T.S. – 16/2023(CC)

Present :: Neyaz Alam
Judge Commercial Court at Rajarhat
North 24 Parganas

CNR:WBNP19-000101-2023
J.O Code – WB01398

14
18.10.2023

Plaintiff files hazira along with extension application.

Defendant No. 2 files hazira along with written notes of arguments.

Record is taken up for passing order in respect of an application under Order XXXIX Rule 1 & 2 CPC under Order XXXIX Rule 4 CPC as well as application under 12A of the Commercial Courts Act,2015.

All the applications taken up together for the sake brevity and convenience.

Heard and considered the submissions of Ld. Counsels for the both the parties.

The Plaintiff Shristi Infrastructure Development Corporation Limited, is a leading pan India civil engineering construction and development company engaged into the business of civil engineering, construction and development projects.

The Defendant No. 1 namely, Yes Bank Limited, is a company and is classified as a Banking Company within the meaning of Section 5(C) of the Banking Regulation Act, 1949.

`The defendant No.2 . is J.C. Flower Private Limited is claimed to be the assigneee of the alleged debt in question from the defendant No. 1.

The defendant No. 3 namely Axis Trustee Service Limited is a company incorporated under the companies Act, 1965 is a security trustee of the defendant No. 1.

Brief facts of the suit is that it is alleged that one Sarga Hotel Private Limited (formerly known as Shristi Hotel Private Limited) (hereinafter referred to as "SHPL"), was incorporated in the year 2004, as a wholly owned subsidiary of the Plaintiff herein as a Special Purpose Vehicle (SPV) for the purpose of setting up a hotel in Kolkata. The that SHPL is not being made a party in the present Suit since it is currently under CIRP and a moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 is operating.

The Plaintiff acquired Ownership of the land admeasuring 8 acres being Premises No. CBE/2 in Street No. MAR situated within Mouza Jatragaachi in New Town within Police Station Rajarhat in the District 24 Parganas (North), having purchased the Total Land vide a registered deed of conveyance dated 22nd March 2007 executed between the Plaintiff and the West Bengal Housing Infrastructure Development Corporation Limited.

It is submitted the Plaintiff had the Ownership rights in the aforesaid Total Land, it agreed to grant a lease to SHPL of divided and demarcated portion of land containing of 3.5 Acres equivalent 14163.80 Square metres out of the total land however the understanding was SHPL would remain a subsidiary of the Plaintiff.

In furtherance thereto, a Framework Agreement dated 29th March 2007 was executed between the Plaintiff and SHPL containing various terms agreed upon.

Subsequent thereto, a registered Lease Deed dated 31st March 2007 was executed between the Parties wherein the Plaintiff leased a divided and demarcated portion of land admeasuring 3.5 acres out the total land admeasuring 8 acres for a period of fifty (50) years in the favour of SHPL which was subsequently further extended for a period of thirty years i.e., from 22nd March 2057 to 21st March 2087 vide a registered Deed of Extension and Modification dated 12th September 2008.

Thereafter the Plaintiff also entered into a Share Subscription and Shareholder Agreement dated 7th August 2008 with SHPL and acquired 65% shareholding in SHPL. That by way of the same Agreement, one Rishima SA Investments LLC also acquired 35% shareholding in SHPL.

In the year 2016, SHPL availed a term loan facility from Defendant No. 1 for an amount of Rs. 300 Crores in furtherance to a Facility Letter dated 16th March 2016 for the purposes of the construction of Hotel Westin in Kolkata.

Subsequent thereto, the Principal Borrower and the Defendant No. 1 entered into a Facility Agreement dated 13th December 2016 along with a Demand Promissory Note and Letter of Continuity for the said Demand Promissory Note.

It is further submitted that the Plaintiff is not a party to any of the aforesaid agreements/instruments entered into by and between the Defendants No. 1 and/or 3 with the Principal Borrower. However, being a shareholder of the Principal Borrower company, at the request of SHPL, the Plaintiff executed a continuing Deed of

Guarantee in favour of Defendant No. 1 in the nature of a Corporate Guarantee dated 13th December 2016 where under the Plaintiff had assured the Defendant No. 1 and had undertaken to pay the dues of the Defendant No. 1 in case the outstanding amount of the Principal Borrower has not been paid on demand of Defendant No. 3. The Plaintiff along with SHPL, also executed an Undertaking cum indemnity in favour of the Defendant No. 1 on 13th December 2016.

The Defendant No. 1 sanctioned the term loan of Rs. 300 Crores to SHPL for the purpose of the Hotel Project out of which a total sum of Rs.275,50,73,858/- was disbursed by the Defendant No. 1 in favour of the Principal Borrower.

As per the Facility Agreement dated 13th December 2016, the Principal Borrower was required to repay the Loan over 41 structured quarterly instalments.

It is stated from March 2020, in view of outbreak of pandemic, the business of the Principal Borrower started suffering.

That due to consequent stress upon the economy due to outbreak of Covid- 19 pandemic, RBI issued a statement on Development and Regulatory Policies dated 27.03.2020. That with a view to ease the financial stress "repayment pressures", the said Statement on Development and Regulatory Policy provided for moratorium on term loans, following the aforesaid Statement on Development and Regulatory Policies, a circular was issued titled "Covid-19 Regulatory Package dated 27.03.2020, thereby providing detailed instructions qua the regulatory measures issued by way of the said Statement.

Further state a circular dated 27.03.2020 came to be further modified by RBI Circulars dated 17.4.2020 titled "Covid-19 Regulatory Package Asset Classification and Provisioning and 23.5.2020 titled "Covid-19 Regulatory Package whereby the moratorium period came to be extended by another three months. i.e. from 1.6.2020 to 31.8.2020 on payment of all installments in respect of term loans.

Further submitted while the entire country was suffering from economic slowdown and financial turmoil, the Plaintiff was served with a Loan Recall Notice dated 9th June 2020 by the Defendant No. 1. even when excess processing fees had already been paid by the Principal Borrower, which should have been adjusted against the instalments & interest. The said Recall Notice was addressed to the Plaintiff and the Principal Borrower recalling the Facility and making it due and payable forthwith and invoking the aforementioned Corporate Guarantee furnished by the Plaintiff in its favour securing the Facility.

It shall further be relevant to mention that the said invocation of the Corporate Guarantee was in the teeth of the RBI Relief / Regulatory Package which was issued on 27th March 2020 whereby all banks and financial institutions were directed to give a moratorium of three months on all loan repayments. The said Relief Package was further extended till 31st August 2020, which sets the said re-call notice otiose.

It is contended vide an order dated February 11, 2022 passed by the Hon'ble National Company Law Tribunal, Kolkata Bench in CP No. 302/KB/2021, SHPL was admitted to Corporate Insolvency Resolution Process (CIRP) and moratorium was declared under Section 14 of the Insolvency and Bankruptcy Code, 2016. The said CIRP proceedings is still pending before the Hon'ble NCLT and the moratorium under Section 14 of the IBC is still continuing. That as a part of the CIRP, the Defendants have along with the Resolution Professional therein, left no stone unturned to harm and cause disrepute to the Plaintiff.

It is pointed that no communication has ever been received by the Plaintiff with respect to the outstanding dues of the Principal Borrower and no Statement of accounts was ever sent to enable the Plaintiff to discharge its obligation under the Corporate Guarantee dated 13th December 2016.

It is contended legally tenable demand has ever been made by the Defendant No. 1 or 2 in terms of the Corporate Guarantee dated 13th December 2016 nor has a proper statement of account provided to the Plaintiff. The Clause 2.2 of the Deed of Guarantee states that the Guarantor is unconditionally obliged to pay the outstanding amounts to the "Security Trustee...on demand" thereby meaning that a specific demand ought to have been raised by the Defendant No. 3 being the Security Trustee.

It is submitted that from a bare perusal of the documents signed by the Plaintiff in favour of the Defendant No. 1, it is abundantly clear that the Plaintiff was only acting as a guarantor undertaking to make payment upon demand in the event the principal borrower fails to pay. That however now, after passage of over 3 years and without having raised any demand on the Plaintiff being the Guarantor, the Plaintiff has credibly learnt that the Defendant No. 1 to 3 are in the process of dealing with the assets and properties of the Plaintiff.

The Plaintiff came to know about the illegal steps being taken by the Defendants on 30th June, 2023 when they saw on the premises some strangers roaming about and wherein, they informed that they have to take necessary measurements so that the land can be sold along with the hotel.

In so far as the obligations of the Plaintiff under the corporate guarantee is concerned, the Plaintiff was always ready and willing to discharge the same, however, the Defendants have never raised a legally tenable demand on the Plaintiff and have deliberately withheld crucial information and failed to disclose a valid, proper and authenticated statement of accounts in order for the Plaintiff to discharge his obligations. Such withholding of information has been orchestrated by the Defendants with the nefarious intent of putting the Plaintiff in a helpless situation and thereby illegally dealing with the assets and properties of the Plaintiff.

The Defendants No. 1 to 3 are in the process of taking coercive action against the Plaintiff, without approaching the Plaintiff who has always been ready and willing to discharge its obligations under the said Guarantee. That even as on date, the Plaintiff is willing to discharge amounts genuinely due under the loan facility.

The Plaintiff is ready and willing to pay such sums as may be found genuinely due and payable, upon account being taken. This would however entitle the Plaintiff to the benefit of all the securities and charges created by the Principal Borrower in favour of the Defendants concerned. In other words, the Plaintiff as a surety entitled to full benefit of the creditor's security. Accordingly, upon the Plaintiff paying the just dues of the Defendants concerned, vis a vis the Principal Borrower, all the securities given in favour of the Defendants concerned, would stand transferred to the Plaintiff.

On the other hand, in the event the Defendants concerned are not willing to allow the Plaintiff to redeem the loan amount and pay, the Plaintiff is entitled to extinguishment of all the guarantee /security provided by it under the Loan Documents.

Finally, it is stated the Defendants have already invaded the valuable rights of the Plaintiff, by depriving the Plaintiff of crucial information and accounts which would have enabled the Plaintiff to redeem the Corporate Guarantee issued by it in favour of the Defendant No. 1. Taking advantage of their own wrong, the Defendants are now falsely claiming a right to deals with the assets and properties of the Plaintiff in spite of having no right to do so, as the Plaintiff has not created any mortgage, charge or any other security interest in favour of the Defendants. The Plaintiff reasonably apprehends that the Defendants would further invade the rights of the Plaintiff in a manner that would render the instant title suit infructuous, by alienating, parting with possession and/or otherwise creating third-party rights in respect of the said Total Land hence, preventive relief is prayed.

The plaintiff in support of his contentions relied on the following decisions :-

(1) (1987) SCC 496 ; Oil and Natural Gas Commission -vs- Western Company of North America

(2) (2018) 17 SCC 12 ; Dinesh Singh Thakur -vs- Sonal Thakur

(3) (2003) 4 SCC 341; Modi Engtertainment Network -vs- W.S.G. Cricket PTE. LTD.

(4) (1999) 8 SCC 436 ; Hindustan Construction Co. Ltd. vs- State of Bihar and others.

Per contra the Plaintiff purportedly acquired the ownership of land admeasuring 8 acres being Premises No. CBE/2 in Street No. MAR situated within Mouza Jatragaachi in New Town within Police Station Rajarhat in District 24 Parganas (North) vide Conveyance Deed dated 22nd March, 2007.

Subsequent thereto, the Plaintiff vide a registered Lease Deeda dated 31 March, 2007 ("Lease Deed") entered into with SHPL leased a divided and demarcated portion of the land admeasuring 3.5 acres out of the Total Land admeasuring 8 acres i.e., the Subject Property in favour of the SHPL for a period of 50 years. The tenure of the Lease Deed was further extended by a period of 30 years vide a registered Deed of Extension and Modification dated 12th September, 2008. SHPL subsequently constructed and operated a hotel named the "Westin, Kolkata" on the Subject Property. It is submitted that as per Clause 3(vi) of the Lease Deed, SHPL had been granted an absolute right to create a charge / mortgage over its leasehold rights in the Subject Property as well as the hotel building constructed upon the Subject Property.

The Applicant post execution of a Share Subscription and Shareholder Agreement dated 7th August, 2008, the Plaintiff holds 65% of the shareholding of SHPL, with the remaining 35% of the shareholding of SHPL being held by another entity known as Rishima SA Investments LLC. The Plaintiff is thus the holding company of SHPL.

In order to facilitate the construction of the hotel on the Subject Property, SHPL vide Facility Letter dated 16th March, 2016 availed a term loan facility from the Defendant No. 1.

In pursuance of the said Term Loan Facility, SHPL and the Defendant No. 1 entered into a Facility Agreement dated 13th December, 2016 along with a Demand Promissory Note and Letter of Continuity.

The Plaintiff vide Consent Letter dated 4th May, 2017 gave its express consent to SHPL to mortgage its leasehold rights and interests over the Subject Property as well as the hotel building constructed thereupon to the Defendant No. 1 in "such form and manner as is satisfactory to the Secured Parties".

Further submitted an Indenture of Mortgage dated 4th May, 2017 was entered into between SHPL and the Defendant No. 3; whereby the Term Loan Facilities were secured by way of mortgage over: (a) the leasehold rights of SHPL over the Subject Property; and (b) the hotel building constructed on the Subject Property.

On account of continuous defaults on the part of SHPL in honouring its debt-service obligations qua the Defendant No. 1, the Defendant No. 1 was constrained to declare the account of SHPL as a Non-Performing Asset ("NPA") with effect from February 29, 2020.

It is contended the Defendant No. 1 further vide a Loan Recall Cum Guarantee Invocation Notice dated 9th June, 2020 ("Loan Recall Cum Guarantee Invocation Notice") sent to SHPL and the Plaintiff called upon SHPL and the Plaintiff in its capacity of the Guarantor of SHPL to pay the outstanding debt of SHPL, being INR 288,95,33,405.48/- as on June 03, 2020 plus applicable interest till further realizations, within a period of 7 days. In the said notice, the Corporate Guarantee executed by the Plaintiff in favour of Defendant No. 1 stood invoked and the Plaintiff being the guarantor of SHPL was liable to pay the entire outstanding debt of SHPL.

Further contended the Borrower committed persistent breaches and defaults in repayment of the principal and payment of interest and other charges in respect of the Facility. The Guarantor have unconditionally and irrevocably agreed that in the event of default on the part of the Borrower in the repayment of the Facility, together with interest, compound interest, liquidated damages and other charges due in respect of the Facility, the Bank shall be entitled to demand the total outstanding since the liability of the Guarantor is joint and several with the Borrower and the liability as the Guarantor is co-extensive with that of the Borrower:

Further state, since SHPL and the Plaintiff failed to discharge their debts, Defendant No. 1 was constrained to file applications under Section 7 of the Insolvency and Bankruptcy Code, 2016 before the Hon'ble National Company Law Tribunal, Kolkata Bench seeking the initiation of a Corporate Insolvency Resolution Process ("CIRP") against SHPL being C.P. (IB) No. 302/KB/2021 and Plaintiff being C.P. (IB) No. 325 of 2022 under Section 7 of the IB Code.

Further state the Hon'ble NCLT, Kolkata Bench, vide order dated 11th February, 2022 (in CP (IB) No. 302/KB/2021), after expressly noting that SHPL, by its own admission, had defaulted in its obligation to repay its debt owed to the Defendant No. 1, 22 admitted the SHPL in Section 7 Application and initiated CIRP against SHPL.

Further state that on December 16, 2022, the Defendant No. 1 unconditionally and irrevocably assigned, transferred and released in favour of the Applicant, all the financial assistance, granted by Defendant No. 1 to SHPL together with all its rights, title and interests therein and the underlying security interest in relation thereto in favour of the Applicant at present, the Committee of Creditors of SHPL ("COC") comprises of the Applicant (holding 94.09% vote share) and Axis Bank (holding 5.91% vote share). Furthermore, the Hon'ble NCLT, Kolkata Bench vide orders dated April 10, 2023, April 21, 2023 and June 07, 2023 has permitted the Applicant to be substituted in place of the Defendant No. 1 in various applications pending in C.P. (IB) 302/KB/2021.

During the corporate insolvency resolution process, the CoC has unanimously approved a resolution plan as per the terms of the provisions of the IBC, which is yet to be approved by the Hon'ble NCLT.

It is argued that the Plaintiff at the time of obtaining the ex-parte order did not disclose and/or draw attention of this Learned Court to the fact that the debt and default by the Principal Borrower namely SHPL stands admitted by SHPL, more particularly even recorded by the Hon'ble NCLT vide order dated February 11, 2022, while admitting the application of the Defendant No. 1 filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 against SHPL. The debt amount therefore stands concluded and is due and payable by SHPL and consequently the Plaintiff in its capacity as the Corporate Guarantor of SHPL to the Defendant No. 1 and consequently the Defendant No. 2.

It is further argued the proviso to Section Order XXXIX Rule 4 of the CPC clearly states that if an application for temporary injunction contains false or misleading statements in relation to a material particular and if the - said injunction has been granted without notice to the opposite party, then a court shall mandatorily vacate such an injunction on an application made by the aggrieved party. Order XXXIX Rule 4 of the CPC.

In consideration of the Secured Lenders agreeing to grant and extend the Secured Facilities to the Borrower on the terms and conditions contained in the Financing Documents, the Guarantor unconditionally, absolutely and irrevocable guarantees, principal obligor and not merely as a surety (i) to pay to the Security Trustee for the benefit of the Secured Parties on demand and without delay, demur or protest, all monies and discharge all payment obligations and liabilities now or hereafter due, owing or payable by the Borrower to the Secured Parties.

Finally stated the Commercial Court is not the correct forum to raise issues qua the issuance of the Loan Recall Cum Guarantee Invocation Notice and any dispute which the Plaintiff may have with regards to manner or form of issuance of the Loan Recall cum Guarantee Invocation Notice is outside the purview of the present Title Suit, and rather the proper forum to raise the same would be the tribunal / court where recovery / insolvency proceedings are pending against the Plaintiff.

The defendant No. 2 in support of his contentions relied on the following decisions :-

(a) 2022 SCC OnLine Cal 1389; Asha Agarwal and others -vs- Willamson Magor & Company Ltd and Ors.

:: ***Findings of the Court*** ::

Deducing the factual matrix it transpires that the Plaintiff Shristi Infrastructure Development Corporation Limited, is a leading pan India civil engineering construction and development company engaged into the business of civil engineering, construction and development projects.

The Defendant No. 1 namely, Yes Bank Limited, is a company and is classified as a Banking Company within the meaning of Section 5(C) of the Banking Regulation Act, 1949.

`The defendant No.2 . is J.C. Flower Private Limited claiming to be the assigneee of the alleged debt in question from the defendant No. 1.

The defendant No. 3 namely Axis Trustee Service Limited is a company incorporated under the companies Act, 1965 is a security trustee of the defendant No. 1.

It is submitted that one Sarga Hotel Private Limited (formerly known as Shristi Hotel Private Limited) was incorporated in the year 2004, as a wholly owned subsdiary of the plaintiff as a Special Purpose Vehicle (SPV) for the purpose of setting up a hotel in Kolkata. The hotel is under CIRP and a moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 is operating.

Further submits the plaintiff acquired ownership of the land admeasuring 8 acres being premises No. CBE/2 in street No MAR situated within Mouza Jatragaachi in New Town by way of registered Deed Conveyance dt. 22.03.2007 from WBHIDCO. Subsequently the plaintiff granted a lease to SHPL of an area measuring 3.5 acres and also entered into a Framework Agreement dt. 29.03.2007.

Further state the plaintiff also entered into a share subscription and shareholder agreement dt. 7.08.2008 with SHPL and acquired 65% shareholding in SHPL. That by way of the same agreement, one Rishima SA Investments LLC also acquired 35% shareholding in SHPL. In the year 2016, SHPL referred to as the Principal Borrower availed a term loan facility from defendant No. 1 for an amount of Rs. 300 crores in furtherance to a Facility Letter dt. 16. 03.2016 for the purpose of construction of Hotel Westin in Kolkata.

It is alleged that the plaintiff is not a party to any of the agreements/instruments entered into by and between the defendant No. 1 and /or 3 with the Principal Borrower. However, being a shareholder of the Principal Borrower company, at the request of SHPL, the plaintiff executed a continuing Deed of Guarantee in favour of Defendant No. 1 in the nature of a Corporate Guarantee dt. 13.12.2016 where under the plaintiff had assured the defendant No. 1 and had undertaken to pay the dues of the defendant No.1 in case the outstanding amount of the Principal Borrower has not been paid on demand of defendant No. 3. The

Principal Borrower availed term loan of Rs. 300 crores and was required to repay the loan over 41 structured quarterly installments.

It is contended inspite of Covid 19 Pandemic prevailing the plaintiff and the Principal Borrower were served with a Loan Recall Notice dt. 09.06.2020 by the defendant No. 1.

It is further alleged the plaintiff has not received any communication or statement of account over outstanding dues of the Principal Borrower which would enable the plaintiff to discharge its obligation under the Corporate Guarantee dt. 13.12.2016 which states the Guarantor is unconditionally obliged to pay the outstanding amounts to the Security Trustee on demand.

After the passage of 3 years the plaintiff came to know about the illegal steps being taken by the defendants on 30.06.2023 when they saw on the premises some strangers roaming about and wherein they informed that they have to take necessary measurements so that the land can be sold along with the hotel.

Lastly, it is pointed out the defendants No. 1 to 3 are in the process of taking coercive action against the plaintiff attempting to illegally deal with the property, without approaching the plaintiff who has always been ready and willing to discharge its obligations under the said Guarantee.

<u>On the other hand</u>, defendant no.2 / applicant substantially admits the fact of the suit as the loan taken by the SHPL and the the plaintiff stood as corporate guarantor. Following breaches in payment of loan amount, the account of the SARGA was declared NPA and the applicant proceeded for recovery of money by initiating CIRP under Section 7 of IBC. The application was admitted, moratorium operated, insolvency professional appointed followed by formation of the CoC, the resolution professional finally submitted resolution plan and the same was approved by the CoC and placed before the adjudicating authority for final approval. The defendant No. 2 in support of his contentions cited the following decisions :-

2022 SCC OnLine Cal 1389 ; Asha Agarwal and Others -vs- Willamson Magor & Company Ltd and Others.

Before touching the larger issue, it is necessary to reproduce certain legal provisions hereinbelow:-

Insolvency and Bankruptcy Code, 2016

Section 31. Approval of resolution plan

(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, [including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whim statutory dues are owed,] guarantors and other stakeholders involved in the resolution plan:

[PROVIDED that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.]

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1), –

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

[(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub- section (1) or within such period as provided for in such law, whichever is later:

PROVIDED that where the resolution plan contains a provision for combination as referred to in Section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the Committee of Creditors]

Section 60. Adjudicating Authority for corporate persons

(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 person is 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 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.

(3) An insolvency resolution process or [liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor] pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for

which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.

Section 63. Civil Court not to have jurisdiction

No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code. Civil Court not to have jurisdiction.

Section 231. Bar of jurisdiction

No civil court shall have jurisdiction in respect of any matter in which the [Adjudicating Authority or the Board] is empowered by, or under, this Code to pass any order and ***no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority under this Code.***

Section 238. Provisions of this Code to override other laws

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

SARFAESI Act, 2002

Section 34. Civil Court not to have jurisdiction – No civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under the proposed legislation to determine and no injunction shall be granted by any Court or other authority in respct of any action taken or to be taken in pursuance of any power conferred by or under the proposed legislation or under the Recover of Debts Due to Banks and Financial Institutions Act, 1993.

The Indian Contract Act, 1872

S.128 Surety's liability

The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

A right or cause of action would ensure to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default committed by the guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of amount of debt. For, the obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as predicated in Section 128 of the Contract Act. As a consequence of such default, the status of the guarantor metamorphoses into a debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) IBC.

The remedy under Section 7 is not for recovery of the amount, but is for reorganization and insolvency resolution of the corporate debtor who is not in a position to pay its debt and commits default in that regard. It is open to the corporate debtor to pay off the debt, which had become due and payable and is not paid by the principal borrower, to avoid the rigours of Chapter II IBC in general and Section 7 in particular.

Bare reading of Section 31 IBC would also make it abundantly clear that once the resolution plan is approved by the adjudicating authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in sub-section (2) of Section 30, it shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders.

After CoC approves the plan, the adjudicating authority is required to arrive at a subjective satisfaction that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 IBC. Only thereafter the adjudicating authority can grant its approval to the plan. It is at this stage that the plan becomes binding on corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The legislative intent behind this is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims.

Section 31 only states that once a resolution plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which when approved, may well include provisions as to payments to be made by such guarantor. This is the reason that Annexure VI(e) to Form 6 contained in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and Regulation 36(2) of the Insolvency Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, require information as to personal/corporate guarantees that have been given in relation to the debts of the corporate debtor.

Further, a resolution professional is a facilitator of the resolution process, whose administrative functions are overseen by the Committee of Creditors and by the adjudicating authority.

The Committee of Creditors is required to evaluate the resolution plan on the basis of feasibility and viability. Once the resolution plan is approved by the Committee of Creditors and thereafter by the adjudicating authority, the resolution plan becomes binding on all stakeholders.

After a resolution plan is approved by the requisite majority of the Committee of Creditors, the plan must then pass muster of the Adjudicating Authority under Section 31(1) of the Code. The Adjudicating Authority's jurisdiction is circumscribed by Section 30(2) of the Code.

There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximizing the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the requisite parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal.

Finally while comparing S.231 of the IBC and S.34 of SARFAESI Act, both have identical wording, the Hon'ble High Court, Calcutta in a decision reported in **2022 SCC OnLine Cal 1389; Asha Agarwal and others -vs- Willamson Magor & Company Ltd and Ors.,**

" even if we assume that the suit was maintainable at this juncture when it was first instituted as on the date of passing of the impugned order of injunction measures under S. 13 of the SARFAESI Act had already been initiated, thereby precluding the civil court from granting any injunction".

Similarly in the present suit S. 7 application had already been admitted, resolution professional submitted the resolution plan and approved by CoC , the effect of such measure are elucidated in catena of decisions reported in *(2021) 9 SCC 321; Lalit Kumar Jain -vs- Union of India and Others, (2021) 7 SCC 474 ; Arun Kumar Jagatramka -vs- Jindal Steel and power Ltd., (2020) 8 SCC 531 ; Committed of Creditors of Essar Steel India Ltd. Through Authorized Signatory -vs- Satsh Kumar Gupta and Others, (2021 8 SCC 481 ; Laxmi Pat Surana -vs- Union Bank of India and another, (2021 9 SCC 657 ; Ghanashyam Mishra and Sons Pvt. Ltd. Through the authorized Signatory -vs Edelweiss Asset Reconstruction company Ltd. through the Director and Others, (2018) 17 SCC 394; State Bank of India -vs- V.Ramakrishnan and Another, (2019) 4 SCC 17 ; Swiss Ribbons Pvt. Ld. and Another -vs- Union of India and others, 2022 SCC OnLine SC 1163 K Paramasivam -vs- Karur Vysya Bank Ltd. and Another and Civil Apeal No. 5590 of 2021; M/s. RPS Infrastructure Ltd. -vs- Mukul Kumar & Ano.*

Therefore, in such factual matrix injunction order shall have pre-emptive effect intended only to restrain the NCLT from exercising its power conferred under IBC with note applicability of the IBC will have primacy over other enactments and it is a self-contained code.

Following detailed discussions over the merits and demerits of the present applications, the injunction order passed is hit by jurisdictional bar. The impugned order passed is without jurisdiction.

Hence, it is

O R D E R E D

"the vacating application under Order XXXIX Rule 4 CPC dt. 21.08.2023 stands allowed vacating the ad-interim order of injunction and consequently the injunction application stands disposed off on contest without cost".

Fix **12.12.2023** for acceptance of written statement.

Sd/- Neyaz Alam
Judge
Commercial Court at Rajarhat
North 24 Parganas