

NCLAT: A corporate guarantor cannot be absolved from its liability only because the guarantee is not invoked

In the case of *Iskon Infra Engineering Private Limited v. Central Bank of India*¹, the National Company Law Appellate Tribunal (“NCLAT”) rejected the dissolution of a company undergoing voluntary liquidation on the ground that such a Company had extended corporate guarantees of substantial amounts for a principal borrower, and even though the guarantee has not been invoked, the lenders could require a guarantor to perform its obligations.

Background

1. M/s Iskon Infra Engineering Private Limited (“**Company**”) initiated voluntary liquidation under Section 59 of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”). The proceeding was at its final stage. The Company, through the liquidator filed a company petition under Section 59(7) of the IBC² seeking dissolution of the Company before the National Company Law Tribunal, New Delhi Bench – VI (“**NCLT**”).
2. During the hearing of the Company Petition, the NCLT issued notice to the registrar of companies (“**ROC**”). The report of the ROC revealed that the Company had extended corporate guarantees to one, M/s Abhinav Steels and Power Limited (“**Principal Borrower**”) of more than INR 1,257 crore (Indian Rupees one thousand two hundred fifty-seven crore) (approx.). The Principal Borrower had availed term loan facilities from a consortium of banks namely, Punjab National Bank (“**PNB**”), Oriental Bank of Commerce (“**OBC**”) and Central Bank of India (“**CBI**”).
3. The ROC further revealed that this guarantee had been extended from 2010 onwards and that as on date, there are 23 (twenty-three) charges against the Company and there is no satisfaction of charge by the Company or the liquidator.
4. The NCLT also issued notices to PNB, OBC and CBI. CBI also filed its objection placing on record the details of the working capital term loan by the Principal Borrower which was secured by the Company’s corporate guarantee. In view of these objections, the NCLT dismissed the Company’s petition.
5. The Company challenged the NCLT’s order before the NCLAT on the grounds that the Company’s corporate guarantee has not been invoked by any of the financial creditors and no claim had been filed before the liquidator. The liquidator argued that the liability against a corporate guarantor only arises once a guarantee is invoked.

¹ Company Appeal (AT) (Insolvency) No.323 of 2024, NCLAT, New Delhi

² “Section 59 (7) - Where the affairs of the corporate person have been completely wound up, and its assets completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate person.”

Issue

Whether the Company can be dissolved (under voluntary liquidation) when it has extended corporate guarantees which are neither invoked, nor have any claims filed in that respect?

Findings and Rational

NCLAT dismissed the Company appeal and upheld the order of the NCLT. The NCLAT held that:

1. The fact that the guarantee has not been invoked does not absolve the corporate guarantor from debt. The NCLAT referred to the clauses of the guarantee deed between the Principal Borrower and the corporate guarantor to conclude that the corporate guarantor has extended a corporate guarantee and undertaken to pay the debts to the lenders. Under such clause, the corporate guarantor had agreed that the *“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”*.
2. The liability of a corporate guarantor is coextensive with the borrowers, and the lenders are at liberty to require the guarantor to perform its obligations.
3. The NCLAT rejected the submission that there is no debt since the guarantee has not been invoked or claims have not been filed. The NCLAT held that guarantee continues to bind the Corporate Guarantor to discharge its liability. If the guarantee has not been invoked within a particular date, it cannot be a ground for Company to be liquidated under Section 59 of the IBC.

Conclusion

This is a significant decision on the continuing liability of corporate guarantors even in situations where neither the guarantee has been invoked, nor the creditors have filed their claims before the liquidator.

Regulation 3(2) of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation) Regulations, 2017³ requires a corporate person to declare (on affidavit) that the corporate person is not being liquidated to defraud any person. This judgement effectively expands the applicability of the existing safeguards by preventing indirect evasion of liability and serves as a deterrent for errant corporate guarantors resorting to voluntary liquidation to evade its liabilities.

³ *Regulation 3 (2) - Where a corporate person, other than a company, intends to liquidate itself voluntarily, a majority of the-*

(a) designated partners, if the corporate person is a limited liability partnership, or

(b) persons responsible for exercising its corporate powers, if the corporate person is not a company or a limited liability partnership shall make a declaration, verified by an affidavit stating that—

(i) they have made a full inquiry into the affairs of the corporate person and they have formed an opinion that either the corporate person has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and

(ii) the corporate person is not being liquidated to defraud any person.”

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