

2022 LiveLaw (SC) 789

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
INDIRA BANERJEE; J., J.K. MAHESHWARI; J.
CIVIL APPEAL NO. 6613 OF 2021; SEPTEMBER 22, 2022
MAITREYA DOSHI *versus* ANAND RATHI GLOBAL FINANCE LTD. AND ANR.**

Insolvency and Bankruptcy Code, 2016; Section 7 - The approval of a resolution in respect of one borrower cannot certainly discharge a co-borrower - If there are two borrowers or if two corporate bodies fall within the ambit of corporate debtors, there is no reason why proceedings under Section 7 of the IBC cannot be initiated against both the Corporate Debtors - The same amount cannot be realised from both the Corporate Debtors. If the dues are realised in part from one Corporate Debtor, the balance may be realised from the other Corporate Debtor being the co-borrower. However, once the claim of the Financial Creditor is discharged, there can be no question of recovery of the claim twice over. (Para 36-37)

Indian Contract Act, 1872 - Contract of indemnity, contract of guarantee and pledge - The contract of indemnity is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person. In a contract of indemnity, a promisee acting within the scope of his authority is entitled to recover from the promisor all damages and all costs which he may incur. A contract of guarantee, on the other hand, is a promise whereby the promisor promises to discharge the liability of a third person in case of his default. The person who gives the guarantee is called the surety. The person in respect of whose default, the guarantee is given is the principal debtor and the person to whom the guarantee is given is the creditor. Anything done or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. On the other hand, the bailment of goods as security for payment of a debt or performance of a promise is a pledge. (Para 35)

For Appellant(s) Mr. K.V. Vishwanathan, Sr. Adv. Ms. Dhanyashree Jadeja, Adv. Mr. Ankit Lohia, Adv. Mr. Samiron Borkataky, AOR Mr. Manas Kotak, Adv.

For Respondent(s) Mr. Prateek Sakseria, Adv. Mr. Saket Mone, Adv. Mr. Nishant Chottani, Adv. Mr. vishesh Kalra, Adv. Ms. Smriti Churiwal, Adv. Ms. Priyashree Sharma PH., Adv. Mr. Jaiveer Kant, Adv. Mr. Syed Faraz, Adv. Mr. Kush Chaturvedi, AOR

J U D G M E N T

Indira Banerjee, J.

This appeal under Section 62 of the Insolvency and Bankruptcy Code 2016, hereinafter referred to as the 'IBC', is against a Judgement and Order dated 25th August 2021, passed by the National Company Law Appellate Tribunal (NCLAT), dismissing the Company Appeal (AT) (Insolvency) No. 191 of 2021 filed by the Appellant, against an order dated 19th February 2021, passed by the Adjudicating Authority (National Company Law Tribunal), NCLT, Mumbai Bench admitting a Company Petition C.P. (IB) No. 1220/MB/2020 filed by the Respondent No. 1 - Anand Rathi Global Finance Limited as Financial Creditor, for initiation of the Corporate Insolvency Resolution Process (CIRP)

of M/s Doshi Holdings Pvt. Ltd., hereinafter referred to as “Doshi Holdings”, under Section 7 of the IBC. The Appellant is a suspended Director of Doshi Holdings.

2. The Respondent No 1, a Non-banking Financial Company, hereinafter referred to as the “Financial Creditor” disbursed loan to the tune of Rs.6 Crores to M/s Premier Limited, hereinafter referred to as “Premier” under three separate Loan-cum-Pledge Agreements, dated 29th June 2015, 4th May 2016 and 5th October 2016, respectively. According to the Appellant, Doshi Holdings pledged shares held by it in Premier, in favour of the Financial Creditor, by way of security for the loan.

3. According to the Appellant, the Loan-cum-Pledge Agreements contemplated two distinct transactions under one document, that is, grant of loan to Premier, and creation of pledge by Doshi Holdings of securities held by the Doshi Holdings in Premier.

4. Premier failed to make repayments in terms of the Loan-cum-Pledge Agreements. The Financial Creditor, therefore, called upon Premier to repay its outstanding dues of Rs.7,64,60,360/- on diverse dates between 28th June 2019 and 10th February 2020.

5. By a communication dated 14th February 2020, the Financial Creditor called upon Premier and Doshi Holdings, also described as the borrower under the Loan-cum-Pledge Agreements, to pay the entire outstanding loan amount.

6. By a letter dated 19th February 2020, Premier admitted and acknowledged its liability to pay its outstanding dues to the Financial Creditor under the Loan-cum-Pledge Agreements, but stated that it could not pay the same on account of genuine difficulty.

7. On 21st September 2020, the Financial Creditor filed a petition under Section 7 of the IBC being C.P.(IB) No.1224/MB/2020 for initiation of CIRP against Premier for default in repayment of Rs. 8,35,25,398/-.

8. On the same day, the Financial Creditor also filed a petition against Doshi Holdings, under Section 7 of the IBC, for initiation of CIRP in respect of the same claim of Rs. 8,35,25,398/-, based on the same loan documents.

9. Both the petitions filed by the Financial Creditor were heard together by the Adjudicating Authority (NCLT). By an order dated 29th January 2021, the Adjudicating Authority (NCLT) admitted the petition for initiation of CIRP against Premier. By another Order passed on 19th February 2021, the Adjudicating Authority (NCLT) admitted the petition for initiation of CIRP against Doshi Holdings for the same set of loans arising out of the same loan documents, in respect of which the Financial Creditor had initiated CIRP against Premier.

10. The Appellant filed an appeal in the National Company Law Appellate Authority (NCLAT) under Section 61 of the IBC. By the impugned judgment and order dated 25th August 2021, the Appellate Authority (NCLAT) dismissed the appeal and upheld the order of admission of the petition under Section 7 of the IBC.

11. Mr. K.V. Vishwanathan, learned Senior Counsel appearing on behalf of the Appellant submitted that no amount under the Loan-cum-Pledge Agreements was disbursed by the Financial Creditor to Doshi Holdings. The Financial Creditor granted loans to Premier. The loans were disbursed to Premier. Doshi Holdings did not utilize any part of the money disbursed by the Financial Creditor under the Loan-cum-Pledge Agreement.

12. According to Mr. Vishwanathan, the Loan-cum-Pledge Agreements were standard form agreements in which Premier was the borrower and Doshi Holdings the pledgor. For convenience, the borrower and the pledgor have collectively been referred to as borrowers and individually referred to as borrower or pledgor. The Appellant executed the Loan-cum-Pledge Agreement and other related documents on behalf of Premier and Doshi Holdings, because the Appellant had independently and separately been authorised by Premier and Doshi Holdings to execute the documents. The fact remains that Doshi Holdings and Premier are separate entities.

13. Mr. Vishwanathan argued that since no disbursement has been made to Doshi Holdings against consideration for the time value of money, there was no obligation on the part of Doshi Holdings to make any repayment to the Financial Creditor. There was, therefore, no financial debt owed by Doshi Holdings to the Financial Creditor under Section 5(8) of the IBC. Insofar as Doshi Holdings is concerned, the Loan-cum-Pledge Agreements only created a pledge of the shares of Doshi Holdings in Premier in favour of the Financial Creditor. The petition under Section 7 of the IBC against the Corporate Debtor was clearly not maintainable.

14. In support of his argument, Mr. Vishwanathan, cited **Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited and Others**¹, where this Court held :-

“46. ...essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as “financial debt” within the meaning of Section 5(8) of the Code....”

15. Mr. Vishwanathan next argued that the Adjudicating Authority/Appellate Authority erred in arriving at the finding that Doshi Holdings was a borrower and hence liable to make repayment in respect of the loan disbursement to Premier. He submitted that the loan was never utilised by Doshi Holdings.

16. Mr. Vishwanathan argued that it was not in dispute that no amount was disbursed to Doshi Holdings. Having accepted the factual position, that no amount had been disbursed to Doshi Holdings, the Adjudicating Authority/Appellate Authority erred in arriving at the finding that Doshi Holdings was a borrower. The petition under Section 7 of the IBC was not maintainable against Doshi Holdings.

17. Mr. Vishwanathan argued that the Adjudicating Authority/Appellate Authority misconstrued the expression “financial debt” in Section 5(8) of the IBC and/or failed to appreciate the scope and ambit of the said expression. The definition of ‘financial debt’ in Section 5(8) of the IBC does not include a pledge.

18. Mr. Vishwanathan submitted that “Contract of Indemnity”, “Contract of Guarantee” and “Pledge” have been defined in the Indian Contract Act, 1872. The expressions are different from one and another in terms of their ramification and implication and they cannot be equated. Distinguishing between the expressions, contract of indemnity, contract of guarantee and pledge, Mr. Vishwanathan argued that creation of pledge of shares of the Corporate Debtor did not and cannot amount to a guarantee and/or indemnity under Section 5(8) of the IBC.

¹ (2020) 8 SCC 401

19. Mr. Vishwanathan cited **Phoenix ARC Pvt. Ltd. v. Ketulbhai Ramubhai Patel**², where this Court, relying upon **Anuj Jain** (supra) held that where a Corporate Debtor had only extended security by pledging shares, the applicant (Respondent) would at best be the secured debtor qua the security but, not a Financial Creditor within the meaning of Sections 5(7) and 5(8) of the IBC.

20. Mr. Vishwanathan argued that the Adjudicating Authority (NCLT) interchangeably referred to Doshi Holdings as a co-borrower/guarantor under the Loan-cum-Pledge Agreement, losing sight of the difference in the liability of a pledgor from that of a guarantor.

21. Mr. Vishwanathan submitted that the Appellate Authority failed to appreciate that the execution of a promissory note gives rise to a presumption that such promissory note is supported by consideration. The presumption is, however, rebuttable.

22. Mr. Vishwanathan cited **Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal**³, where this Court held :-

“12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by consideration. Such a presumption is rebuttable. The defendant can prove the nonexistence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument.....”

23. Mr. Vishwanathan pointed out that the interpretation clause in the agreement stated that Premier and Doshi Holdings were collectively referred to as the borrowers and individually as a borrower or pledgor. Mr. Vishwanathan submitted that the expressions borrower and pledgor had to be read in the context of the obligation of the parties under the Loan-cum-Pledge Agreement.

24. Mr. Vishwanathan finally argued that the Adjudicating Authority had passed its order dated 19th February 2021, impugned in this appeal, ignoring its earlier finding pronounced in open Court on 29th January 2021, which is as follows :-

“25...However, under Section 7, if the claim against Premier Limited (Corporate debtor herein) is “Admitted” then for the same set of loans, arising under the same loan documents, the same debt/claim against Doshi will not be permissible...”

25. Mr. Vishwanathan submitted that the order of admission was contrary to judicial discipline. Relying on the judgment of this Court in **Sub-Inspector Rooplal & Another v. Lieutenant Governor and Others**⁴, Mr. Vishwanathan argued that in the event, if any, Member of the Bench was of the opinion that earlier view taken by another Member of the same Bench was incorrect, the matter should have been referred to a larger Bench to avoid difference of opinion.

26. Mr. Prateek Sakseria, learned counsel appearing on behalf of the Respondent submitted that Doshi Holdings was party to the Loan-cum-Pledge Agreements in its dual capacity as co-borrower and pledgor which had pledged its shares in Premier in favour

² (2021) 2 SCC 799

³ (1999) 3 SCC 35

⁴ (2000) 1 SCC 644

of the Financial Creditor. Mr. Sakseria emphasised on the fact that the Appellant had signed documents on behalf of Doshi Holdings in its capacity as co-borrower. The Appellant was Director of both, Premier and Doshi Holdings.

27. Mr. Sakseria referred to the following documents:-

- (i) Letter of Sanction dated 27th June 2015, 4th May 2016 and 5th October 2016.
- (ii) Loan-cum-Pledge Agreement dated 29th June 2015.
- (iii) Loan-cum-Pledge Agreement dated 4th May 2016.
- (iv) Loan-cum-Pledge Agreement dated 5th October 2016.
- (v) Loan Receipts acknowledging the receipt of Rs.6,00,00,000/-.
- (vi) Demand Promissory Note unconditionally promising to pay to the Financial Creditor.

28. Mr. Sakseria pointed out that both Premier and Doshi Holdings have been described as borrowers in the Loan-cum-Pledge Agreements. Mr. Sakseria also pointed out that Doshi Holdings had acknowledged receipt of monies disbursed under three loan agreements by executing loan receipts. Doshi Holdings had also issued demand promissory note unconditionally promising repayment of loan to the Financial Creditor. The loan agreements, receipts and demand promissory notes have been signed by the Appellant in his capacity as the authorised signatory/Director of Doshi Holdings and Premier. After Premier defaulted in payment of loan, demand notice was issued to Doshi Holdings to repay the loan in its capacity as co-borrower.

29. Mr. Sakseria argued that the definition of financial debt contemplates a disbursal against consideration for time value of money, and not a disbursal necessarily to the Corporate Debtor. Otherwise, an amount payable under a guarantee could never have been included inasmuch as amounts are never disbursed to a guarantor, but he is liable for debts of another.

30. Mr. Sakseria further argued that the definition of Corporate Debtor does not require as a pre-condition that monies should have been disbursed to the Corporate Debtor. The sine qua non for an entity to be considered as a Corporate Debtor is that such person/entity should owe a debt to any person and not that a disbursal has to be made to such a person/entity.

31. Mr. Sakseria submitted that Doshi Holdings satisfies the aforesaid criteria inasmuch as it is a Co-Borrower in terms of the Loan Agreement under which monies have been borrowed by both Premier and Doshi Holdings. Both Premier and Doshi Holdings have executed loan receipts admitting receipt of loan amounts and demand promissory notes unconditionally promising to pay the monies borrowed to the Financial Creditor for value received.

32. The mere fact of it also being a pledgor is wholly irrelevant and does not in any manner disentitle the Respondent No.1 to initiate proceedings under Section 7 of the IBC against such a co-borrower.

33. It is not in dispute that the Financial Creditor disbursed loan to the tune of Rs.6,00,00,000/- to Premier pursuant to the Loan-cum-Pledge Agreements referred to above, executed both by Premier and by Doshi Holdings. Doshi Holdings has been referred to in the agreement as borrower and pledgor. Prima facie, it appears that Doshi

Holdings was a party to the Loan-cum-Pledge Agreement in its dual capacity of borrower and pledgor of shares. The Appellate Authority has arrived at the factual finding that Doshi Holdings is also a borrower under the Loan-cum-Pledge Agreement. The factual finding of the Appellate Authority which was the final fact finding authority ought not to be interfered in this appeal.

34. The finding of the Appellate Authority that Doshi Holdings is a borrower, is based on its interpretation of the Loan-cum-Pledge Agreements and supporting documents. The interpretation given by the Appellate Authority is definitely a possible interpretation. In our view, the interpretation is a plausible interpretation which cannot be interfered with in an appeal under Section 62 of the IBC.

35. It is true, as argued by Mr. Vishwanathan that contract of indemnity, contract of guarantee and pledge are not one and the same. The contract of indemnity is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person. In a contract of indemnity, a promisee acting within the scope of his authority is entitled to recover from the promisor all damages and all costs which he may incur. A contract of guarantee, on the other hand, is a promise whereby the promisor promises to discharge the liability of a third person in case of his default. The person who gives the guarantee is called the surety. The person in respect of whose default, the guarantee is given is the principal debtor and the person to whom the guarantee is given is the creditor. Anything done or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. On the other hand, the bailment of goods as security for payment of a debt or performance of a promise is a pledge.

36. The proposition of law which emerges from the judgment is that a pledgor per se may not be a Financial Debtor. However, in this case, as observed above, the Appellate Authority arrived at a factual finding that Disha Holdings was a borrower. In **Lalit Kumar Jain v. Union of India**⁵, this Court held that the approval of a resolution plan in relation to a Corporate Debtor does not discharge the guarantor of the Corporate Debtor. On a parity of reasoning, the approval of a resolution in respect of one borrower cannot certainly discharge a co-borrower.

37. If there are two borrowers or if two corporate bodies fall within the ambit of corporate debtors, there is no reason why proceedings under Section 7 of the IBC cannot be initiated against both the Corporate Debtors. Needless to mention, the same amount cannot be realised from both the Corporate Debtors. If the dues are realised in part from one Corporate Debtor, the balance may be realised from the other Corporate Debtor being the co-borrower. However, once the claim of the Financial Creditor is discharged, there can be no question of recovery of the claim twice over.

38. We find no grounds to interfere with the impugned judgment and order of the Appellate Authority. The appeal is, accordingly, dismissed.

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⁵ (2021) 9 SCC 321