the principal borrowers in the year 2017, the liability of corporate debtor based on the guarantee arose and there was no need for invocation of guarantee to make the corporate debtor liable. The language of Section 14 of the IBC does not say that Respondent cannot invoke a guarantee. Invocation of guarantee does not tantamount to institution of legal proceeding. If the Respondent would have filed the proceeding for invoking guarantee then Section 14 will come into play. Respondent has not initiated any proceeding after approval of the plan. Claim was filed in time. It was duty of the Resolution Professional to receive and collate the claim. It was expected of the Resolution Professional to put the claim submitted by the Respondent before the Committee of Creditors/ Authority who were required to decide the same. The impugned order passed by the Adjudicating Authority does not suffer from infirmity.

6. Counsel for both the parties in support of respective submissions has relied on various judgments of this Tribunal as well as judgment of the Hon'ble Supreme Court which we shall refer while considering the submissions in detail.

7. From the pleadings brought on the record, following facts are undisputed: -

(i) The CIRP against the Corporate Debtor commenced by order dated 10.10.2019. Publication in the newspaper inviting claims from creditors was issued on 16.10.2019. Last date of submission was 26.10.2019.

(ii) No claim was submitted by the Respondent No.1 in response to the publication made by the IRP.

(iii) The Corporate Debtor has executed a corporate guarantee in favour of the Respondent on 13.11.2014 guaranting the financial assistance extended by Respondent in favour of farmers.

(iv) On 18.09.2020, the Respondent- Sustainable Agro-Commercial Financial Ltd. invoked the guarantee dated 13.11.2014 and asked the corporate debtor to make the payment. On 24.09.2020, the Corporate Debtor informed the Respondent of initiation of CIRP against the corporate debtor and asked the Respondent to file its claim before the Resolution Professional.

(v) Letter dated 23.10.2020 was sent by the Respondent No.1 to Resolution Professional.

(vi) On 13.07.2021, CoC approved the Resolution Plan.

(vii) On 13.10.2021, Respondent sent claim in Form C.

8. In the application which was filed by the Respondent being IA No.886 of 2022, the Respondent claimed that they were not aware of the CIRP. The case of the Respondent in the application was that it has given loan to various farmers to which the Corporate Debtor stood as guarantor. The Respondent sent a letter dated 18.09.2020 invoking the corporate guarantee which letter

has been brought on the record of the Appeal. It is useful to extract paragraph 7 of the letter, which is as follows:-

> *"7. That you are hereby demanded and call upon you in your capacity as the Guarantor, which we hereby do, to make payment of an aggregate amount of Rupees more particularly referred in Annexure 1 being the amount due as on more particularly referred in Annexure 1 inclusive of principal, interest, costs, charges and expenses, with further interest on the principal sum of Rs more particularly referred in Annexure 1 @ more particularly referred in Annexure 1 per annum from 29.08.2020 till the date of actual payment, within 7 (seven) days of receipt of this notice, failing which SAFL shall be constrained to initiate appropriate civil and/or criminal proceedings against you without any further notice to you."*

9. The admitted fact is that the Respondent for the first time has invoked the guarantee given by the corporate debtor by letter dated 18.09.2020.

10. The Application being IA No.886 of 2022 which was filed by the Respondent was opposed by the Resolution Professional by filing a reply to the application dated 04.05.2022. Copy of the reply has been brought on the record to Annexure 3 of the Appeal. In Paragraph 3 of the reply, it was pleaded that the corporate guarantee has been invoked on 18.09.2020 and as per Section 14(1)(c) any action to recover or enforce any security interest created by the corporate debtor is prohibited. It is useful to notice paragraph 3:-

> *"3. At the further outset it is submitted before this Hon'ble Tribunal that the alleged claim of the Applicant*

seems to arise out of the Corporate Guarantee Deed dated 13 November 2014 executed by and between the Applicant herein and the Corporate Debtor, however, the notice invoking Corporate Guarantee was issued by the Applicant only on 18 September 2020 i.e. subsequent to the failure of the principle borrower to repay the said outstanding to the Applicant which is much after initiation of the CIRP of the Corporate Debtor i.e. 10 October 2019. I state and submit that the alleged claim of the Applicant is in violation of various Provisions of the Insolvency Bankruptcy Code, 2016 ("Code") and regulation thereof, the same are detailed herein below: -

a. Section 3 (11) of the Code states that a "debt" means a liability or obligation in respect of a claim which is due as on the insolvency commencement date; vis-à-vis in the instant case the Applicant had invoked the Corporate Guarantee on 18 September 2020 and the insolvency commencement date is 12 October 2019, therefore, the alleged claim of the Applicant is not maintainable.

b. As per section 14 (1) (c) of the Code, any action to recover or enforce any security interest created by the Corporate Debtor is prohibited by the moratorium declared by the Adjudicating Authority from the insolvency commencement date, vis-à-vis in the instant case the Applicant had invoked the Corporate Guarantee on 18 September 2020 in contravention to the moratorium declared by the Hon'ble NCLT as on 10 October 2019.

c. Further, reliance can be placed upon regulation 13 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("Regulations"), the resolution professional has to verify only those claims which are existing as on the insolvency commencement date; vis-à-vis in the instant case the Applicant had invoked the Corporate Guarantee only on 18 September 2020 Le. post the insolvency commencement date (10 October 2019), therefore, the alleged claim of the Applicant did not even exist as on the insolvency commencement date."

11. The first question which has arisen in the present Appeal for consideration is as to whether the Respondent could have invoked the guarantee after initiation of the CIRP process against the Corporate Debtor which invocation was basis for filing of the claim by the Respondent.

12. Before we proceed to consider respective submissions, we need to notice certain statutory provisions of the IBC. Section 3(31) defines "security interest" which is as follows:-

*"**3. Definitions. –(**31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:*
Provided that security interest shall not include a performance guarantee"

13. The above definition of 'security interest' is an inclusive definition. By the execution of the guarantee dated 03.11.2014 a security interest is created in favour of Respondent No.1 by which corporate debtor was obliged to secure payment or performance of the obligation. Section 14 of the IBC provides for "Moratorium". Section 14(1) provides as follows:-

> *"**14. Moratorium.** - (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -*
> *(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;*
> *(b)transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
> *(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*
> *(d)the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*
> *[Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force,*

> *a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]"*

14. The submission advanced by the Appellant is that after enforcement of Moratorium on 10.10.2019, the Respondent had no authority or jurisdiction to invoke the guarantee dated 03.11.2014. The purpose and object for enforcement of Moratorium has been examined by the Hon'ble Supreme Court in ***"Rajendra K. Bhutta vs. Maharashtra Housing and Area Development Authority and Anr.- (2020) 13 SCC 208"***. The Hon'ble Supreme Court has held that after enforcement of Moratorium, statutory freeze comes in operation. Paragraph 25 of the judgment is as follows:-

> *"**25.** There is no doubt whatsoever that important functions relating to repairs and reconstruction of dilapidated buildings are given to MHADA. Equally, there is no doubt that in a given set of circumstances, the Board may, on such terms and conditions as may be agreed upon, and with the previous approval of the Authority, hand over execution of any housing scheme under its own supervision. However, when it comes to any clash between MHADA Act and the Insolvency Code, on the plain terms of Section 238 of the Insolvency Code,*

the Code must prevail. This is for the very good reason that when a moratorium is spoken of by Section 14 of the Code, the idea is that, to alleviate corporate sickness, a statutory status quo is pronounced under Section 14 the moment a petition is admitted under Section 7 of the Code, so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused and that are dealt with by Section 14. The statutory freeze that has thus been made is, unlike its predecessor in the SICA, 1985 only a limited one, which is expressly limited by Section 31(3) of the Code, to the date of admission of an insolvency petition up to the date that the adjudicating authority either allows a resolution plan to come into effect or states that the corporate debtor must go into the liquidation. For this temporary period, at least, all the things referred to under Section 14 must be strictly observed so that the corporate debtor may finally be put back on its feet albeit with a new management."

15. The purpose and object of Moratorium is to save the corporate debtor from any future liability which may arise after initiation of CIRP against the Corporate Debtor and to protect its assets for purposes of resolution.

16. Counsel for the Appellant in support of his submission that after initiation of the CIRP, guarantee given by the corporate debtor could not have been invoked by the Respondent No.1 has relied on judgment of this Tribunal in ***"IDBI Trusteeship Services Limited vs. Mr. Abhinav Mukherji & Anr.- Company Appeal (AT) (Insolvency) No.356 of 2022".*** One of the issues which was framed in the above case for consideration was issue (c). Issue (c) is as follows:-

> *"(c) Whether the Appellant can make a 'Claim' on the basis of the 'Guarantee Deed' which was never invoked pre-commencement of the CIRP, and remained uninvoked even as on the date of filing of the 'Claim', thereby meaning that 'Right to Payment' has not yet accrued."*

17. This Tribunal while considering the aforesaid issue referred to and relied on judgment of the Hon'ble Supreme Court in ***"Ghanshyam Mishra and Sons Pvt. Ltd. vs. Edelweiss Asset Reconstruction Company Limited- (2021) 9 SCC 657"*** as well as judgment of this Tribunal in ***"Edelweiss Asset Reconstruction Company Ltd. vs. Orissa Manganese and Minerals Ltd.- 2019 SCC OnLine NCLAT 764"***. This Tribunal ultimately held that the corporate guarantee could have been invoked prior to commencement of the CIRP. In paragraphs 27, 28, 29 and 30 of the judgment, following has been held:-

> *"27. It is seen from the aforenoted Judgement that an uninvoked Corporate Guarantee cannot be considered as a 'Matured Claim'. In para 133 of the aforenoted Judgement the Hon'ble Supreme Court has upheld the finding of the Adjudicating Authority that once the moratorium was applied under Section 14 of the Code, a Corporate Guarantee cannot be invoked. Though this is a case where the Resolution Plan has been approved, the fact remains that the Principle that a Corporate Guarantee cannot be invoked once the CIRP has commenced and that an uninvoked Corporate Guarantee as on date of filing of the Claim, cannot be considered as 'Matured Claim' has been laid down by the Hon'ble Supreme Court.*

28. We also place reliance on the observations of the Hon'ble Supreme Court in para 38 of 'Swiss Ribbons Pvt. Ltd. & Anr.' Vs. 'Union of India & Ors.', (2019) 4 SCC 17, in which it is stated as follows:

"38. In this context, it is important to differentiate between "claim", "debt» and default». Each of these terms is separately defined as follows:-
3. Definitions- in this Code, unless the context otherwise requires- xxx
(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 gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured; xxxxxxx
(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:
(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 paid by the debtor or the corporate debtor, as the case may be; xxxxx

Whereas a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not paid by the debtor. It is for the reason that a financial creditor has to prove "default" as opposed to an operational creditor who merely "claims" a right to payment of a liability or

obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors Under Section 7 and by operational creditors Under Sections 8 and 9 of the Code becomes clear."

(Emphasis Supplied)

29. It is clear from the observations made by the Hon'ble Supreme Court in the aforenoted Judgement 'Swiss Ribbons Pvt. Ltd. & Anr.' (Supra) that a 'Claim' gives rise to a debt only when it becomes due. A 'Claim' is wider in its scope then debt. A claim may be due or may not be due, but a debt must be a claim which is due. A complete mechanism has been provided in IBC, 2016 as to how and when claims become 'due and payable' and debt owed. In the instant case, the CIRP commencement date of the 'Corporate Debtor' is 27/01/2020 and the Appellant had recalled the entire redemption amount with respect to debentures on 25/03/2020 subsequent to the initiation of CIRP. The Adjudicating Authority recorded that the Corporate Guarantee was invoked on 07/04/2020. The claims were filed by the Appellants on 10/02/2020. This Tribunal is of the earnest view that the Appellants cannot Claim the amounts in the CIRP of the 'Corporate Debtor' who is a 'Corporate Guarantor' on the basis of the Deed of Guarantee which was never invoked as on the date of filing of the Claims. The record also does not show that any Notice in terms of Clause 2.1(ii) of the Deed of Guarantee was ever issued to the 'Corporate Debtor'. We do not find any substance in the argument of the Appellant Counsel that no such Notice is required to be issued as invocation of Guarantee is not a pre-

condition to file a 'Claim'. The Deed of Guarantee stipulates such a notice to be issued which was never sent as the Deed was never invoked prior to CIRP filing of Form C.

30. In 'SBI' Vs. 'Orrisa Manganese & Minerals Ltd.' dated 22/06/2018, EARC (Edelweiss Asset Reconstruction Co. Ltd.) filed an Application before the Adjudicating Authority, (NCLT) Kolkata in CA(IB) 470/KB/2018 in CP (IB) No. 371/KB/2017 challenging the decision of the RP in not admitting the claim of the Applicant. In this case, the 'Corporate Debtor' had executed a guarantee securing loan received by APNRL which has been given by India Infrastructure Finance Company Ltd. (IIFCL). The Corporate Guarantee executed by the 'Corporate Debtor' was in favour of IIFCL, which assigned its rights to the Applicant, who filed their Form C but have not invoked the Corporate Guarantee. The Adjudicating Authority has categorically held that the Applicant was prevented from invoking Corporate Guarantee during Moratorium and that RP has rightly rejected the Claim as the Corporate Guarantee was not invoked. In an Appeal preferred by Edelweiss Asset Reconstruction Company Ltd. (EARC), NCLAT reversed its decision passed in 'Axis Bank' (Supra) and has held that on declaration of moratorium, it was not open to EARC to invoke the Corporate Guarantee and held that the IRP has rightly not accepted the claim of the Appellant/EARC. As the Resolution Plan was already approved in that case, the Hon'ble Supreme Court in 'Ghanshyam Mishra and Sons Private Limited' (Supra) in paragraph 133 has also closed the right of EARC in terms of taking any

further action. Therefore, we are of the view that the ratio of the Hon'ble Supreme Court in 'Ghanshyam Mishra and Sons Private Limited' (Supra), is squarely applicable to the facts of this case and hence we are of the considered view that when the 'Corporate Debtor' is a 'Guarantor' and when the 'Corporate Guarantee' has never been invoked prior to the commencement of the CIRP, as on the date of filing of the Claims, the 'Right to Payment' has not accrued."

18. The Judgment in ***"Ghanshyam Mishra and Sons Pvt. Ltd."*** (supra) of the Hon'ble Supreme Court as referred above needs to be noticed for answering the question. In ***"Ghanshyam Mishra and Sons Pvt. Ltd."*** (supra), one of the appeal which came for consideration by the Hon'ble Supreme Court was Civil Appeal No.8129 of 2019. In the above case, EARC has filed an application before the Adjudicating Authority complaining about non-admission of its claim submitted to the Resolution Professional. CA (IB) No. 470/KB/2018 was filed by EARC challenging the decision of the Resolution Professional for not admitting its claim which fact has been noticed in paragraph 107 of the judgment which is as follows:-

*"**107.** By common order dated 22-6-2018 [SBI v. Orissa Manganese & Minerals Ltd., 2018 SCC OnLine NCLT 20888], the application being CA (IB) No. 402/KB/2018 filed by RP, came to be allowed thereby, granting approval under the provisions of Section 31(1) of the I&B Code and declaring that the same will be binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.*

Application being CA (IB) No. 398/KB/2018 filed by EARC challenging the approval granted by CoC to the resolution plan submitted by GMSPL was dismissed. Vide same order dated 22-6-2018 [SBI v. Orissa Manganese & Minerals Ltd., 2018 SCC OnLine NCLT 20888] , application being CA (IB) No. 470/KB/2018 filed by EARC challenging the decision of the RP in not admitting its claim and application being CA (IB) No. 509/KB/2018 filed by the District Mining Officer, Department of Mining and Geology, Jharkhand challenging the non-admission of its claim were also dismissed with costs of Rs 1,00,000 each."

19. The Adjudicating Authority had rejected the application filed by EARC questioning the decision of the Resolution Professional. The Judgment of the NCLT on the application has been noticed in paragraphs 109 and 110 which is as follows:-

*"**109.** Insofar as the application filed by EARC with regard to non-admission of its claim submitted to RP is concerned, NCLT found that the corporate debtor had executed guarantee securing loan received by APNRL which had been given by India Infrastructure Finance Company Ltd. ("IIFCL" for short). The corporate guarantee executed by the corporate debtor was in favour of IIFCL. The corporate debtor also owned share in APNRL which was pledged with IIFCL to secure the loan given by IIFCL to APNRL. IIFCL assigned its rights to EARC. EARC being the assignee of the aforesaid submitted its claims to the RP.*

> ***110.*** *NCLT found that by email dated 6-1-2018 EARC had submitted its claim in Form 'C' for an amount of Rs 648,89,62,395. In response to the said email, RP sought a clarification as to whether the corporate guarantee had been invoked by the applicant. RP had not received any response till 21-2-2018 from EARC. Despite repeated requests made by RP, EARC did not respond to the query made by RP. From the record placed before NCLT, it was clear that EARC had not invoked the corporate guarantee. NCLT therefore posed a question to itself, as to whether an uninvoked corporate guarantee could be considered as matured claim of the applicant. NCLT found that once the moratorium was applied under Section 14 of the I&B Code, EARC was prevented from invoking the corporate guarantee. NCLT further found that the OMML's guarantee had not been invoked by EARC till the date of completion of CIRP process and once the moratorium was imposed, it could not invoke the corporate guarantee. NCLT therefore found that there is no illegality or irregularity in not admitting the claim of EARC."*

20. In paragraph 110, it was noticed by the Hon'ble Supreme Court that NCLT has found that the OMML's guarantee had not been invoked by EARC till the date of completion of CIRP process and once the moratorium was imposed, it could not invoke the corporate guarantee. The order passed by the NCLT was challenged before this Tribunal. In the judgment of this Tribunal in ***"Edelweiss Asset Reconstruction Company Ltd. vs. Orissa Manganese and Minerals Ltd."*** (supra), an observations were made by this Tribunal that rejection of the claim for the purpose of collating the claim and making it part

of the Resolution Process will not affect the right of EARC who has invoked the bank guarantee against the corporate debtor which observation has been noticed in paragraph 118 of ***"Ghanshyam Mishra and Sons Pvt. Ltd."*** (supra) by the Hon'ble Supreme Court which is as follows:-

> *"**118.** Vide the impugned judgment and order dated 23-4-2019 [Edelweiss Asset Reconstruction Co. Ltd. v. Orissa Manganese & Minerals Ltd., 2019 SCC OnLine NCLAT 764] , NCLAT found that as no ground was made out in terms of Section 61(3) of the I&B Code, no relief could be granted in the appeals. However, while doing so, NCLAT observed thus : (Orissa Manganese and Minerals case [Edelweiss Asset Reconstruction Co. Ltd. v. Orissa Manganese & Minerals Ltd., 2019 SCC OnLine NCLAT 764] , SCC OnLine NCLAT paras 28, 42-43 & 51-52)*
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> *"28. However, we make it clear that the rejection of the claim for the purpose of collating the claim and making it part of the "resolution plan" will not affect the right of the appellant "Edelweiss Asset Reconstruction Ltd." to invoke the bank guarantee against the "corporate debtor" in case the "principal borrower" failed to pay the debt amount, the "Moratorium" period having come to an end.*
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> *42. From the aforesaid provisions, it is clear that after period of Moratorium it is open to the person to move before a civil court or to move an application before the court of competent jurisdiction against the "corporate debtor".*

43. In the present case, since it is not possible either for the adjudicating authority or for this Appellate Tribunal to give any specific finding, we are of the view that the appellant may move before the civil court or court of competent jurisdiction and may file an application before the Labour Court for appropriate relief in favour of the workmen concerned or against the "corporate debtor" if they have actually worked and have not been taken care in the "resolution plan" due to lack of knowledge and non-filing of the claim within time.

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51. In the present case, as no ground has been made out in terms of sub-section (3) of Section 61 of the "I&B Code" and the decision of the "resolution professional" was not challenged by the appellant, no relief can be granted. However, this order will not come in the way of the appellant to move before appropriate forum for appropriate relief if the claim is not barred by limitation.

52. Insofar dues of the State of Jharkhand are concerned, we hold that the statutory dues shall be payable to the State of Jharkhand in terms of existing law which comes within the meaning of "operational debt" as defined in Section 5(20) read with Section 5(21) and held in CIT v. Spartek Ceramics (India) Ltd. [CIT v. Spartek Ceramics (India) Ltd., 2018 SCC OnLine NCLAT 289] Except the aforesaid observations, in absence of any appeal filed by the State of Jharkhand, no order is passed."

21. The above observations of this Tribunal was not approved. The Hon'ble Supreme Court held that the NCLAT ought to have dismissed the Appeal. The

Hon'ble Supreme Court also noticed the submissions made on behalf of the EARC relying on the judgment of this Tribunal in ***"Export Import Bank of India v. JEKPL (P) Ltd. Resolution Professional- 2018 SCC OnLine NCLAT 465"***. The said submission has been noticed in paragraphs 124 and 125 of the judgment. However, the Hon'ble Supreme Court took the view that the case relied by on behalf of the EARC is not being applicable even though SLP was dismissed by the Hon'ble Supreme Court dated 23.10.2019 against the judgment dated 14.08.2018. In paragraph 126 of the judgment, the Hon'ble Supreme Court has noted following:-

> *"**126.** We find that the said case, on facts, would not be applicable to the case at hand. No doubt that the appeal filed against the judgment and order of NCLAT dated 14-8-2018 [Export Import Bank of India v. JEKPL (P) Ltd. Resolution Professional, 2018 SCC OnLine NCLAT 465] has been dismissed by this Court on 23-1-2019 [Atyant Capital (India) Fund I v. JEKPL (P) Ltd. Resolution Professional, 2019 SCC OnLine SC 2005] . However, it is a settled law that dismissal of a special leave petition/appeal does not amount to affirmation of the view taken in the judgment impugned in the special leave petition/appeal. It will also be relevant to refer to the order passed by this Court dated 23-1-2019 [Atyant Capital (India) Fund I v. JEKPL (P) Ltd. Resolution Professional, 2019 SCC OnLine SC 2005] while dismissing the appeal, which reads thus : (Atyant Capital India Fund I case [Atyant Capital (India) Fund I v. JEKPL (P) Ltd. Resolution Professional, 2019 SCC OnLine SC 2005] , SCC OnLine SC paras 3-5)*

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3. We have heard the learned counsel for the parties and perused the relevant material on record.

4. The civil appeal is dismissed.

5. It will be open for the appellant to urge all points as may be available to it in law before the appropriate forum, if so advised."

It will thus be clearly seen that this Court in Atyant Capital India Fund I case [Atyant Capital (India) Fund I v. JEKPL (P) Ltd. Resolution Professional, 2019 SCC OnLine SC 2005] while dismissing the appeal has reserved the liberty to the appellant to urge all points as may be available to it in law before the appropriate forum."

22. Ultimately in paragraph 134, the Hon'ble Supreme Court allowed the Appeal and set aside the observations made by the NCLAT in paragraphs 28, 42, 43, 51 and 52 and the judgment of the NCLT dated 22.06.2018 was upheld in paragraph 133 of the judgment. Following was held in paragraph 133:-

*"**133.** We are therefore of the considered view that the appeal deserves to be allowed by expunging SCC OnLine NCLAT paras 28, 42, 43, 51 and 52 from the judgment of NCLAT dated 23-4-2019 [Edelweiss Asset Reconstruction Co. Ltd. v. Orissa Manganese & Minerals Ltd., 2019 SCC OnLine NCLAT 764] . It is ordered accordingly. The judgment and order passed by NCLT dated 22-6-2018 [SBI v. Orissa Manganese & Minerals Ltd., 2018 SCC OnLine NCLT 20888] is upheld. No costs."*

23. From the above judgment indicated that the view taken by the NCLT in the above case that the guarantee could not have been invoked after initiation of the CIRP was upheld by the Hon'ble Supreme Court after noticing the submission of Counsel for EARC relying on the judgment of this Tribunal in ***"Export Import Bank of India v. JEKPL (P) Ltd."*** (supra).

24. Counsel for the Respondent has relied on the judgment of this Tribunal in ***"Export Import Bank of India v. JEKPL (P) Ltd.***" (supra). It is relevant to notice that the said judgment of this Tribunal was not approved by the Hon'ble Supreme Court in Ghanshyam Mishra's case in subsequent judgment. In ***"Edelweiss Asset Reconstruction Company Ltd. vs. Orissa Manganese and Minerals Ltd."*** (supra) has laid down following in paragraphs 24, 25 and 27:-

> *"**24.** It is true that the 'Corporate Debtor' had taken guarantee but the said guarantee was not invoked in favour of the Appellant-'Edelweiss Asset Reconstruction Limited'. However, the said guarantee was not invoked by the Appellant-'Edelweiss Asset Reconstruction Limited' as on the date of admission or filing of the claim.*
>
> ***25.** On declaration of 'Moratorium', it was not open to the Appellant-'Edelweiss Asset Reconstruction Limited' to invoke the guarantee of initiation of 'Corporate Insolvency Resolution Process' (date of admission). (Corporate Guarantee).*
>
> ***27.** For the said reasons, we hold that the 'Resolution Professional' has rightly not accepted the claim of the Appellant - 'Edelweiss Asset*

> *Reconstruction Limited' and the Adjudicating Authority has rightly rejected the application filed by the Appellant - 'Edelweiss Asset Reconstruction Limited' for accepting its claim."*

25. It is to be noted that the above judgment in ***"Edelweiss Asset Reconstruction Company Ltd. vs. Orissa Manganese and Minerals Ltd."*** (supra) was by the same Bench which decided ***"Export Import Bank of India v. JEKPL (P) Ltd.***" (supra) case. Subsequently this Tribunal in ***"IDBI Trusteeship Services Limited"*** (supra) after noticing all the judgments of this Tribunal as well as the judgment of the Hon'ble Supreme Court in ***"Ghanshyam Mishra and Sons Pvt. Ltd."*** (supra) has taken the view that on the basis of uninvoked guarantee prior to initiation of the CIRP, no claim can be admitted.

26. Counsel for the Respondent has also placed reliance on the judgment of this Tribunal in ***"Iskon Infra Engineering Pvt. Ltd. vs. Central Bank of India- 2024 SCC OnLine NCLAT 425"***. The above case arose from an order passed by the Adjudicating Authority rejecting the application filed by the liquidator under Section 59 which fact has been noticed in paragraph 1 of the judgment. The Appeal was filed by the Appellant who has commenced the voluntary liquidation proceeding. Reliance has been placed in paragraphs 4, 9 and 12 of the judgment which are as follows:-

> *"**4.** The Learned Counsel for the Appellant challenging the order contends that guarantee has not been invoked by any of the financial creditors nor any claim was filed before the liquidator hence, the Adjudicating*

Authority committed error in rejecting the liquidation application. The Learned Counsel for the Appellant referred to one of the Guarantee Deed which was executed by Company in favour of the Punjab National Bank which is at page 20 of the Additional Affidavit and referred to para 16 and 23 of the Deed. He has also placed reliance on the judgment passed in Company Appeal (AT) (Insolvency) No. 329 of 2023 "Pooja Ramesh Singh v. State Bank of India" decided on 28.04.2023 and in support of his submission submitted that liability against the Corporate Guarantor shall arise only when guarantee is invoked.

9. *The fact that guarantee has not been invoked, does not absolve the Corporate Guarantor from debt. The debt which is Corporate Guarantor, the Company has been given corporate guarantee and undertaken to pay the debt and in para 10 of the Deed, following has been undertaken:*

"10. The rights of Lenders against the Guarantor shall remain in full force and effect notwithstanding any arrangement which may be reached between Lenders and the other Guarantor/s, if any, or notwithstanding the release of that other or others from liability and notwithstanding that at any time hereafter the other Guarantor/s may cease for any reason whatsoever to be liable to LENDERS, Lenders shall be at liberty to require the performance by the Guarantor of its obligations hereunder to the same extent in all respects as if the Guarantor had at all times been solely liable to perform the said obligations."

> ***12.*** *The liability of Corporate Guarantor is coextensive with the Lenders and the Lenders are at liberty to require the performance by the Guarantor of its obligation. The Adjudicating Authority after noticing the fact which was brought by the RoC as well as Central Bank of India and has rightly taken the view that the present in the not case for liquidating the Company under the process of voluntary liquidation. The submission of the Appellant that since guarantee has not been invoked there is no debt cannot be accepted. Guarantee continues to bind the Corporate Guarantor to discharge its liability and the fact that as on date, guarantee has not been invoked, cannot be a ground for Appellant to be liquidated under Section 59 of the IBC. We thus, do not find any error in the impugned order. The Appeal is dismissed."*

27. The above judgment indicates that submission which was advanced by the Appellant in paragraph 4, as noted above, was accepted and this Tribunal in paragraph 12 had held that there was no sufficient ground to liquidate the Appellant under Section 59.

28. In the above case, the Tribunal was not considering the issue which has arisen for consideration in the present Appeal. The said judgment was in reference to Section 59 i.e. for closure of liquidation process and the above judgment cannot be held to support the submissions of the Appellant in the present case.

29. In view of the foregoing discussions, we are of the view that when the Respondent having invoked the guarantee on 18.09.2020 i.e. subsequent to

initiation of the CIRP, on the basis of said invocation no claim could have been accepted in the CIRP.

30. Counsel for the Appellant has also referred to Regulation 13 of the IBBI (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 which Regulation 13 provides as follows:-

> *"**13. Verification of claims.** (1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it……"*

31. It is, thus, clear that no claim existed of the Respondent on the date of commencement of the CIRP process, hence, the said claim could not have been admitted in the process. Counsel for the Respondent submitted that prior to submitting the claim in Form C on 13.10.2021, it has sent letter dated 23.10.2020 which can be treated as claim which was required to be placed by the IRP before the CoC. We have found that the Respondent could not have been invoked the guarantee given by the corporate debtor on 18.09.2020. The said invocation cannot be base for any claim to be admitted in the CIRP it having not matured. It is not necessary for us to examine the contention that the claim of the Respondent has to be treated to have been filed on 23.10.2020 and not on 13.10.2021.

32. Coming to the order of the Adjudicating Authority impugned in the Appeal, it is to be noticed that the Adjudicating Authority has not even adverted to the ground raised in the reply by the IRP that the claim arises out of the guarantee invoked after initiation of the CIRP which ground was taken by the IRP in paragraph 3, as extracted above. Without adverting to the said ground the Adjudicating Authority has allowed the application which order cannot be sustained.

33. In view of the foregoing discussions, we are of the view that the appeal deserves to be allowed and order passed by the Adjudicating Authority dated 17.02.2023 in IA No.886 of 2022 deserves to be set aside and is hereby set aside. IA No.886 of 2022 filed by the Respondent No.2 is rejected.

34. The Appeal is allowed. Parties shall bear their own cost.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

New Delhi
Anjali