



## **PARALLEL PROCEEDINGS AGAINST BORROWER AND GUARANTOR IS MAINTAINABLE**

### **Introduction**

It was recently clarified by the Supreme Court that National Company Law Tribunal (NCLT) would be the adjudicating authority for insolvency resolution of a Personal Guarantor pursuant to the notification of the Central Government.<sup>1</sup> Earlier, creditors had to approach Debt Recovery Tribunal (DRT) since many guarantees for loans of corporates are issued by its promoters in the form of personal guarantees.<sup>2</sup>

### **Issue before the Appellate Tribunal**

In appeal filed before the National Company Law Appellate Tribunal, Delhi (NCLAT),<sup>3</sup> the issue involved was parallel proceedings filed against the 'Principal Borrower' when Corporate Insolvency Resolution Process (CIRP) had already been initiated against the 'Corporate Guarantor' and the claim of the 'Financial Creditor' had already been accepted in the CIRP for the whole amount. The Appellant State Bank of India relied on an earlier decision of the NCLAT wherein it held that once an application filed by the 'Financial Creditor' under Section 7 is admitted against one of the Corporate Debtors (Principal Borrower or Corporate Guarantor), a second application by the same Financial Creditor for the same claim and default cannot be admitted against the other Corporate Debtor (Corporate Guarantor or Principal Borrower).<sup>4</sup> This judgement was operating on the principle that for the same debt there cannot be two CIRPs.

### **Findings of the Appellate Tribunal**

<sup>1</sup> S.O. 4126 (E) issued by the Ministry of Corporation Affairs, Central Government dated 15.11.2019.

<sup>2</sup> *State Bank of India vs. V. Ramakrishnan and Ors.* (14.08.2018 - SC): MANU/SC/0849/2018.

<sup>3</sup> [https://efiling.nclat.gov.in/nclat/order\\_view.php?path=L05DTEFUX0RvY3VtZW50cy9DSVNfRG9jdW1lbnRzL2Nhc2Vkb2Myb3JkZXJzL0RFTEhJLzIwMjE0MDctMDkvY291cnRzLzEvZGFpbHkvMTYyNTkwNTMwODc3OTA3ODkwNzYwZTk1ODljMTJhNmEucGRm](https://efiling.nclat.gov.in/nclat/order_view.php?path=L05DTEFUX0RvY3VtZW50cy9DSVNfRG9jdW1lbnRzL2Nhc2Vkb2Myb3JkZXJzL0RFTEhJLzIwMjE0MDctMDkvY291cnRzLzEvZGFpbHkvMTYyNTkwNTMwODc3OTA3ODkwNzYwZTk1ODljMTJhNmEucGRm)

<sup>4</sup> *Vishnu Kumar Agarwal vs. Piramal Enterprises Ltd.* (08.01.2019 - NCLAT): MANU/NL/0003/2019.

NCLAT did not venture into the interpretation of law it had earlier made when it had held that it would be a matter of adjustment when the Financial Creditor receives debt due from the Borrower/Guarantor in the respective CIRP, that the same should be taken note of and adjusted in the other CIRP. This can be conveniently done, more so when Resolution Professional in the CIRPs is same.<sup>5</sup> For example, assuming ‘A’ the Financial Creditor lends INR 100 to ‘B’, a Company and ‘C’, its promoter provides a Corporate/Personal Guarantee. When CIRP is initiated by ‘A’ against ‘B’ who is now the Corporate Debtor, ‘A’ can, on receipt of only INR 80 from B can still pursue against ‘C’ for the balance to be adjusted. In other words, ‘A’ has a right to pursue for the remaining INR 20 against ‘C’.

NCLAT, however, remarked that one need not look at both its earlier precedents which are contrary to each other and based its finding on a simple reading of Section 60(2) of The Insolvency Bankruptcy Code, 2016 (IBC) and held that it is clear that if CIRP or liquidation proceedings of a Corporate Debtor is pending before a NCLT, an Application relating to Insolvency Resolution of a Corporate Guarantor or Personal Guarantor, as the case may be, of such Corporate Debtor shall be filed before such NCLT.

## Conclusion

Though the text “*bankruptcy of a personal guarantor of such corporate debtor*” and “*bankruptcy proceeding of a personal guarantor of the corporate debtor*” were inserted in Section 60 (2) and (3) of the IBC respectively way back in 2018,<sup>6</sup> these provisions have been recently unlocked pursuant to the notification of the Central Government<sup>7</sup> and NCLAT has accordingly, without going into its earlier decisions on the question of law, has rightly held that that the parallel proceedings against borrower and guarantor are maintainable.

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<sup>5</sup> *State Bank of India vs. Athena Energy Ventures Private Limited* (24.11.2020 - NCLAT): MANU/NL/0436/2020.

<sup>6</sup> Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.

<sup>7</sup> S.O. 4126 (E) issued by the Ministry of Corporation Affairs, Central Government dated 15.11.2019.