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Corporate insolvency resolution process can be initiated separately and simultaneously against a corporate debtor and a corporate guarantor for the same debt and same default

In the case of *BRS Ventures Investments Ltd. vs. SREI Infrastructure Finance Ltd. & Anr.*¹, the Hon'ble Supreme Court of India ("Supreme Court") held that simultaneous insolvency proceedings against a borrower and a corporate guarantor can be initiated for the same debt and default; and that assets of a subsidiary do not form part of the corporate insolvency resolution process ("CIRP") of its holding company.

Brief Facts

1. SREI Infrastructure Finance Limited ("SREI") had granted Gujarat Hydrocarbon and Power SEZ Limited ("GHPL"), a loan of INR 100,00,00,000 (Indian Rupees one crore) ("Loan"). The Loan was guaranteed ("Corporate Guarantee") by GHPL's holding company, Assam Company India Limited ("ACIL").
2. The Corporate Guarantee was invoked and subsequently, CIRP of ACIL was initiated under the Insolvency and Bankruptcy Code, 2016 ("IBC"). In the CIRP of ACIL, BRS Ventures Investments Ltd, ("BRS Ventures") emerged as the successful resolution applicant. As a part of the approved resolution plan ("Resolution Plan"), BRS Ventures paid a sum of INR 38,87,00,000 (Indian Rupees thirty-eight crore eighty-seven lakh) to SREI as full and final payment of its dues.
3. SREI subsequently initiated CIRP against GHPL for the balance amount under the Loan which was opposed by BRS Ventures. BRS Ventures contended that (a) upon payment to SREI in the CIRP of ACIL, the rights of SREI with regard to the Loan would stand subrogated in favour of BRS Ventures; (b) simultaneous CIRP proceedings cannot lie against GHPL and ACIL when the entire debt has been discharged; and (c) by way of initiation of CIRP against GHPL, the valuable assets of ACIL have been taken away.
4. The National Company Law Appellate Tribunal ("NCLAT") had dismissed the appeal by BRS Ventures.

Issues

1. Whether the liability of the principal borrower continues upon extinguishment of liability of the corporate guarantor by way of a resolution plan?
2. Whether CIRPs against a borrower and a guarantor can be initiated and / or can continue simultaneously for the same debt and default?

¹ Civil Appeal No.4565 of 2021. Judgement dated July 23, 2024.

3. Do the assets of a subsidiary company form a part of CIRP of its holding company?

Analysis and Findings

The Supreme Cour observed the following:

1. Co-extensive liabilities of the principal borrower and guarantor and consequence of involuntary discharge of the guarantor

- a) It is settled law that the liability of the surety and principal debtor is co-extensive and the creditor is entitled to proceed against both or either of them. If a creditor recovers a part of the guaranteed amount from the surety and agrees to not proceed against the surety for the remaining amount, the same does not extinguish the remaining debt payable by the principal debtor.
- b) As per the provisions of the Indian Contract Act, 1872 (the “**Contract Act**”), involuntary acts of the principal borrower or creditor do not result in the discharge of the surety. In this regard, the Supreme Court cited several judgments, including in the case of *Lalit Kumar Jain vs. Union of India and Ors.*² where it was held that discharge of a principal debtor by an involuntary process i.e. operation of law, or due to liquidation or insolvency proceedings, does not absolve a guarantor of its liability.
- c) As per Section 31 of the IBC, when the CIRP of the corporate guarantor ends in a resolution plan, it will bind the creditor of the corporate guarantor. Consequently, the corporate guarantor's liability may end in such a case by operation of law, but this does not affect the liability of the principal borrower to repay to the creditor the balance loan amount (that is, after deducting the amount recovered from the corporate guarantor or the amount paid by the resolution applicant on behalf of the corporate guarantor as per the resolution plan).
- d) Under Section 140 of the Contract Act, if the surety pays only a part of the amount payable to the creditor, the subrogation right the surety gets will be confined to the debt cleared. Accordingly, notwithstanding the subrogation to the extent of the amount paid on behalf of a guarantor, the right of the creditor to recover the balance debt payable by the corporate debtor is in no way extinguished.

2. Simultaneous proceedings under the IBC against the corporate debtor and the guarantor

- a) Section 60(2) of the IBC contemplates separate or simultaneous insolvency proceedings against the corporate debtor and the guarantor. Accordingly, Section 60(3) provides that if CIRP in respect of the corporate guarantor and a borrower are pending before different adjudicating authorities, CIRP proceedings against the corporate guarantor must be transferred to the adjudicating authority before whom CIRP in respect of the borrower is pending.
- b) Thus, consistent with the basic principles of the Contract Act that the liability of the principal borrower and surety is co-extensive, the IBC permits separate or simultaneous proceedings to be initiated under Section 7 of the IBC by a financial creditor against the borrower and the corporate guarantor.

3. Assets of the corporate debtor in the CIRP of the guarantor:

The Resolution Plan only deals with the assets of ACIL and the investments of ACIL in its subsidiaries, not the assets of the subsidiaries.

- a) Section 36 of the IBC specifically excludes assets of a subsidiary company from the liquidation estate of a corporate debtor. A similar exception is provided in Section 18, regarding the meaning of ‘assets.’ The court observed that perhaps the reason for including these 2 (two) provisions is that it is well-settled that a shareholder has no interest in the company's assets.
- b) The court noted that in the case of *Vodafone International Holdings BV vs. Union of India and Anr*³, the Supreme Court took the view that if a subsidiary company is wound up, its assets do not belong to the holding company

² (2021) 9 SCC 321

³ (2012) 6 SCC 613

but to the liquidator. Therefore, the assets of the subsidiary company of a corporate debtor cannot be part of the resolution plan of the corporate debtor.

- c) Based on the above, the Supreme Court held that (i) the part payment by ACIL to SREI will extinguish the liability of GHPL only to the extent of the amount paid by ACIL and GHPL will be liable to pay the balance amount under the Loan; (ii) the assets of the subsidiary company cannot be included in the resolution plan of a holding company; and (iii) SREI is entitled to file separate and simultaneous applications under Section 7 of the IBC against GHPL and ACIL. Accordingly, the appeal was dismissed.

Conclusion

On January 8, 2019, the NCLAT had, in *Vishnu Kumar Agarwal vs. M/s Piramal Enterprises Ltd*⁴ (which is currently pending in appeal in the Supreme Court), observed that simultaneous applications for the same set of claims cannot be admitted against a corporate debtor and a guarantor. However, the NCLAT (on March 7, 2019) diverted from the view in *Piramal (supra)*, in the matter of *Edelweiss Asset Reconstruction Company Limited vs. Sachet Infrastructure Pvt. Ltd.*⁵ Subsequently, the Insolvency Law Committee Report in 2020 also differed with the view in *Piramal (supra)* citing Section 60(1) to (3) of the IBC. On November 24, 2020, in *State Bank of India vs. Athena Energy Ventures Private Limited*⁶, relying on the same provisions, the NCLAT chose to interpret the law differently to the *Piramal (supra)* order.

The Supreme Court has now clarified that CIRP can be initiated simultaneously against a corporate debtor as well as a corporate guarantor for the same debt and same default. Accordingly, creditors will not be required to wait for the payment under the CIRP of a borrower / guarantor before proceeding against the other entity.

⁴ Company Appeal (AT) (Ins.) No. 346 & 347 of 2018

⁵ Company Appeal (AT) (Ins.) No. 377 of 2019

⁶ Company Appeal (AT) (Ins.) No. 633 of 2020

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