NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1204 of 2024

[Arising out of order dated 30.04.2024 passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Court – II), in C.P. (IB) No. 360/NCLT/AHM/2020]

IN THE MATTER OF:

Mr. Paresh Parekh
503 & 504, Alton, Opp.
Navarachana University, **...Appellant**
Vasana Bhally Road, Vadodara
Email: parekhindia@gmail.com

Versus

1. Alchemist Asset Reconstruction Co. Ltd.
A-270, 1st & 2nd Floor, Defence Colony,
New Delhi-110024
Email: admin@alchemistarc.com **...Respondent No. 1**

2. Mr. B. L. Chakravarti
Resolution Professional of the Appellant
G C 901 Aditya Mega City,
Vaibhav Khand Indirapuram,
Ghaziabad, Uttar Pradesh, 201014.
Email: blchakravarti.associates@gmail.com
...Respondent No. 2

Present:

For Appellant : Mr. Atul Singh and Ms. Mitika Agrawal, Advocates.

For Respondents : Ms. Varsha Banerjee, Advocate for R-1.

WITH

Company Appeal (AT) (Insolvency) No. 1205 of 2024

[Arising out of order dated 30.04.2024 passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Court – II), in C.P. (IB) No. 360/NCLT/AHM/2020]

IN THE MATTER OF:

Mr. Manish Patel
C-13, Shivam Bungalows,
Opp. Ambe School, Manjalpur,
Vadodara – 390002.
Email: manishgopalpatel@gmail.com

...Appellant

Versus

1. Alchemist Asset Reconstruction Co. Ltd.
A-270, 1st & 2nd Floor, Defence Colony,
New Delhi-110024.
Email: admin@alchemistarc.com

...Respondent No.1

2. Mr. B. L. Chakravarti
Resolution Professional of the Appellant
G C 901 Aditya Mega City,
Vaibhav Khand Indirapuram,
Ghaziabad, Uttar Pradesh, 201014.
Email: blchakravarti.associates@gmail.com

...Respondent No. 2

Present:

For Appellant : Mr. Atul Singh and Ms. Mitika Agrawal, Advocates.
For Respondents : Ms. Varsha Banerjee, Advocate for R-1.

J U D G M E N T

(Hybrid Mode)

{Per: Barun Mitra, Member (Technical)}

The present two appeals have been filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellants arises out of the Orders dated 30.04.2024 (hereinafter referred to as '**Impugned Orders**') passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench-II). In CA(AT)(INS) No. 1204 of 2024, order under challenge is order dated 30.04.2024 passed in CP(IB) No. 360/NCLT/AHM/2020 and in CA(AT)(INS) No. 1205 of 2024, order under challenge is order dated 30.04.2024 passed in CP(IB)No. 361/NCLT/AHM/2020. By the impugned orders, the Adjudicating Authority has admitted the Section 95 petitions filed by Alchemist Asset Reconstruction Company Limited-Financial Creditor and initiated Insolvency Process against both the Appellants-Personal Guarantors (Paresh Parekh and Manish Patel). Aggrieved by the impugned orders, the present appeal has been filed by both the Appellants.

2. Both the Appellants are Personal Guarantors of the Corporate Debtor-Sort India Enviro Solutions Ltd. and Alchemist Asset Reconstruction Company Limited-Financial Creditor having filed applications under Section 95 of IBC against both the Personal Guarantors, it shall be sufficient to refer to the pleadings and facts in CA(AT)(INS) No. 1204 of 2024 for deciding these two Appeals.

3. The brief facts of the case which are relevant to be noticed are as follows:-

- Sort India Enviro Solutions Ltd. (SIESL)-Corporate Debtor had entered into a Working Capital Agreement and Term Loan Agreement with RBL Bank Ltd., the original lender, on 28.11.2015 whereunder a credit facility was extended to the Corporate Debtor.
- In consideration of the sanction/renewal/enhancement of the credit facility, the Corporate Debtor as well as its Personal Guarantors (**'PG'** in short), namely, Paresh Parekh and Manish Patel, executed various documents and secured the said credit facilities not exceeding Rs.32.30 crore.
- A Deed of Guarantee was executed on 28.11.2015 and 17.10.2016 by the PG to repay the debt in respect of the aforesaid credit facility in case of default on the part of the Corporate Debtor.
- On 12.11.2016, a Put Option Agreement was entered into between the Corporate Debtor, RBL Bank, PG and Agnus Capital LLP (**'Agnus'** in short) whereunder, on the occurrence of default by the Corporate Debtor under the facility agreement, the Put Option would be exercised by RBL requiring Agnus to pay outstanding amounts due and payable by the Corporate Debtor as consideration for transfer of the pledged shares of the Appellants.
- The Corporate Debtor-SIESL having defaulted, the loan account of the Corporate Debtor was declared as NPA on 31.05.2018.

- An Assignment Agreement was executed on 28.06.2018 by RBL Bank with the Alchemist Asset Reconstruction Company Limited-Respondent No.1/Financial Creditor.
- By this Assignment Agreement, RBL assigned the debt of the Corporate Debtor together with all rights, titles and interests to Respondent No.1. The Respondent No.1 in turn issued an intimation letter dated 10.07.2018 and 21.07.2018 to the PG regarding the Assignment Agreement.
- On 16.08.2018, Respondent No.1 sent a demand notice to the Corporate Debtor and PG to clear their liability. Neither the Corporate Debtor nor the PG cleared the outstanding liability.
- Respondent No.1 further sent an email containing notice of invocation of personal guarantee on 17.11.2019 demanding from PG to pay their outstanding dues which invocation was objected to by the PG on 24.12.2019.
- In view of the defaults under the Deed of Guarantee, the Respondent No.1 issued Statutory Demand Notice on 14.07.2020 to the PG demanding an amount of Rs. 32.25 cr as on 30.06.2020.
- Meanwhile, the Corporate Debtor was admitted into CIRP on 23.09.2020.
- On 09.10.2020, Respondent No.1 filed applications for Insolvency Process of the PG under Section 95 of the IBC in CP(IB) No. 360/NCLT/AHM/2020 and CP(IB) No. 361/NCLT/AHM/2020 in

which applications, Resolution Professional (**'RP'** in short) was appointed.

- The Respondent No.2-RP filed its Report under Section 99 of IBC on 13.10.2021 recommending the admission of the Section 95 applications.
- The Adjudicating Authority after hearing the parties passed the impugned order on 30.04.2024 admitting the applications and admitted the PG into Insolvency Process. Aggrieved by the impugned order, the present appeal has been preferred.

4. We have heard Shri Atul Singh, Ld. Counsel for the Appellant-Personal Guarantors and Ms. Varsha Banerjeee, Ld. Counsel representing Financial Creditor- Respondent No.1 in both Company Appeals.

5. Making submissions on behalf of the Appellant, the Ld. Counsel submitted that the Adjudicating Authority did not provide sufficient opportunity to the Appellant to present its defence while admitting the Section 95 application. It was submitted that the Ld. Counsel appearing on behalf of the Appellant before the Adjudicating Authority was unable to present the arguments effectively due to technical glitch and connectivity error. When the scheduled virtual hearing was unsuccessful, the Adjudicating Authority should have provided another opportunity of hearing. However, the Adjudicating Authority closed further opportunity of hearing to the Appellant and instead reserved the

matter for orders after directing the Appellant to file written submissions in lieu of the oral arguments on the very same day. Thus, even the time afforded to furnish the written statement was compressed to less than a few hours which however was complied to by the Appellant. Besides the fact that grossly insufficient time was allowed to furnish their written submission, it was submitted that these submissions did not even receive due cognisance of the Adjudicating Authority and was summarily brushed aside in the impugned order by simply recording a line that the PG had filed additional affidavit raising certain objection to the present application. This curtailment of their right tantamount to violation of principles of natural justice and prejudicially affected their interests. It was contended that since the matter was not heard on merits, the matter deserves to be remanded back to the Adjudicating Authority for re-hearing.

6. From the perspective of merit, it was also contended that the report of the RP under Section 99 of IBC suffered from grave infirmities. The report had chosen to ignore that the Assignment Agreement executed by RBL with Respondent No.1 was not carried out in good faith but done with the malafide intention to give the Respondent No. 1 a backdoor entry into the Committee of Creditors ('**COC**' in short) as a Financial Creditor. It was also contended the Respondent No.1 was precluded from exercising its rights under the Deed of Guarantee as it was obligated to first exercise rights in term of the Put Option

Agreement. Pointing out that the Assignment Agreement was entered into after the account of the Corporate Debtor was declared to be NPA, it was added that the timing shows that it was mischievously contrived to escape the consequences of the Put Option Agreement which had been executed earlier. Further submission was made that the Adjudicating Authority failed to take into account that payments were made by Agnus to RBL towards discharging liability of outstanding due and payable by the Corporate Debtor on account of the Put Option Agreement.

7. Submission was also made that the bank statement relied upon by the Respondent No.1 to claim debt and default was not only incomplete but also fabricated and morphed. By submitting incomplete and defective Form C under Rule 7(2) of the Insolvency Bankruptcy (Application to Adjudicating Authority for Insolvency Process of Personal Guarantor to Corporate Debtor) Rules, 2019 under Section 95 of IBC, the mandatory provision of disclosing the details/documents that evidence debt and default also stood unmet.

8. Refuting the contentions raised by the Appellant, the Ld. Counsel for Respondent No.1 contended that the impugned order was a well-reasoned order. Denying that the principles of natural justice were violated in any manner, it was submitted that the Adjudicating Authority had passed the impugned order after having duly considered all the issues and contentions raised by the Appellant on the Section 95

petition filed by Respondent No.1. It was also submitted that the Adjudicating Authority, in accordance with the statutory scheme of IBC, had directed the RP to submit a Report under Section 99 of IBC. After examining all materials/documents, the RP had filed a detailed Report demonstrating the existence of debt and default and basis these detailed findings correctly recognised Respondent No.1 as a Financial Creditor.

9. It was further contended that the Appellant had wrongly premised their argument on the fact that the Financial Creditor was precluded from exercising its rights under the Deed of Guarantee as it was obligated to first exercise rights in term of the Put Option Agreement. It was vehemently contended that since the terms of Deed of Guarantee were absolute in nature and the Appellant had breached the guarantee terms, there was no irregularity on the part of Respondent No.1 in invoking the guarantee and initiating proceedings under Section 95 of the IBC by virtue of being an assignee of the original lender.

10. Advancing their arguments further, it was pointed out that once the Assignment Deed was duly executed and registered, the Respondent No.1, being the assignee of the debt disbursed by the original lender/RBL, it had stepped into the shoes of original lender. The Respondent No.1 had thus become a secured Financial Creditor of the Corporate Debtor and fully eligible to exercise such rights as that of a financial creditor. It was further stated that the records of NeSL clearly reflected the liability of both the Corporate Debtor as well as the

Appellant qua the Respondent No.1. The Appellant having clearly failed to discharge the debt owed by the Corporate Debtor and also having failed to place on record any documents/details to record satisfaction of the debts of the Corporate Debtor, the impugned order suffers from no infirmity in admitting Section 95 application.

11. On the claim of the Appellant that there was an obligation on the part of Agnus in terms of the Put Option Agreement to discharge the obligation of the Corporate Debtor in case of occurrence of a put event as defined in the Put Option Agreement, the same was vehemently denied by Respondent No.1. On the alleged non-adherence to the terms of the Put Option Agreement by the Respondent No.1, it was asserted that this contention is legally untenable and cannot form the basis for challenging the impugned order.

12. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully.

13. The main issues for consideration before us are as follows:-

(i) In the facts of the present case, whether there has been denial of natural justice to the Appellant by the Adjudicating Authority.

(ii) Whether the invocation of Deed of Guarantee of the PG stood circumscribed by the Put Option Agreement.

(iii) Whether the Appellant-PG was entitled to object to the Assignment Agreement between RBL/original lender and Respondent No.1.

14. To answer the first question as to whether the impugned order passed by the Adjudicating Authority without hearing the Appellant stood vitiated on grounds of violation of the principles of natural justice, we would like to first notice the orders of the Adjudicating Authority, passed on 15.04.2024, whereby the matter was reserved for hearing. The order of 15.04.2024 reads as follows:

> *"None present for the Resolution Professional, but Ld. Counsel for applicant was present. It is a old matter and RP had filed report long back and served copy on respondents. Learned Counsel for the respondent who was present online is not visible and not audible when asked to argue the matter. Learned Counsel for the respondent is directed to file written submissions not more than two to three pages today itself.*
>
> *Order is reserved."*

15. On reading the above order, there is no ambiguity that the Ld. Counsel for the Appellant had appeared before the Adjudicating Authority in virtual mode but was prevented from presenting his arguments due to audio-video problems. It is also clear from the order that while no further right of hearing was given to the Appellant by the Adjudicating Authority, it also allowed the Appellant to file written submissions. It is also noticed that even the after the matter was reserved for orders, the Appellant did not take any steps to file an application seeking recall of the order of the Adjudicating Authority. The

Appellant could always have agitated the matter before the Adjudicating Authority against forfeiture of the right to hearing which it did not choose to do. Instead, the Appellant availed the opportunity of filing an additional affidavit to press further submissions.

16. The application of principles of natural justice requires to be determined in the background of the facts and circumstances of each case as there is no one-size fits all formula. Having said that, we need to also appreciate the background in which the Adjudicating Authority decided to reserve the matter for orders. It is significant to note that the Adjudicating Authority while reserving the matter for orders observed that the that RP had filed its report under Section 99 of IBC "long back" and the matter at hand was "old". When we look at the sequence of events in the present case, we find that the RP had submitted its report under Section 99 of IBC on 13.10.2021 which is more than two years old. However, the statutory provisions of IBC under Section 100 provides for only 14 days time to the Adjudicating Authority to adjudicate on the admission or rejection of Section 95 application from the date of submission of the Report of the RP. In view of such stringent timelines provided under the IBC for initiation of Insolvency Resolution Process under Chapter-III of the IBC, prima facie, the Adjudicating Authority cannot be faulted in the given circumstances for having proceeded with reserving the matter for orders after giving the Appellant due liberty to file further written submissions.

17. Thus, to reply to the first question, in view of the time-bound nature of IBC proceedings, we find no infirmity in the endeavour made by the Adjudicating Authority to expedite disposal of the present Section 95 application rather than prolong the matter. We are not convinced with the contention of the Appellant that there was violation of the principles of natural justice by the Adjudicating Authority.

18. We are of the considered view that remanding the matter back to the Adjudicating Authority would be a time-consuming process and frustrate the time-lines set under IBC. At the same time to allay the sentiments expressed by the Appellant that they were precluded from agitating their cause effectively before the Adjudicating Authority, we have given them sufficient opportunity to present their case in an elaborate manner before us. We have also taken particular care to consider the additional points raised in the additional affidavit for the satisfaction of the Appellant.

19. Now coming to the other two questions outlined above, we find both these issues to be inextricably intertwined and therefore wish to consider them conjointly after outlining the main provisions contained in the Term Loan Agreement, Assignment Agreement, Deed of Guarantee and the Put Option Agreement.

20. At this stage, we wish to go to the root of the matter and look into the Term Loan Agreement of 28.11.2015 which was entered between the

Corporate Debtor and the RBL/Original Lender to find out whether the clauses set out therein bestowed the right to assign on the Borrower-SIESL/Corporate Debtor. Clause 14 is the relevant clause which clearly bequeaths this power to assign only on the Bank and not on the Borrower. The relevant clause reads as follows:

> *"14. BANK'S RIGHT TO ASSIGN*
>
> *The Borrower shall not assign or transfer any of its rights, duties or obligations under this Agreement except with the prior written permission of the Bank. The Borrower expressly recognizes and accepts that the Bank shall be absolutely entitled and shall have full power and authority to sell, assign or transfer in any manner, in whole or in part, and in such manner and on such terms as the Bank may decide, (including reserving a right to the Bank to retain its power thereunder to proceed against the Borrower on behalf of the purchaser, assignee or transferee) any or all outstanding dues of the Borrower to any third party of the Bank's choice without any further reference or intimation to the Borrower. Any such action and any such sale, assignment or transfer shall bind the Borrower to accept such third party as creditor exclusively or as a joint creditor with the Bank as the case may be."*
>
> (Emphasis supplied)

To be fair to the Appellant, it has not disputed the Term Loan Agreement. Neither has it questioned the fact that the Original Lender was saddled with the right to assign the debt.

21. This now brings us to the Assignment Agreement of 26.08.2018 by which the original lender/RBL had assigned all its rights, title and interest in the financing documents and all collateral and underlying Security Interests and/or pledges created to secure and/or guarantees

issued in respect of the repayment of the Loans, to the Assignee. The relevant clause 2.1.2 is reproduced below:

> *"**2.1.2** The Assignor hereby further assigns in favour of the Assignee, all its rights, title and interest in the Financing Documents, all agreements, deeds and documents related thereto and all collateral and underlying Security Interests and/or pledges created to secure and/or guarantees issued in respect of the repayment of the Loans, which the Assignor is entitled to. The Assignee shall have the right to enforce such Security Interests, pledges and/or guarantees and appropriate the amounts realized there from towards the repayment of the Loans and to exercise all other rights of the Assignor in relation to such Security Interests, pledges and/or guarantees. The Assignor shall transfer/deliver or cause to be transferred/ delivered or hold for and on behalf of the Assignee, all such original/photocopied (whichever is available) documents, deeds and/or writings, including but not limited to the Financing Documents, and produce the same promptly upon any request by the Assignee."*
>
> (Emphasis supplied)

Clearly this Assignment Agreement was purely between the assignor and the assignee and was flowing out from Clause 14 supra of the Term Loan Agreement.

22. Next, we proceed to look into the Deed of Guarantee which was executed by the PG with the Original Lender on 28.11.2015 and 17.10.2016 which clearly preceded the Assignment Agreement. Paras 2 and 14 of the Deed of Guarantee are relevant which clearly state that the borrower shall forthwith on demand, without any demur or protest, irrevocably and unconditionally pay to Bank the whole of such guaranteed sum. In other words, the guarantee was irrevocable and

unconditional on demand. The relevant clauses 2 and 14 are as reproduced below:

> *"**2**. If at any time default shall be made by the Borrower in repayment of the Guaranteed Sum together with interest, costs, charges, expenses and/or other monies for the time being due to Bank in respect of/or under the Loan, the Guarantor/s shall forthwith on demand, without any demur or protest, irrevocably and unconditionally without any reference to the Borrowers, and without raising any objection or issue whatsoever and irrespective of or notwithstanding any dispute or difference in respect of the said amounts falling due to the Bank, pay to Bank the whole of such Guaranteed Sum together with interest, costs, charges, expenses and/or any other monies as may be then due to Bank in respect of the loan and shall indemnify and keep indemnified Bank against all losses of the said Guaranteed Sum, interest or other monies due and all costs charges and expenses whatsoever which Bank may incur by reason of any default on the part of the Borrower. This is a guarantee of payment and not of collection.*
>
> ***14**. The Guarantee shall be irrevocable and enforceable against the Guarantor/s not withstanding any dispute between Bank and the Borrower."*

(Emphasis supplied)

23. Equally relevant are clauses 5, 8 and 12 of the Deed of Guarantee which clearly postulate that the guarantee shall be enforceable against the guarantor notwithstanding failure to discharge separate securities or any other collateral as set out here-under:

> *"**5**. As the Loan may have been further secured in any manner whatsoever including but not limited to by hypothecation and/or pledge and/or mortgage under separate security documents executed with the Bank, the Guarantors agree that no failure in requiring or obtaining such security or in the observance or performance of any of the stipulations or terms of the said security documents and no act, omission, delay or default of the Bank in*

requiring or enforcing the observance or performance of any of the said stipulations or terms of the security documents shall have the effect of releasing or discharging or in any manner affecting the liability of the Guarantors under this Deed.

***8**. The Guarantee herein contained shall be enforceable against the Guarantor/s notwithstanding the securities aforesaid or any of them or any other collateral.*

***12**. Notwithstanding Bank's rights under any security which Bank may have obtained or may obtain, Bank shall have the fullest liberty to call upon the Guarantor/s to pay the Guaranteed Sum together with Interest as well as costs charges and expenses and/or other monies for the time being due to Bank in respect of the Loan or under the Loan Agreement, or any of them without requiring Bank to realise from the Borrower the amount due to Bank in respect of the Loan and/or requiring Bank to enforce any remedies or securities available to Bank."*

(Emphasis supplied)

24. More significantly, we focus on Clauses 31 and 32 of the Deed of Guarantee which clearly stipulate that the Lender shall have the power to assign the Deed of Guarantee but denies any such right to the Borrower. The relevant clauses are as reproduced below:

***"31.** The Guarantor/s shall not assign or transfer any of their rights and/or obligations under this Deed. No delay in exercising or omission to exercise any right, power or remedy accruing/available to Bank upon any default or otherwise hereunder or any other security documents/letters of guarantee shall impair or prejudice any such right, power or remedy or shall be construed to be a waiver thereof or any acquiescence therein and any single or partial exercise or any right, power or remedy hereunder shall not preclude the further exercise thereof and every right and remedy of Bank shall continue in full force and effect until such right, power or remedy is superficially waived by an instrument in writing executed by Bank.*

> ***32.*** *However Bank shall be entitled to, without issuing any notice or obtaining any consent from the Guarantor/s, sell or assign this Deed with or without any other security in favour of Bank (Including all guarantee/s, if any) to any person ("Intending Assignee") of Bank's choice in whole or in part and in such manner and on such terms and conditions as Bank shall decide. Any such sale, assignment, securitization or transfer shall conclusively bind the Guarantor/sand all other related persons."*
>
> (Emphasis supplied)

Having read the clauses of the Deed of Guarantee, it becomes clear that the present Deed of Guarantee is an independent contract between the original lender and the Appellant-PG and that the Deed of Guarantee could be assigned by the original lender/RBL.

25. The other salient agreement is the Put Option Agreement of 12.11.2016 to which particular attention has been drawn by the Appellant. It would be relevant to notice the core recitals of this Agreement which are to the effect:

> *"C. One of the conditions of the Loan is that on the happening of a Put Option Event (as defined below), the Put Option Party shall have the obligation to purchase the Pledged Securities from the Bank, at a price not less than the total of the amounts outstanding under the loan along with any interest, penal interest or any other charges due from the Borrower to the full discharge of the obligations of the Borrower to the bank under the facility Agreement.*
>
> *NOW THEREFORE, the Parties hereto hereby agree as follows:*
>
> *1. Definitions*
>
> *(a) Unless the context otherwise requires, and if not otherwise defined herein below, capitalised words used herein shall have the meaning respectively assigned to them under the Facility Agreement The following capitalised words shall have the meaning assigned to them below:*

"Put Event" shall mean the happening of any Event of Default under the Facility Agreement;

"Put Option" means the obligation of the Put Option Party to buy the Pledged Securities on the happening of the Put Event as per the terms of this Put Option Agreement.

2. PUT OPTION

2.1 Exercise of the Put Option

(a) At any time during the subsistence of the Facility Agreement on the occurrence of a Put Event, the Bank shall be entitled to exercise the Put Option be delivering the Put Option Notice to Put Option Party.

(b) The delivery of the Put Option Notice shall constitute a binding agreement and obligation of Put Option to purchase or cause the purchase of the Pledged Securities."

26. It is the case of the Appellant that PG can be approached to make payment only after the bank has exhausted all its possible claims against borrower. It is contended by the Appellant the Put Option agreement comes into force when any default occurs under facility agreement. Submitting that Put Option means the obligation of the Put Option Party to buy the Pledged Securities on the happening of the put event, it has been contended by the Appellant that in terms of this Agreement when the borrower defaults under the loan agreement, then the lender was required to approach Agnus Capital LLP which is put option party to discharge its obligation of borrower. It is also vehemently contended that Assignment Agreement is not acceptable to the Appellant as neither the Corporate Debtor nor the Personal Guarantor were party to this agreement. No prior consent of PG or any intimation

was given to the PG about the Assignment Agreement. Since PG had given guarantee to the original lender/RBL and not to Respondent No 1, therefore, no action can be initiated against the PG. It is also canvassed by the Appellant that the Assignment Agreement was entered into to overcome the ramifications of the Put Option Agreement and aimed at securing an unfair advantage to Respondent No.1 to fabricate claims against the PG. It has been asserted that the Adjudicating Authority has failed to appreciate that the Assignment Agreement was not executed in good faith.

27. At this stage we may see how the Adjudicating Authority has considered these issues. The findings of the Adjudicating Authority are captured in paragraph 9 of the impugned order which is extracted below:

> *"9. As far as Assignment Agreement is concerned, provision for the same is mentioned in the Deed of Guarantee clause 32, the bank has the power to assign the deed with any party and the same was binding on the guarantor. Further as regards the put option clause to have been exercised, it is a separate document regarding the pledged security or a right available for the parties, but the same does not have a provision in the guarantee document executed. Guarantee is a separate document which can be invoked when the default occurs. The respondent has not questioned the default which becomes payable under provisions of Sec 95 of IBC 2016. The company has already in to CIRP and liquidation and the Applicant has invoked the guarantee."*

28. Having looked at the relevant clauses of the four Agreements in the preceding paragraphs, we are of the considered view that the Deed

of Guarantee entered between the original lender and PG is an independent, distinct and a special contract which has to be construed on its own terms. The terms of the Deed of Guarantee are therefore extremely material as the invocation of the guarantee had to be purely in accordance with the terms of guarantee. It is clear from the reading of the clauses contained in Deed of Guarantee that guarantee was given by the PG in unequivocal terms and the guarantee amount was to be paid by the guarantors without demur or objection once the guarantee was invoked.

29. In the letter invoking the guarantee, it was clearly stated that the Corporate Debtor had not performed its obligation of debt repayment. It is an admitted fact that the Corporate Debtor did not discharge the debt. It is a settled position in law that under Section 128 of the 'Indian Contract Act', the liability of the surety is coextensive with that of principal debtor unless it is otherwise provided by the contract. This legal precept has been laid down by the Hon'ble Supreme Court in the matter of ***Maharashtra State Electricity Board, Bombay Vs. Official Liquidator, High Court, Ernakulam and Anr. (1982) 3 SCC 358***. In the present case, once the principal borrower failed to discharge the debt, the liability of the guarantor got triggered on the invocation of guarantee. By virtue of this Deed of Guarantee, the PG was therefore mandatorily obliged to honour its guarantee.

30. However, the question which requires to be answered as outlined at Sl no (ii) at para 12 supra before us is whether the invocation of Deed of Guarantee of the PG stood circumscribed by the Put Option Agreement and whether until non-exercise of the Put Option Agreement by the lender, the surety stood absolved of its liability. Keeping in view that the Deed of Guarantee was an unconditional and irrevocable guarantee in terms of Clauses 2 and 14 thereof and there is no mention of put event or put of option therein, the Appellant is not entitled to raise the issue of the non-exercise of Put Option rights under the Put Option Agreement by the Financial Creditor as condition precedent to the invocation of the guarantee. The dispute raised in the context of Put Option Agreement is immaterial and inconsequential. The Deed of Guarantee and Put Option Agreement were two different transactions and the liability of the PG has to be read from the Deed of Guarantee.

31. In our opinion, therefore, the Adjudicating Authority did not commit any error in holding that the right of the Respondent No.1 to recover money from the PG emanates from the terms of the Deed of Guarantee which were not in any manner obliterated, overwhelmed or superseded by the Put Option Agreement with the latter having its own sphere of operation. The liability of the PG was purely dependent on the terms of the Deed of Guarantee which was independent of the Put Option Agreement.

32. Now coming to the other contention canvassed by the Appellant that the Assignment Agreement was entered into with the malafide motive to overcome the ramifications of the Put Option Agreement and that the Assignment Agreement was inapplicable on them since they were not a party to the said assignment agreement and their prior consent was not taken while executing the same, we need to see whether the assignment in the given factual matrix was a valid mode of transfer of rights, title and interest.

33. The recitals of the present Assignment Agreement provide that the assignee is a securitization and asset reconstruction company registered in pursuance to Section 3 of the SARFAESI Act, 2002. The original lender/RBL in terms of Clause 2.1.2 of the Assignment Agreement has assigned the loan together with all its rights, title and interest in the financing documents and any underlying security interests, pledges and/or guarantees in respect of such loans to the Assignee. The Assignment Agreement at Clause 2.1.1 also postulates that it is in accordance with Section 5 of the SARFAESI Act, 2002. Section 5 of the SARFAESI Act, 2002 provides as follows:

> *"5. Acquisition of rights or interest in financial assets. - (1) Notwithstanding anything contained in any agreement or any other law for the time being in force, any asset reconstruction company may acquire financial assets of any bank or financial institution—*
>
> *(a) ….*

(b) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.

.....

(2) If the bank or financial institution is a lender in relation to any financial assets acquired under sub- section (1) by the asset reconstruction company, such asset reconstruction company shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.

34. Section 5(1) begins with the non-obstante clause and is an enabling provision empowering an Asset Reconstruction Company to acquire financial assets in the manner provided therein. The present Assignment Agreement between the original lender/RBL and Respondent No.1 which being an asset reconstruction company fell within the ambit of Section 5(1)(b). Section 5(2) further contains a deeming clause which provides that an Asset Reconstruction Company on such acquisition of financial assets from the original lender will be deemed to be the lender and all the rights of such original lender shall vest in them. Once the deeming provision contained in Section 5(2) comes into play, the Asset Reconstruction Company shall be deemed to be Lender for all purposes.

35. In the present case too, the legal fiction has come into play and the Respondent No.1 as the assignee in the Assignment Agreement clearly stepped into the shoes of her assignor and was therefore fully entitled to exercise its right to initiate proceeding under Section 95 of

IBC against the PG. The Respondent No.1 has to be deemed to be lender and is thus entitled to exercise all rights which were vested in the lender. Once the Assignment Deed was duly executed and registered, the Respondent No.1 by operation of law was substituted in place of the original lender in all actions for realisation of the debt vis-à-vis the Corporate Debtor. The legal position recognising the rights of an Asset Reconstruction Company to act in furtherance of assignment of debt as a valid legal right is no longer *res integra*. That being so, the borrower or the guarantor has no locus or right to challenge any such assignment. Furthermore, since Clause 32 of the Deed of Guarantee which was an exclusive contract and made provision for the Assignment Agreement, the terms of this agreement became binding on the Appellant-PG and the locus of the PG to object to the assignment does not arise. Thus, our reply to the question framed at Sl No (iii) at para 12 supra is in the negative.

36. This now brings us to certain other issues raised by the Appellant in the Additional affidavit. Submission has been made in the additional affidavit that the Respondent No.1 did not produce bank statement for the period 28.06.2019 to 28.06.2020 and this material concealment of fact by Respondent No.1 has not been taken note of by the RP while submitting his Report under Section 99 of IBC evidencing debt and default. Submission has also been pressed that the original lender received certain payments in their account from Agnus. As such there

were no sums due and payable to the Respondent No.1 by the PG. It has also been contended in the additional affidavit that the bank statement produced by Respondent No.1 was a morphed statement and so created with a view to fabricate a case against the Appellant. It was asserted that these facts including a defective Form C went unnoticed in the Report of the RP as well as by the Adjudicating Authority.

37. The above contentions of the Appellant have been vehemently denied by Respondent No.1 and emphatically asserted that the Appellant was a defaulter from whom an amount of Rs. 32.92 cr was due and payable as on the date of filing of personal insolvency proceedings. Without satisfying financial debt of Rs.32.92 crore, the Appellant has tried to raise frivolous plea of fraudulent bank statements and defective Form C to deny the legal rights and remedies of Respondent No.1. An attempt has also been made by the Appellant to mislead the Adjudicating Authority by adverting to the receipt of certain payment from Agnus so as to wriggle out of the personal insolvency proceedings.

38. When we look at the Report of the RP recommending the Section 95 application to the Adjudicating Authority, we find that the RP has gone through a maze of documents before finalising its recommendation. The RP also provided fair and reasonable opportunity to the Appellant to prove the repayment of debt which had been claimed by Respondent No.1 as unpaid. The RP submitted its Report as placed

at pages 346-356 of the Appeal Paper Book (**'APB'** in short). This report clearly lists out various documents examined by the RP including intimation letters sent to PG by Respondent No.1 dated 10.07.2018 and 21.07.2018 regarding Assignment Agreement; Demand Notice dated 16.08.2018; Information Utility Records; Statement of Accounts of the Corporate Debtor; Deed of Guarantee; Loan Agreement; Memorandum of Pledge of Physical Shares; Deed of Hypothecation etc. We also find that the RP issued notice dated 05.10.2021 to the PG to give evidence, if any, of proof of payment of debt which had been claimed as unpaid by Respondent No.1. The records of NeSL which clearly reflected the liability was also taken notice of. However, as per the Report, the RP having received no documentary evidence or information from the PG to show repayment of debts nor having received any documents to show that the Deed of Guarantee stood cancelled or set aside. The PG having failed to rebut the factum of default, we do not find any infirmity in the Report of the RP recommending to the Adjudicating Authority to admit the Section 95 petition.

39. At this stage we would like to see how the Adjudicating Authority has considered the Report of the RP and whether it had dealt with the limitation aspect in the impugned order which is as extracted below:

> *"10. Further, the application is filed within the period of limitation. In the present case the date of default as mentioned in the application is 31.03.2018 and the application filed before*

this tribunal on 09.10.2020. Therefore, the present application falls within the period of limitation.

11. The RP has recommended to initiate the Insolvency Resolution Process against the Personal Guarantor. The RP has submitted the copies of documents and also details of assets of respondent. It is observed from the record that the respondent had not brought on record any document denying or disputing the invocation of his Personal Guarantee. There is no any evidence given by the respondent to show that he has paid the debt or his Personal Guarantee agreement is cancelled."

The Adjudicating Authority having returned the finding that there exists financial debt which is not time-barred and the guarantor having failed to disprove default and the guarantee having been invoked, in our considered view no error has been committed by the Adjudicating Authority in admitting the Section 95 application. We must add here that the question of limitation was not pressed by the Appellant before us.

40. As regards the issue of defective Form C raised by the Appellant, we notice that the RP has observed that the Insolvency Petition has been filed in the requisite form in terms of Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantor to Corporate Debtors) Rules, 2019, supported by requisite fee and documents. Form C is the statutory form in which an application is required to be submitted by a creditor who institutes an application for the initiation of the insolvency resolution process. This Form includes particulars of the applicant,

particulars of the guarantor, particulars of the debt and particulars of the insolvency professional and enables furnishing of such information as lies within the knowledge of the creditor. When we see the Form C furnished by the Respondent No. 1 as placed at pages 317-324 of the APB, we find that all these details have been duly filled up. As regards the contention that fabricated and morphed bank statements were submitted by the Respondent No. 1 which bordered on fraud and mischief, we are not impressed by this submission. When any ground of fraud is raised, this needs to be *prima facie* established by strong evidence and merely making a sweeping general uncorroborated statement cannot suffice to establish fraud. It is a well settled legal position that allegation of fraud needs to be subsequently pleaded and evidenced from proceedings on record. This not having been done, we cannot attach much credibility thereto.

41. This Bench is of the considered view that the liability of the Appellant as surety being coextensive with that of the principal debtor in terms of the Deed of Guarantee and the Respondent No.1 having stepped into the shoes of the original lender pursuant to the Assignment Deed executed in its favour and Appellant having failed to show that debt of the principal borrower stands extinguished and having failed to honour the guarantee obligation despite invocation of personal guarantee, no error has been committed by the Adjudicating Authority

in the impugned order admitting Section 95 application. There is no merit in the Appeal(s). Both the Appeal(s) are dismissed. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

Place: New Delhi

Date: 20.08.2024

Harleen Kaur