

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 257 of 2020**

[Arising out of Order dated 13.11.2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in M.A No. 3439/2019 in CP No. 1973/2018]

In the matter of:

**1. Mr. Nitin Chandrakant Naik,
Plot No. 49, Flat No. 1, 586,
Ramsukh Apartments Subhash
Nagar, Shukrawar Peth, Pune,
411002, Maharashtra, India**

....Appellant No.1

**2. Mrs. Megha Nitin Naik,
Plot No. 49, Flat No. 1, 586,
Ramsukh Apartments Subhash
Nagar, Shukrawar Peth, Pune,
411002, Maharashtra, India**

....Appellant No.2

Vs.

**1. Sanidhya Industries LLP
F/5, 2nd Floor, H No. 1173,
Limayewadi, Sadashiv Peth,
Pune MH 411030 IN**

....Respondent No.1

**2. M/s. Simrut Foods & Hospitality Pvt. Ltd.
2nd Floor, Silver Prestige, 1025,
Shukrawar Peth Pune MH 411002 IN**

....Respondent No.2

**3. Mr. Nagalingam Muthiah
Resolution Professional of Simrut Foods &
Hospitality Pvt. Ltd.**

....Respondent No.3

**4. The Yashwant Co-operative Bank Ltd.
Dr Babashaeb Amebedkar
Chowk, Raviwar Peth, Phaltan
Dist Satara, Pin - 415523**

....Respondent No.4

**5. The Chikhli Urban Co-operative Bank Ltd.
Dr. Shyamaprasad Mukherji
Marg, Shivaji Chowk, Chikhli,
Buldhana- 443201**

....Respondent No.5

For Appellants:

**Mr. Abhishek Anand, Mr. Kunal Godhwani, Mr.
Parthik Choudhury, Mr. Rahul Adlakha, Advocates**

**For Respondents:- Mr. Rohit Kumar Singh, Mr. Samrat Nigam, Mr. A Chandra, Advocate for R1.
Mr. Ajay K Jain and Mr. Atanu Mukherjee, Advocates for R3.
Mr. Krishnendu Datta, Senior Advocate with Mr. Ashish Porwal, Mr. Kushank Sindhu, Mr. Tushar Bhardwaj, Mr. Abhinav Goyal, Ms. Seeta Swamy, Advocates for R4 & 5.
CA Raghunath S for R4 & 5.**

Company Appeal (AT) (Insolvency) No. 239 of 2021

[Arising out of Order dated 28.01.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court III, in M.A Nos. 919/2020, 442/2020, 2694/2019 in C.P (IB)- 1973(MB)/2018]

In the matter of:

**1. Mr. Nitin Chandrakant Naik,
Plot No. 49, Flat No. 1, 586,
Ramsukh Apartments Subhash
Nagar, Shukrawar Peth, Pune,
411002, Maharashtra, India**

....Appellant No.1

**2. Mrs. Megha Naik,
Plot No. 49, Flat No. 1, 586,
Ramsukh Apartments, Subhash
Nagar, ShukrawarPeth, Pune,
411002, Maharashtra, India**

....Appellant No.2

Vs.

**1. Sanidhya Industries LLP
F/5, 2nd Floor, H No. 1173,
Limayewadi, Sadashiv Peth,
Pune, Maharashtra- 411030**

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**2. M/s. Simrut Foods & Hospitality Pvt. Ltd.
2nd Floor, Silver Prestige, 1025,
Shukrawarpeth, Pune, Maharashtra- 411002**

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**3. Mr. Nagalingam Muthiah
Resolution Professional of M/s. Simrut Foods &
Hospitality Pvt. Ltd.
2nd Floor, Silver Prestige, 1025,
Shukrawar Peth, Pune, Maharashtra- 411002**

....Respondent No.3

**4. The Yashwant Co-operative Bank Ltd.
Dr Babashaeb Ambedkar**

**Chowk, Raviwar Peth, Phaltan,
Dist Satara, Pin – 415523**

....Respondent No.4

**5. The Chikhli Urban Co-operative Bank Ltd.
Dr. Shyamaprasad Mukherji Marg,
Shivaji Chowk, Chikhli,
Buldhana- 443201**

....Respondent No.5

For Appellants: Mr. Abhishek Anand, Mr. Kunal Godhwani, Mr. Parthik Choudhury, Mr. Rahul Adlakha, Advocates
For Respondents:- Mr. Rohit Kumar Singh, Mr. Samrat Nigam, Mr. A Chandra, Advocates for R1.
Mr. Ajay K Jain and Mr. Atanu Mukherjee, Advocates for R3.
Mr. Krishnendu Datta, Senior Advocate with Mr. Ashish Porwal, Mr. Kushank Sindhu, Mr. Tushar Bhardwaj, Mr. Abhinav Goyal, Ms. Seeta Swamy, Advocates for R4 & 5.
CA Raghunath S for R4 & 5.

J U D G M E N T
(26th August, 2021)

A.I.S. Cheema, J.

Company Appeal (AT) (Insolvency) No. 257 of 2020

1. The Appellants, Promoter and Suspended Directors of the Corporate Debtor- ‘Simrut Foods & Hospitality Private Limited’ have filed this Appeal against impugned order dated 13.11.2019 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) in M.A. No. 3439/2019 in CP No. 1973/ 2018. By the Impugned Order, the Adjudicating Authority allowed the Application filed by Respondent No.3- Resolution Professional seeking approval of the Resolution Plan approved by the Committee of Creditors which plan was submitted by Respondent No.1- ‘Sanidhya Industries LLP’. Aggrieved by the approval of the Resolution Plan, the Appellants have filed this Appeal mainly on the ground that the Resolution

Plan has provision to transfer personal properties of the Appellants who had given their personal properties as security in favour of the Corporate Debtor, whom Corporate Debtor took loan.

2. The Appeal claims and it is argued on behalf of the Appellants that the Resolution Plan approved made provision of transfer of personal properties of the Appellants. It is claimed that the personal properties of the Shareholders/ Directors cannot form part of the Resolution Plan under Regulation 37 of the CIRP Regulations. Resolution Plan has to be with respect to the property of the Corporate Debtor and cannot enforce action against the properties of Shareholders/ Directors or Guarantors without proceeding against them. If the Creditor desires the Creditor has to proceed against the Guarantor under SARFAESI Act, 2002, Indian Contract Act, 1972 or the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which proceedings could have been filed before the DRT as Part III of the Insolvency and Bankruptcy Code, 2016 ("IBC" for short) which has not yet been notified. The Appellants alleged that the Information Memorandum published by Respondent No.3- Resolution Professional did not show the personal properties of the Appellants as properties of the Corporate Debtor. The same could not have been shown to be properties of the Corporate Debtor. However, in the Resolution Plan filed by Respondent No.1, the properties were included and sought to be transferred. Appellants claim that in the CIRP, the personal properties of the Appellants were not got valued and liquidation value of the assets of the Corporate Debtor was shown as mere Rs. 1,19,785/- against outstanding debt of Rs. 6,88,80,539/-. According to the Appellants, when the loan was

taken in October, 2014, the Financial Creditors- Respondent Nos. 4 and 5 had got the personal properties of the Appellants valued at Rs. 6.43 Crores. It is claimed that the value at present is about Rs. 11-12 Crores. According to the Appellants, earlier Mr. Eknath Walke and Mr. Goraksh Dalimbkar had filed Resolution Plans which were even approved by the Committee of Creditors but later on Respondent No.1 applied to the Adjudicating Authority and, taking orders, filed Resolution Plan whereafter these two persons immediately withdrew the plans they had given. The Appellants alleged that the Resolution Plan earlier submitted by Mr. Eknath Walke and Mr. Goraksh Dalimbkar when perused with Resolution Plan submitted by the Appellants by Respondent No.1- Successful Resolution Applicant is verbatim similar, it shows collusion between the Resolution Professional and the Successful Resolution Applicant. The earlier Resolution Applicants were only proxies.

3. The Appellants claim that the Respondent No.3- Resolution Professional filed M.A No. 3439 of 2019 for approval of the Resolution Plan and the Appellants filed M.A No.3486 of 2019 raising objections. The Resolution Plan was approved without deciding the objections raised by the Appellants. It is argued for the Appellants that the Resolution Professional in connivance with the Successful Resolution Applicant let personal properties of the Appellants be included in the Resolution Plan. When such information was not put in the Information Memorandum published for people to know, the connivance is apparent. The people at large did not know that the properties worth crores of rupees would be available along with assets of the Corporate Debtor. Appellants claim that they had only given their personal

properties as security to Financial Creditors to provide loan to the Corporate Debtor. Their properties could not have been included in the Resolution Plan when Part-III of the IBC has not been enforced.

4. Before proceeding further, it needs to be noted here that in this matter the Resolution Plan was approved on 13.11.2019 and Section 2(e) and provisions of Part-III of IBC came to be notified on 15.11.2019 enforcing Part-III of IBC to limited extent of making it possible to enforce Resolution relating to personal Guarantors of the Corporate Debtor. Notification was issued by Government and a judgment was passed by Hon'ble Supreme Court in the matter of '**Lalit Kumar Jain vs. Union of India & Ors.**'-[Transferred Case (Civil) No. 245/2020] in this context. In the present matter thus, the disputes raised are on the basis of as to how the law stood (before making Part III of IBC applicable to Personal Guarantors of Corporate Debtor) at the time of approval of Resolution Plan by the Committee of Creditors and then by the Adjudicating Authority.

5. The Respondent No.1- 'Sanidhya Industries LLP' (Successful Resolution Applicant) has filed reply and the Respondent has while making submissions referred to various events. It is claimed by this Successful Resolution Applicant that it had a Leave and License Agreement with Corporate Debtor and 'M/s. Sanidhya Industries Private Limited' (now 'Sanidhya Industries LLP') executed on 24th August, 2016. The Successful Resolution Applicant refers to earlier litigation with the Corporate Debtor. Subsequently, when CIRP got initiated, this Successful Resolution Applicant appears to have filed claim with the Resolution Professional. Subsequently, this Respondent filed

Resolution Plan which has been approved and which is now in dispute. This Respondent claims that the properties dealt with under the Insolvency Process are the properties wherein the Appellants were carrying on the hotel business of the Respondent No.2- Corporate Debtor. This Successful Resolution Applicant is referring to the other disputes to claim that the Appellants cheated the Respondent No.1 by inducing them to execute Leave and License Agreement on the basis of forged letter of Bank. It is claimed that the Respondent- Corporate Debtor had no actual property in its own name. The Successful Resolution Applicant is supporting the impugned order to claim that the order is legally tenable.

6. The Resolution Professional has filed reply to claim that the Adjudicating Authority and this Appellate Tribunal had limited judicial review available with regard to the commercial decision taken by the Committee of Creditors. The reply (without answering the averments in the Appeal that Information Memorandum did not include personal assets of the Appellants as the assets of the Corporate Debtor available for Resolution) has claimed that Resolution Plan complied with all the necessary provisions of the IBC and the Regulations and the CIRP was carried out as per the provisions of law. The Resolution Professional has mentioned in the reply and it is not in dispute that two registered Valuers had been appointed who stated the average liquidation value of the Corporate Debtor as just Rs.1,75,000/-. Copy of the Information Memorandum has been filed by the Resolution Professional as Annexure-D of the reply (Diary No.20035) at Page 51. It is also claimed by him that during the pendency of CIRP, the Respondent Nos.4 and 5- Financial

Creditors have in exercise of their statutory powers under SARFAESI Act taken physical possession of the assets of the Appellants and the said assets are in custody of the Financial Creditors. It is claimed that in such contingency, the Resolution Plan of the Respondent No.1 came to be accepted.

7. Respondent Nos. 4 and 5, the Financial Creditors have also filed reply and it is argued by these Respondents that the Appellants are the Promoters of the Corporate Debtor and they had mortgaged the subject properties to these Respondents vide Mortgaged Deed dated 20th October, 2014. It is claimed that the Appellants had executed personal guarantees in order to secure the advances given to the Corporate Debtor and that the properties concerned are commercial in nature (The documents show the properties on personal names of Appellants- See Schedule of Annexure-B- Joint Mortgage Deed dated 20.10.2014). It is claimed that these Respondents had proceeded to take action under Section 13(2) of the SARFAESI Act on 17.09.2018 and 28.07.2017 respectively and that the possession was taken by notice dated 19.02.2018 under the SARFAESI Act. The CIRP got initiated on 03.09.2018. Para 4 of Reply Diary No.23074 shows that these Respondents got the secured assets valued on 08.02.2019. These Respondent Nos.4 and 5 had 91.31% voting shares in the CoC. These Respondents are relying on para 22 of the judgment in the matter of “**State Bank of India v. V. Ramakrishnan & Anr.**” [Civil Appeal No.3595 of 2018] passed by the Hon’ble Supreme Court on 14th August, 2018. The said paragraph reads as under:-

“22. Section 31 of the Act was also strongly relied upon by the Respondents. This Section 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 Indian 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 has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the Respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him."

8. These Respondents lay stress on the observations of the Hon'ble Supreme Court that the Resolution Plan 'may well include provisions as to payments to be made by such guarantor'. On such basis, these Respondents claim that the Adjudicating Authority rightly approved the Resolution Plan and that the Appeal should be dismissed.

9. Both sides have argued against or in favour (as the case may be) with regard to Paras 15 to 18 and 26 of the Impugned Order. The Adjudicating Authority while referring to the Resolution Plan of Respondent No.1 observed in Paras 15 to 18 in the impugned order, as under:-

"15. The proposed break up of payments to the Secured Financial Creditors under this plan is as below:

Sr. No.	Name of the Creditor	Amount admitted	Voting Share	Settlement Amt.	Settlement %
1	The Yashwant Coop Bank Limited	59,33,467	8.61%	49,00,000	82.58

2	The Chikhli Urban Coop Bank Limited	6,29,47,072	91.39%	5,09,00,000	80.86
				5,58,00,000	

16. The Resolution Plan approved by the Committee of Creditors provides for the following payments to the stakeholders:

Sr. No.	Particulars	Amount Admitted (INR Cr)	Settlement Value offered (INR Cr.)	Terms of Payment
1	Corporate Insolvency Process Cost	At Actual	At Actual	To be paid in full within 30 days from the effective date
2	Secured Financial Creditors	6,88,80,539	Rs. 5,58,00,000/- (Rupees Five Crore Fifty-Eight Lakh only) inclusive of CIRP cost by an upfront payment	To be paid in full within 90 days from the Effective Date
3	Other Financial Creditors	Nil	Nil	Nil
4	Operational Creditor			
A	Employee and Workmen	NIL	NIL	NIL
B	Other Operational Creditor	NIL	NIL	NIL
C	Other creditors	NIL	NIL	NIL
		Total	Rs. 5,58,00,000/-	

17. CIRP Cost has been estimated at an amount of Rs. 5,58,00,000/- (Rupees Five Crore Fifty-Eight Lakh Only) and in pursuance of the scheme of resolution as envisaged by the Code, the Resolution Plan provides for the payment of the CIRP costs in priority over payments to any other creditors. Such payment would be made from the fresh funds infused by the Resolution Applicant within 30 days from the Effective Date. The details of the funds proposed to be infused by the Resolution Applicant. We understand that nay cost for making application by the Resolution Professional under Sections 43,45,50,66 of the Code, may be treated as part of CIRP Costs up to a cap of Rs. 25 Lacs duly netted off by any recoveries made in any such cases. Any recoveries pursuant to such applications, over and above Rs. 25 lacs shall be credited directly to the Financial Creditors and the Operational Creditor namely Sanidhya Industries LLP.

18. It Is also submitted that, with the payment of the sum of Rs. 5,58,00,000/- (inclusive of CIRP Cost incurred) the Owners of the premises mortgaged as security for the credit facilities availed from Yashwant Co-operative Bank Limited and Chikali Urban Co-operative Bank Limited, and secured Financial Creditors, shall transfer and convey the said properties to the Resolution Applicant free of all encumbrances and third-party rights of whatsoever nature by signing as Confirming Parties in Tripartite Agreements.

For the purposes of clarity, the complete description of the premises to form part of the Tripartite Agreements with the names of their current owners is set out here in below:

Sr.	Name of the Owner/Mortgage/	Description of Property	Area in (Sq. Mt.) Approx.
1.	Mrs. Megha Nitin Naik	Shop No 3 & 4 Shukrawar Peth, Taluka - & Havel, Pune District	Shop no 3 is 28.80 Shop No. 4 is 28.80 along with Area of 2.78 below the staircase
2.	Mrs. Megha Nitin Naik	Shop No 5 Shukrawr Peth, Taluka - &	28.80 built up along with garden space of 21.36
3	Mrs. Megha Nitin Naik	First Floor Office No. 104 & 105, Shukrawar Peth, Taluka -Havel, Pune	Office no 104 & 15 admeasuring 44
4	Mrs. Megha Nitin Naik	First Floor Office No. 107 &	39.61
5	Mr. Nitin Chandrakant Naik	Third Floor Office No. 301 108, Shukrawar Peth, Taluka - Havel, Pune District	58.064, together with Terrance garden/premises admeasuring about 130.06

It is also submitted that the Financial Creditors shall be at liberty to proceed against the properties of the Promoters erstwhile Directors/Guarantors other than those mentioned above to recover their balance.”

10. Thereafter, the Adjudicating Authority referred to Sections 30 and 31 of the IBC as well as Regulations 38 & 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016’ (“CIRP Regulations” for short) and concluded in Para 21 that mandatory contents of Resolution Plan have been complied with, *inter*

alia Adjudicating Authority went on to give direction in Para 26 of the impugned order as under:-

“26. It is directed that Mrs. Megha Nitin Naik and Mr. Nitin Chandrakant Naik, the owners of the premises as mentioned above and the Corporate Debtor, shall enter into Tripartite Agreements (with the Financial Creditors), for transfer of the premises (as mentioned in paragraph 18 of this Order) to the Resolution Applicant in compliance with the decision of CoC.”

11. It appears that the Adjudicating Authority at the time of passing such impugned order on 13.11.2019 also passed orders in M.A 3486/2019 as is pointed out by the Respondent No.3- the Resolution Professional vide Annexure-A of his reply. The Appellants filed the Appeal claiming that the Adjudicating Authority had not passed orders in their MA 3486/2019 and their objections were not decided. Now of-course, it is pointed out that order in MA 3486/2019 was also passed. The Respondents are claiming that the Appellants have not challenged the order in MA 3486/2019 and without challenging that order the Appellants cannot make grievance with the Resolution Plan. According to them, if the primary order is not challenged, the consequential order cannot be challenged.

12. We find that MA 3486/2019 was raising objections with regard to the Resolution Plan which had been approved. Rather the order approving the Resolution Plan is the primary order which is source of grievance for the Appellants and their objections being more legal are required to be considered as affected parties. Even if they had not raised any objections by way of MA 3486/2019, they would have been entitled to and justified to challenge the

Resolution Plan approved when according to them the plan was including their personal properties without there being legal proceedings against them. We are concerned with legal question whether in a CIRP against Corporate Debtor could the same be treated as Resolution Process against Personal Guarantors, so as to transfer personal properties of the Personal Guarantors in CIRP of Corporate Debtor.

13. We have heard learned Counsel for the parties. When CIRP is initiated, in the first step, Interim Resolution Professional (IRP) is required under Section 18(1) to collect all information relating to the assets, finances and operations of the Corporate Debtor for determining the financial position of the Corporate Debtor. He has to make a list of assets and liabilities of Corporate Debtor. Regulation 36 of the CIRP Regulations provides as to what is required to be incorporated in the Information Memorandum which is to be issued by the Resolution Professional. Here also the Information Memorandum requires including details of the assets and liabilities of the Corporate Debtor as per Regulation 36(2) (a). Sub-clause (f) of Regulation 36(2) provides that the Information Memorandum should give details of guarantees that have been given in relation to the debts of the Corporate Debtor by other persons, specifying which of the guarantors is a related party. Thus reference to details of Guarantees given by Related Party has to be there. That reference does not make property of Guarantor a property of Corporate Debtor for which Section 36(2) (a) is there.

If this is kept in view when we have perused copy of the Information Memorandum (Annexure-D) filed by Respondent No.3- Resolution

Professional, we find that *inter alia* the Information Memorandum first referred to the brief background of the Corporate Debtor which mentions that the Leave and License Agreement of Respondent No.1- Successful Resolution Applicant was terminated by a Deed of Cancellation on 22.01.2018 but however, 'Sanidhya Industries Pvt. Ltd.' (now Successful Resolution Applicant) has continued to remain in possession of the said premises and that the Corporate Debtor has not been able to refund the security deposit etc. The Information Memorandum has page with the title 'Comparative Balance Sheet of Simrut Foods & Technologies Private Limited' (?)- (It is not made clear if this name referred is earlier name of the Corporate Debtor) which reads as under:-

“COMPARATIVE BALANCE SHEET OF SIMRUT FOODS & TECHNOLOGIES PRIVATE LIMITED

(Amount in Rs.)

Particulars	As per Provisional financial statement as on 19.09.2018	As per Audited financial Statement as on 31.03.2018	As per Audited financial statement as on 31.03.2017
Equity and liabilities			
Share Capital	1,00,000	1,00,000	1,00,000
Reserve and surplus	(89,26,346)	(67,00,710)	26,48,178
Share Application money pending for allotment	61,49,274	61,49,274	61,49,274
Long term Borrowings	5,52,18,825	5,30,66,655	4,95,67,150
Trade Payables	58,46,350	58,46,350	48,37,635
Short term Provisions	34,40,605	34,40,605	31,10,510
Total	6,18,28,707	6,19,02,173	6,64,12,747
Assets			

Plant and Machinery	7,765	9,135	10,747
Furniture and Fixture	9,02,753	10,03,059	11,14,510
Kitchen Equipments	1,84,509	2,17,069	-
Non Depreciable Asset		-	12,66,605
Long term loans and advances	71,81,549	71,81,549	98,48,632
Current Investment	5,89,846	5,89,846	5,85,951
Inventories		-	14,12,558
Trade Receivable	83,742	83,742	97,175
Cash and Bank Balances	6,58,493	6,64,840	(1,07,334)
Other Current Assets	5,21,52,934	5,21,52,934	5,21,83,903
Total	6,18,28,707	6,19,02,173	6,64,42,747

14. Then there are 'particulars of debt due from or to related parties' including Appellant No.1 and 'Note-3- Security Details' is at page 63 of the Information Memorandum, which reads as under:-

"Note-3-Security Details"

Account No	Property Details	Valuation date and amount
3171/234 to 3171/237 and 4175/118	All that piece and parcel of the city survey no 1025+1024B in building silver prestige, ground floor, Shop No 3,4 & 5 in silver prestige condominium situated at Shukrawar Peth, Pune, Taluka-Haveli.	03/10/2014 1,39,13,000/- And 2,09,25,000/- Total 3,48,38,000/-
	First floor commercial offices bearing no 104,105,107,108,201,301 in the building known as Silver Prestige Condominium situated at Shukrawar Peth, Pune, Taluka-Haveli.	03/10/2014 71,04,000/- 63,95,000/- 30,45,000/- 1,58,99,000/- Total 3,24,43,000/-
	Survey no 15/1/1 in Renuka Nagari Co-Op Housing Society	03/10/2014 13,25,000/- Total- 13,25,000/-
3171/252	Flat No 10,11 and 12 Eknath Smruti Building, Guruwar Peth, Pune	03/10/2014 26,97,000/- 28,53,000/- 48,10,000/-

		Total- 1,03,60,000/-
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The above security given is in respect of loans granted to Corporate Debtor, promoters and their related parties.”

15. Clearly this is in the context of the security given under Regulation 36(2) (f). It has to be distinguished from assets of the Corporate Debtor which is not shown in the comparative balance sheet which we have reproduced. The Appellants have argued that the Resolution Professional did not get the personal properties of the Appellants valued and without doing so, the same have been included in the Resolution Plan and have been undervalued. The Resolution Professional has not claimed that the personal properties of the Appellants were got valued in CIRP. The Reply of Respondent Nos.4 and 5 (Diary No. 23074) rather claims that during CIRP they got the properties of Appellants valued. That would be irrelevant because, even if the properties were to be included, it would be for Resolution Professional to get valuation done. This was not done (as it would be impermissible). Thus, the personal properties of the Appellants were neither valued nor included in the Information Memorandum and have been allowed by the Resolution Professional to be included in the Resolution Plan so as to transfer the same to the Successful Resolution Applicant.

16. The Respondents are relying on judgment in the matter of “**State Bank of India v. V. Ramakrishnan & Anr.**” to submit that the Hon’ble Supreme Court has observed that in the Resolution Plan approved property of the personal guarantors can be dealt with. We have already reproduced para 22 of the judgment which the Respondents are relying on to argue that the properties of the personal guarantors can be included. When Judgment in the

matter of “**State Bank of India v. V. Ramakrishnan & Anr.**” is perused, in that matter, the debt of the Respondent No.2 Company had been classified as a non-performing asset on 26.07.2015 and the State Bank of India had issued a notice dated 04.08.2015 under Section 13(2) of the SARFAESI Act. Subsequently, a possession notice was issued under Section 13(4) of the SARFAESI Act. The Respondent No.2 Company filed application under Section 10 of the IBC to initiate the corporate insolvency resolution process against itself and the Application under Section 10 of the IBC was admitted directing Moratorium under Section 14 of the IBC. When such application was pending, Respondent No.1 Personal Guarantor of the Corporate Debtor took up the plea that Section 14 of the IBC would be applicable to the personal guarantor as well and as such proceedings against the Personal Guarantor and his property would have to be stayed. The Adjudicating Authority in that matter held that under Section 31 of the Code, a Resolution Plan made thereunder would bind the personal guarantor as well, and since, after the creditor is proceeded against, the guarantor stands in the shoes of the creditor, Section 14 would apply in favour of the personal guarantor as well. The State Bank of India thus was taken against Respondent No.1- Personal Guarantor. Appeal filed against the order of the Adjudicating Authority came to be dismissed and thus, the matter was carried to the Hon’ble Supreme Court. In such set of facts, the Hon’ble Supreme Court considered the various provisions of the IBC, including Section 60 as it then stood. In paras 15 to 17, it was observed, as under:-

“15. The first important thing that needs to be noticed is that, as has been stated earlier in this judgment,

Part III of the Code has not yet been brought into force. This part is entitled “Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms”. The repealing provision, namely Section 243, which repeals the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920, has also not been brought into force. Section 249, which amends the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, so that the Debt Recovery Tribunals under that Act can exercise the jurisdiction of the Adjudicating Authority conferred by the Code, has also not been brought into force.

16. Under Part II of the Code, which deals with “Insolvency Resolution and Liquidation for Corporate Persons”, a financial creditor or a corporate debtor may make an application to initiate this process. Once initiated, the Adjudicating Authority, after admission of such an application, shall by order, declare a moratorium for the purposes referred to in Section 14 (See Section 13 of the Code).

17. Section 14 refers to four matters that may be prohibited once the moratorium comes into effect. In each of the matters referred to, be it institution or continuation of proceedings, the transferring, encumbering or alienating of assets, action to recover security interest, or recovery of property by an owner which is in possession of the corporate debtor, what is conspicuous by its absence is any mention of the personal guarantor. Indeed, the corporate debtor and the corporate debtor alone is referred to in the said Section. A plain reading of the said Section, therefore, leads to the conclusion that the moratorium referred to in Section 14 can have no manner of application to personal guarantors of a corporate debtor.”

17. When Judgment in the matter of “**State Bank of India v. V. Ramakrishnan & Anr.**” was passed, Part-III of the IBC had not yet been applied to Personal Guarantors to the Corporate Debtor which were enforced w.e.f. 1st December, 2019 as we have mentioned earlier. What becomes clear from the perusal of the above paragraphs of the Judgment of the Hon’ble Supreme Court is that when Part-III of the IBC had not been enforced, the

provisions operating with regard to Personal Guarantors of the Corporate Debtor were- the ‘Presidency Towns Insolvency Act, 1909’, ‘the Provincial Insolvency Act, 1920’ and ‘Recovery of Debts Due to Banks and Financial Institutions Act, 1993’. When Resolution Plan was approved in the present matter by the Adjudicating Authority, those provisions under those Acts were as much applicable and if the Financial Creditors had to proceed against the Personal Guarantors, the same would have to be done under those Acts. Respondent Nos. 4 and 5, in fact did initiate actions against Appellants during CIRP but without proceeding further appear to have let pushed in reference to the personal properties of the Personal Guarantors in the Resolution Plan so as to transfer title. This is clear from further perusing the judgment in the matter of “**State Bank of India v. V. Ramakrishnan & Anr.**” which shows in Para 19, as under:-

“19. We are afraid that such arguments have to be turned down on a careful reading of the Sections relied upon. Section 60 of the Code, in sub-section (1) thereof, refers to insolvency resolution and liquidation for both corporate debtors and personal guarantors, the Adjudicating Authority for which shall be the National Company Law Tribunal, having territorial jurisdiction over the place where the registered office of the corporate person is located. This sub-section is only important in that it locates the Tribunal which has territorial jurisdiction in insolvency resolution processes against corporate debtors. So far as personal guarantors are concerned, we have seen that Part III has not been brought into force, and neither has Section 243, which repeals the Presidency-Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. The net result of this is that so far as individual personal guarantors are concerned, they will continue to be proceeded against under the aforesaid two Insolvency Acts and not under the Code. Indeed, by a Press Release dated 28.08.2017, the Government of India, through the

Ministry of Finance, cautioned that Section 243 of the Code, which provides for the repeal of said enactments, has not been notified till date, and further, that the provisions relating to insolvency resolution and bankruptcy for individuals and partnerships as contained in Part III of the Code are yet to be notified. Hence, it was advised that stakeholders who intend to pursue their insolvency cases may approach the appropriate authority/court under the existing enactments, instead of approaching the Debt Recovery Tribunals.”

(Emphasis supplied)

18. The Hon’ble Supreme Court examined the Scheme under Section 60(2) & (3) and considered whether Section 14 of the IBC could be relied on by the Personal Guarantor to stop the creditor from taking action when CIRP has been initiated against the Corporate Debtor. It was in this context that Section 31 was examined by the Hon’ble Supreme Court which paragraph we have reproduced earlier and the observations of the Hon’ble Supreme Court show that the Resolution Plan ‘may well include provisions as to payments to be made by such guarantor’. These observations are in the context of Section 133 of the Indian Contract Act so that the Guarantor does not get relieved from the liability to make payments. It is clear that Resolution Plan can refer to payments to be made by Guarantor under the Guarantee and liability is saved. The Hon’ble Supreme Court in para 22 of the Judgment for the purpose referred to Form-6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Form-6 is with regard to application which is filed by Corporate Applicant (under Section 10 of IBC) to initiate CIRP under Chapter-II of Part-II of the IBC. The Hon’ble Supreme Court referred to instructions below Form-6 namely Annexure-VI (e). The same reads as under:-

“Annexure VI A statement of affairs made up to a date not earlier than fourteen days from the date of application including the following document, namely:-

xxx xxx xxx
(e) whether any, and if so what, guarantees have been given in relation to the debts of the corporate debtor by other persons, specifying which, if any, of the guarantors is a related party to the corporate debtor and the corporate applicant
xxx xxx xxx”

19. Thus, the Application under Section 10 of the IBC in Form-6 would require the Corporate Applicant to give such particulars regarding the guarantees. The Hon’ble Supreme Court has read these Rules with Regulation 36(2) which we have already referred with regard to the contents to be incorporated in the Information Memorandum. As such, the Hon’ble Supreme Court observed that the reliance of the personal guarantor in that matter on Section 31 of the IBC would not be helpful to the personal guarantor. To recall, the Personal Guarantor in that matter wanted to rely on Section 14 of Part II to stop action against Personal Guarantor. Section 31(1) of the IBC reads as under:-

“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, creditors, 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 whom 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.”

20. The Hon’ble Supreme Court observed that Section 31 is one more factor in favour of the fact that a personal guarantor is required to pay for debts due without any moratorium applying to save him. What is clear is that Section 31 does not absolve the personal guarantor from liability. But then the Respondents are trying to rely on para 22 of the judgment of the Hon’ble Supreme Court to say that in the Resolution Plan itself there can be provision to move against personal guarantor. We do not agree with these submissions. It appears Resolution Plan can have jurisdiction as to right of payment to be received from Personal Guarantor. To us, it does not appear that the Judgment lays down that in the Resolution Plan of the Corporate Debtor itself provision could be made to consume property of Personal Guarantor without recourse to appropriate proceedings which were, earlier as per Acts then applicable (and now without recourse to Part III of IBC). Before Part-III was enforced against personal guarantors of the Corporate Debtor, the provisions under which one could move against the personal guarantors are as mentioned by the Hon’ble Supreme Court in para 15 of the judgment in the matter of “**State Bank of India v. V. Ramakrishnan & Anr.**”. After coming into force of Part-III, now one would have to proceed as per Chapter III of Part-III of IBC. If the arguments of the Respondents were to be accepted, there would have been no need of the earlier provision being maintained. After Part-III is enforced there would be no need of Part-III if properties of the Personal

Guarantors could be simply included in the Resolution Plan and disposed directing them to sign the transfer deed as is being done in the present matter.

21. The Hon'ble Supreme Court in the Judgment in the matter of **"Committee of Creditors of Essar Steel India Limited Through Authorised Signatory vs. Satish Kumar Gupta & Ors."** [Civil Appeal No. 8766-67 of 2019] vide judgment dated 15.11.2019 in Paras 63 to 67 of the Judgment dealt with the topic of "Extinguishment of Personal Guarantees and Undecided Claims". The said paragraphs 63 to 67 are reproduced as under:-

"Extinguishment of Personal Guarantees and Undecided Claims"

63. *Shri Gopal Subramaniam and Shri Rakesh Dwivedi have also appealed against the extinguishment of the rights of creditors against guarantees that were extended by the promoters/promoter group of the corporate debtor. According to them, this was done by a side wind by the Appellate Tribunal without any reasons for the same.*

64. *Shri Prashant Ruia a promoter/director of the corporate debtor in his personal guarantee dated 28.09.2013, specifically stated as follows:*

"7. The obligations of the Guarantor under this Guarantee shall not be affected by any act, omission, matter or thing that, but for this Guarantee, would reduce, release or prejudice any of its obligations under this Guarantee (without limitation and whether or not known to it or any Secured Party) including :

*xxx xxx xxx
(g) any insolvency or similar proceedings."*

Also, under the caption "terms of settlement", the final resolution plan dated 02.04.2018, as approved on 23.10.2018, specifically provided:

"Financial Creditors:

Pursuant to the approval of this Resolution Plan by the Adjudicating Authority, each of the Financial Creditors shall be deemed to have agreed and acknowledged the following terms:

- *The payment to the Financial creditors in accordance with this Resolution Plan shall be treated as full and final payment of all outstanding dues of the Corporate Debtor to each of the Financial Creditors as of the Effective Date, and all agreements and arrangements entered into by or in favour of each of the Financial Creditors, including but not limited to loan agreements and security agreements (other than corporate or personal guarantees provided in relation to the Corporate Debtor by the Existing Promoter Group or their respective affiliates) shall be deemed to have been (i) assigned / novated to the Resolution applicant, or any Person nominated by the Resolution applicant, with effect from the effective Date, with no rights subsisting or accruing to the Financial Creditors for the period prior to such assignment or novation; and (ii) to the extent not legally capable of assigned or novated- terminated with effect from the effective Date, with no rights accruing or subsisting to the Financial Creditors for the period prior to termination.*

- *In relation to the loan and financial assistance provided to the Corporate Debtor; each of the Financial Creditors, as the case maybe, shall:*

- *Assign/ novate all security given (including but not limited to Encumbrance over assets of the Corporate Debtor, pledge of shares of the Corporate Debtor (other than corporate guarantees and personal guarantees) related in any manner to the Corporate Debtor) to the Resolution Applicant and /or its Connected Persons, and /or banks or financial institutions designated by the Resolution Applicant in this regard, pursuant to the Acquisition Structure, with effect from the Effective Date;*

- Issue such letters and communications, and take such other actions, as may be required or deemed necessary for the release, assignment or novation of (i) the Encumbrance over the assets of the Corporate Debtor; and (ii) the pledge over the shares of the Corporate Debtor; within 5(five) Business Days from the Effective Date; and
- Be deemed to have waived all claims and dues (including interest and penalty, if any) from the Corporate Debtor arising on and from the insolvency Commencement Date, until the effective Date.”

65. Shri Rohatgi, learned senior advocate appearing on behalf of Shri Prashant Ruia, also pointed out Section XIII (1)(g) of the resolution plan dated 23.10.18, in which it is stated as follows:

“Upon the approval of the Resolution Plan by the Adjudicating Authority in relation to guarantees provided for and on behalf of, and in order to secure the financial assistance availed by the Corporate Debtor, which have been invoked prior to the Effective Date, claims of the guarantor on account of subrogation, if any, under any such guarantee shall be deemed to have been abated, released, discharged and extinguished.

It is hereby clarified that, the aforementioned clause shall not apply in any manner which may extinguish/affect the rights of the Financial Creditors to enforce the corporate guarantees and personal guarantees issued for and on behalf of the Corporate Debtor by Existing Promoter Group or their respective affiliates, which guarantees shall continue to be retained by the Financial Creditors and shall continue to be enforceable by them.”

(emphasis supplied)

We were also informed by the learned senior counsel that the personal guarantees of the promoter group have been invoked and legal proceedings in respect

thereof are pending. It has been pointed out to us that Shri Prashant Ruia and other members of the promoter group, who are guarantors, are not parties to the resolution plan submitted by ArcelorMittal and hence, the resolution plan cannot bind them to take away rights of subrogation, which they may have if they are ordered to pay amounts guaranteed by them in the pending legal proceedings.

66. Section 31(1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate as it were. In **State Bank of India v. V. Ramakrishnan, 2018 (9) SCALE 597**, this Court relying upon Section 31 of the Code has held:

“22. Section 31 of the Act was also strongly relied upon by the Respondents. This Section 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 Indian 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 has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the Respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due

without any moratorium applying to save him.”

*Following this judgment, it is difficult to accept Shri Rohatgi’s argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile directors of the corporate debtor. So far as the present case is concerned, we hasten to add that we are saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, the NCLAT judgment being contrary to Section 31(1) of the Code and this Court’s judgment in **State Bank of India** (supra), is set aside.*

67. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count.”

22. Perusal of the above Judgment of the Hon’ble Supreme Court shows that in that matter the Hon’ble Supreme Court looked into the contents of personal guarantee dated 28.09.2013. The Hon’ble Supreme Court observed that it would say nothing which would affect the pending litigation on account

of invocation of those guarantees. It is apparent that even in that matter there was separate pending litigation with regard to invocation of the guarantees and the same was not interfered with. In the present matter also, the Financial Creditors resorted to action under SARFAESI Act, during period of CIRP which at that time was remedy available.

23. Going back to the judgment in the matter of “**State Bank of India v. V. Ramakrishnan & Anr.**”, if Moratorium under Section 14 of the IBC during CIRP did not apply to Personal Guarantors of the Corporate Debtor, personal properties of the Corporate Debtor cannot be realised by sale/ transfer etc. in the CIRP of the Corporate Debtor without resorting to proceeding before appropriate authority/ Court under the existing enactment before portion of Part-III has been applied to the Personal Guarantors of Corporate Debtor. Now, after portion of Part-III has been applied to Personal Guarantors of Corporate Debtor, one would have to resort to those provisions under IBC if Personal Guarantors of Corporate Debtor are to be proceeded against. In Resolution Plan of Corporate Debtor provision relating to right of Financial Creditor to proceed against Personal Guarantor can be there, but enforcement of such right has to be as per provisions of law as discussed.

24. For the above reasons, we hold under Section 61(3) of the IBC that the Resolution Plan as approved by the Adjudicating Authority is in contravention of the provisions of law as discussed above and there have been material irregularities in exercise of powers by the Adjudicating Authority when it directed the Appellants (in para 26 of the impugned order (referred supra)), that the owners of the premises as mentioned in the judgment shall enter into

Tripartite Agreements for transfer of the premises (as mentioned in para 18 of impugned order). In fact, if para 18 is seen, after describing the properties in the chart there is also portion added which says that the Financial Creditors shall be at liberty to proceed against the properties of the Promoters erstwhile Directors/ Guarantors “other than those mentioned above to recover their balance”. This, in the Resolution Plan would be blank cheque given to proceed even with regard to any other property also of the Personal Guarantors. In our view, without resorting to appropriate proceedings against the Personal Guarantors of Corporate Debtor this is irregular exercise of powers.

25. For the above reasons, we pass the following order:-

ORDER

The Appeal is allowed. The impugned order is quashed. The Resolution Plan approved by the Adjudicating Authority is rejected. All actions taken in consequence of the impugned order approving the Resolution Plan shall stand set aside. As the Insolvency Resolution Process period under Section 12 of the IBC is already over, the matter is remitted back to the Adjudicating Authority to pass appropriate order of liquidation under Section 33 of the IBC.

No order as to costs.

Company Appeal (AT) (Insolvency) No. 239 of 2021

26. This Appeal has been filed by the Appellants against impugned order dated 28.01.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court-III) in M.A. 919/2020 in C.P. (IB)-

1973(MB)/2018. After the Resolution Plan was approved by the Adjudicating Authority in M.A. 3439/2019 which we have discussed in the above Company Appeal (AT) (Insolvency) No. 257 of 2020, the Adjudicating Authority passed order in M.A. 919/2020 which was filed by the Successful Resolution Applicant which order reads as under;-

“M.A. 919/2020

This is an application filed by Resolution Applicant. Prayer ‘A’ is not pressed and accordingly stands withdrawn.

Prayer ‘B’ reads as under:-

Granting authority to the Financial Creditor of the Corporate Debtor namely The Yashwant Co-operative Bank Limited and The Chikhali Urban Cooperative Bank Ltd., to execute the Tripartite agreement, also on behalf of the owners of the property namely Mr. Nitin Naik and Mrs. Megha Naik for transfer of the properties as stated in the order dated 13.11.2019 in favour of the resolution applicant.

Accordingly, prayer ‘B’ is allowed. List this matter on 10.03.2021.”

27. The Appellants have filed this Appeal against the said order directing the Financial Creditors to proceed to transfer the properties on behalf of the Appellants- the real owners in view of the order dated 13.11.2019. This Appeal has been filed raising grounds which we have already discussed while dealing with Company Appeal (AT) (Insolvency) No. 257 of 2020.

28. On 2nd February, 2021 in Company Appeal (AT) (Insolvency) No. 257 of 2020, when the above development was taken up by the Counsel for the Appellants, we had stayed para 26 of the impugned order (against which Company Appeal (AT) (Insolvency) No. 257 of 2020 had been filed). When this

Company Appeal (AT) (Insolvency) No. 239 of 2021 was filed, we stayed the impugned order in M.A 919/2020 as per the order dated 31st March, 2021.

29. Having heard parties in both these Appeals, as in Company Appeal (AT) (Insolvency) No. 257 of 2020, we have set aside the impugned order as well as Resolution Plan approved, the present impugned order in M.A 919/2020 would also not survive, we pass the following order:-

ORDER

The Appeal is allowed. Impugned order passed in M.A 919/2020 dated 28th January, 2021 is set aside. No order as to costs.

Common Directions in Both Appeals

30. We make it clear that the orders which we are passing in both these Appeals will not come in the way of the Financial Creditors from taking appropriate steps under the law to invoke and enforce personal guarantees given by the Appellants, as Personal Guarantors of Corporate Debtor.

Both the Appeals are disposed of, accordingly.

**[Justice A.I.S. Cheema]
The Officiating Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

New Delhi
Anjali