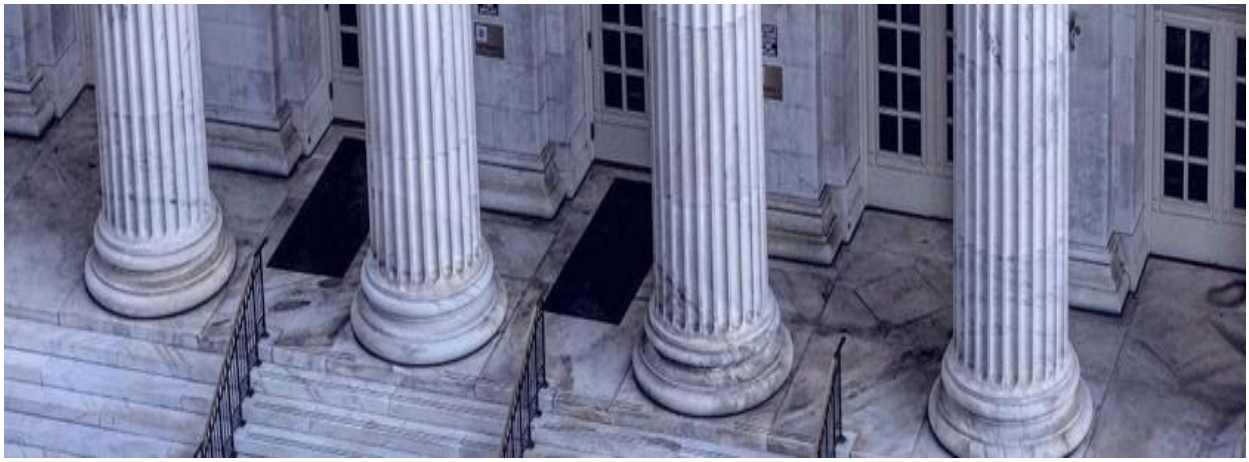
VAISH ASSOCIATES ADVOCATES ESTD. 1971

Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST



KEY HIGHLIGHTS

⁎ **Allahabad High Court:** No ipso facto absolvement of guarantor's liability upon approval of resolution plan.

⁎ **NCLAT**: The obligation of the adjudicating authority to direct for liquidation shall rise only when decision of the Committee of Creditors is in accordance with the Insolvency and Bankruptcy Code, 2016.

⁎ The Rise of ESG Investing in India: What it Means for Corporations.

I. Allahabad High Court: No ipso facto absolvement of guarantor's liability upon approval of resolution plan.

The High Court of Allahabad ("**High Court**") by order dated January 12, 2023, in the matter of ***Narendra Singh Panwar v. Pashchimanchal Vidyut Vitran Nigam Limited and Others [Writ – C No. 26355 of 2022]***, held that approval of a resolution plan does not ipso facto discharge a personal guarantor of a corporate debtor of his liabilities under contract of guarantee.

Facts

The National Company Law Tribunal, Allahabad ("**NCLT**") initiated Corporate Insolvency Resolution Process of Trimurti Concast Private Limited ("**Corporate Debtor**"), following an application by Ram Alloys Casting Private Limited under Section 7 (*Initiation of corporate insolvency resolution process by financial creditor*) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). Thereafter, by an order dated March 22, 2022 ("**Order**"), NCLT approved the resolution plan ("**Plan**") in respect of the Corporate Debtor. During the consideration of approval of Plan, an application was filed by Pashchimanchal Vidyut Vitran Nigam Limited ("**Respondent**"), basis which NCLT directed that its claim pertaining to electricity dues be considered in the resolution plan, along with other operational creditors.

Thereafter, the electricity connection of the Corporate Debtor, which was temporarily disconnected since September 9, 2019, was permanently disconnected on August 30, 2022. Further, a demand notice dated June 30, 2022 (" **Impugned Notice**") under Section 3 (*Notice of demand for dues not paid*) read with Section 5 (*Recovery of dues*) of the U.P. Government Electrical Undertakings (Dues Recovery) Act, 1958 ("**Act**") was issued against two of the directors of Corporate Debtor, Mr. Narendra Singh Panwar ("**Petitioner**") and Mr. Ashok Sharma. On August 2, 2022, a copy of the Impugned Notice was also forwarded to the District Magistrate, Muzaffarnagar for making recovery of dues as arrears of land revenue.

Aggrieved by the above-mentioned, the Petitioner challenged the Impugned Notice before the High Court by way of the captioned writ petition.

Issue

Whether a director of a company who is claimed to be the personal guarantor for payment of electricity dues of the company would be liable to fulfil the demand of dues of electricity from his personal assets, in view of the insolvency proceedings concluded in relation to the defaulter company under the IBC.

Arguments

Contentions raised by the Petitioner:

Petitioner contended that a provision has already been made in the Plan for recognition and treatment of the electricity dues of the Corporate Debtor as operational dues. These outstanding dues could not have been recovered from the directors of the Corporate Debtor, since they are not personally liable. Pursuant to the NCLT approving the Plan in respect of the Corporate Debtor, treating the electricity dues as operational dues, all claims against the Corporate Debtor stood extinguished.

Further, the Petitioner demonstrated the waivers, reliefs and exemptions granted by the NCLT in the Order to contend that pursuant to approval of a resolution plan, a creditor is prohibited from initiating proceeding for recovery of its claims which are not part of the resolution plan and all such claims stand permanently extinguished. It was thus, contended that the Plan is binding on the Corporate Debtor as well as all other stakeholders.

Placing reliance upon the judgment of the Supreme Court ("**SC**") in the matter of ***Indian Overseas Bank v. RCM Infrastructure Limited [AIR Online 2022 SC 736]***, the Petitioner further contended that IBC is a complete code in itself and by virtue of Section 238 (*Provisions of this Code to override other laws*) of IBC, it will override other laws for the time being in force, in the event of inconsistency.

Further, it was contended that the expression "consumer" as defined under Section 2(15) of the Electricity Act, 2003 does not cover the director, where the body corporate is a consumer and recovery, as such, cannot be made against the directors.

Contentions raised by the Respondent:

The Respondent submitted that the provisions of the Electricity Supply Code, 2005 empower the electricity department to initiate recovery proceeding against the directors of a company and any payment due to the licencee company can be recovered as arrears of land revenue as per the provisions of the Act in accordance with the provisions of the Electricity Supply Code, 2005.

It was further contended that out of the total outstanding due against the Corporate Debtor to the tune of INR 9,00,00,000 (Rupees Nine Crores only), the Plan merely provides for payment of an amount to the tune of INR 6,00,000 (Rupees Six Lakhs only).

Observations of the High Court

The High Court observed that IBC is a complete code in itself and in the event of any inconsistency, shall prevail over any other law for the time being in force, by virtue of its non-obstante clause, that is, Section 238 of IBC.

The High Court further observed that the waivers, reliefs and exemptions granted by the NCLT while approving the Plan are with respect to the claims against the Corporate Debtor and the assets of the Corporate Debtor. However, the issue in the present case pertains to the personal liability of the directors of the Corporate Debtor.

It was further observed that one of the directors of the Corporate Debtor, Mr. Ashok Sharma, filed his affidavit along with the application form for supply of electricity, to undertake that whatever be the dues of the Company, he would always be ready and bound to deposit the same in accordance with the orders of the Executive Engineer, U.P. Power Corporation Limited. Further, the agreement for supply of electrical energy dated April 8, 2013 had been signed by Mr. Ashok Sharma in the capacity of director of the Corporate Debtor as the 'consumer'.

Further, the High Court relied upon the judgment of the SC in the matter of ***State Bank of India v. Ramakrishna and Another [(2018) 17 SCC 394]***, wherein the question before the SC was whether upon admission of the insolvency petition, the moratorium under Section 14 of IBC would apply to a

personal guarantor of corporate debtor. It was observed in the above-mentioned judgment that the absence of mention of 'personal guarantor' in the provisions of Section 14 of IBC makes it clear that Section 14 has no application to personal guarantors of corporate debtor.

Further, the High Court relied upon the judgment of the SC in the matter of ***Laxmi Pat Surana v. Union of India and Another [(2021) 8 SCC 481]***, whereby the SC had held that the obligation of guarantor is coextensive and coterminous with that of the principal borrower, as stipulated under Section 128 (*Surety's liability*) of the Indian Contract Act, 1872.

Thereafter, the High Court arrived at the conclusion that the sanction of a resolution plan and finality imparted to it by Section 31 (*Approval of resolution plan*) of IBC does not discharge the guarantor's liability. Approval of a resolution plan does not ipso facto absolve the surety/ guarantor of his liability, which arises out of an independent contract of guarantee. Further, the nature and extent of the guarantor's liability arising out of such guarantee shall depend upon the terms of the guarantee/ contract.

Decision of the High Court

In view of the aforesaid observations and the precedents, the High Court held that the contention of the Petitioner to challenge the recovery of electricity dues on the ground that approval of Plan of Corporate Debtor would ipso facto absolve the directors of the Corporate Debtor, who have stood as guarantor, from all liabilities in respect thereof whatsoever, cannot be accepted. Accordingly, the High Court dismissed the writ petition.

VA View:

The High Court has rightly held that the challenge to Impugned Notice for recovery of electricity dues, issued jointly in the name of the directors of the Corporate Debtor, cannot be sustained on the ground that in view of approval of the Plan of the Corporate Debtor, all liabilities of directors who may be the guarantor, stood automatically discharged/ extinguished.

It is well-settled law that upon the approval of resolution plan pertaining to the corporate debtor, all liabilities, claims, dues and all waivers, reliefs, exemptions for past period, stands discharged/ extinguished, only in respect of the corporate debtor itself, but it does not discharge the directors of the Company, who may have stood as personal guarantors, from the liability of making the payments to the creditors/ requisite authorities as per the terms of the contract/ deed of guarantee executed by them.

Therefore, the present judgment of the High Court ensures that no director of a company or personal guarantor shall attempt to wriggle out of his responsibilities/ liabilities, on the ground that the resolution plan has already been approved and all liabilities have thus stood extinguished qua the directors/ guarantor.

II. NCLAT: The obligation of the adjudicating authority to direct for liquidation shall arise only when decision of the Committee of Creditors is in accordance with the Insolvency and Bankruptcy Code, 2016.

The National Company Law Appellate Tribunal ("**NCLAT**"), in the case of ***Hero Fincorp Limited v. M/s. Hema Automotive Private Limited [Company Appeal (AT) (Insolvency) No. 1540 of 2022]***, held that the obligation of the adjudicating authority to direct for liquidation shall arise only when decision of the Committee of Creditors ("**CoC**") is in accordance with the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Facts

Hero Fincorp Limited ("**Appellant**") extended financial facilities to the corporate debtor in the year 2018-19. The corporate debtor committed default in repayment of the loan facilities. The financial creditor initiated proceedings under Section 13 (*Enforcement of security interest*) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by taking possession of the secured assets. An order dated July 8, 2022 was passed by the adjudicating authority commencing the Corporate Insolvency Resolution Process ("**CIRP**") against the corporate debtor.

The CoC was constituted with the Appellant as the sole member of the CoC. On October 7, 2022, in accordance with the approval of the CoC, the Resolution Professional ("**RP**") published Form-G, wherein the last date for receipt of Expression of Interest ("**EOI**") was October 24, 2022.

The RP convened the CoC meeting on October 19, 2022 with sole agenda pertaining to eligibility criteria vis-à-vis extension of time seeking EOI by revising Form-G. In the meeting, CoC passed the resolution for liquidation of the corporate debtor. In pursuance of the said resolution, the RP filed an application in ***M/s. Five Ess Precision Components Private Limited v. M/s. Hema Automotive Private Limited [IA No. 5586 of 2022]*** ("**Application**") praying for an order of the liquidation.

The adjudicating authority heard and dismissed the Application on November 23, 2022 and directed the CoC to reconsider the Application ("**Impugned Order**"). It made the following directions to the CoC:

"*[...]*

Para 3 of the present application says that as per the public announcement dated 28.07.2022 the last date for submission of claims by Creditors was 09.08.2022. It also transpires that M/s. Hero Fincorp Ltd. (in NBFC) is the sole Member of the CoC. It transpires that on 07.10.2022 in accordance with the approval of the CoC, RP has published "Form G" wherein the last date of receipt of Expression of Interest ("EOI") was 24.10.2022. However, prior to the said date the sole Member of the CoC resolved and directed the RP to move an application for liquidation of the Corporate Debtor.

Such approach is not in the spirit of IB Code as Insolvency Resolution is the focus of the act. Only in the event of failure of insolvency resolution the steps for liquidation have to be taken. The sole Member of CoC has not adopted a judicious approach of exploring the possibility of resolution. Since he has recommended the liquidation even before the time period for seeking EOI had elapsed which is 24.10.2022. Therefore, CoC is directed to reconsider the present application. CoC is also directed to release RP fee and expenses incurred by RP till date on priority basis. The prayer at "(i)", "(iii)" & "(iv)" are denied."

The present appeal has been filed against the Impugned Order ("**Appeal**").

Issue

Whether the adjudicating authority was obligated to direct for liquidation of the corporate debtor, considering the provisions of Section 33(2) (*Initiation of liquidation*) of the IBC.

Arguments

Contentions raised by the Appellant:

The Appellant contended that it was mandatory for the adjudicating authority to pass an order of liquidation in view of the provision of Section 33(2) of the IBC and that the adjudicating authority committed error in not allowing the Application filed by the RP. The Appellant relied on the judgment of the NCLAT in ***Sreedhar Tripathy v. Gujarat State Financial Corporation and Others [Company Appeal (AT) (Insolvency) No. 1062 of 2022]*** ("**Sreedhar Tripathy**").

The Appellant also submitted that the decision taken by the CoC for liquidation was in the commercial wisdom of the CoC, which ought not to have been interfered by the adjudicating authority. The Appellant relied on the judgment of the Hon'ble Supreme Court in ***Vidarbha Industries Power Limited v. Axis Bank Limited [(2022) 8 SCC 352]*** ("**Vidarbha Industries**").

Observations of the NCLAT

It is pertinent to note Section 33(2) of the IBC as under:

"*... (2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six percent of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).*

Explanation- For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum. ..."

The NCLAT observed that the explanation to Section 33(2) of the IBC contains a legislative declaration empowering the CoC to take a decision to liquidate the corporate debtor any time after its constitution and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum. The provisions contained in the explanation has to be given meaning and effect.

The NCLAT, while considering the contentions of the Appellant, observed that in the case of Sreedhar Tripathy, CoC had passed a resolution for liquidation. However, in the said case, the corporate debtor was not a going concern since the last 19 years. Hence, the adjudicating authority had passed the order allowing for liquidation basis the below observation:

"*[...] The CoC in the Legislative Scheme has been empowered to take decision to liquidate the Corporate Debtor, any time after its constitution and before confirmation of the resolution plan. The power given to the CoC to take decision for liquidation is very wide power which can be exercised*

immediately after constitution of the CoC. The reasons which has been given in Agenda Item 1, it is made clear by the CoC that the Corporate Debtor is not functioning for last 19 years and all machinery has become scrap, even the building is in dilapidated condition and the CIRP will involve huge costs. We are not convinced with the submission of learned counsel for the Appellant that the CoC's decision is an arbitrary decision. CoC is empowered to take decision under the statutory scheme and when in the present case the decision of the CoC for liquidation has been approved by the Adjudicating Authority, we see not good ground to interfere at the instance of the Appellant. However, we make it clear that the decision taken by the CoC was in the facts of the present case and it cannot be said that whenever decision is taken for liquidation the same is not open to judicial review by the Adjudicating Authority and this Appellate Tribunal. It depends on the facts of the each case as to whether the decision to liquidate the Corporate Debtor is in accordance with the I&B Code or not. With these observations, the Appeal is dismissed."

Further, the NCLAT observed in the case of Vidarbha Industries that,

"*... 77. On the other hand, in the case of an application by a financial creditor who might even initiate proceedings in a representative capacity on behalf of all financial creditors, the adjudicating authority might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the corporate debtor. The adjudicating authority may in its discretion not admit the application of a financial creditor.*"

The NCLAT further noted that though Section 33(2) of the IBC uses the word 'shall', judicial review of the decision of the CoC in a particular case is not precluded and it depends on facts of each case. This was clearly held in the case of Sreedhar Tripathy.

Decision of the NCLAT

In view of the aforesaid observations and precedents, the NCLAT was of the opinion that the adjudicating authority did not commit any error in rejecting liquidation of the corporate debtor and asking the CoC to reconsider its decision. Accordingly, the Appeal was dismissed.

VA View:

The NCLAT engaged in a detailed analysis of the provisions of Section 33(2) of the IBC, particularly with regard to the role of adjudicating authority in the liquidation process.

Not only does the ruling uphold the spirit of the IBC by ensuring fair and just resolution of the corporate debtor, it also ensures that corporate debtors are not simply sent for liquidation without following the due process laid down in the IBC for their resolution. The NCLAT's decision strengthens the role of adjudicating authorities in such cases under the IBC and will serve as a precedent for similar cases in the future.

III. The Rise of ESG Investing in India: What it Means for Corporations

Environmental, social, and governance ("**ESG**") investing is rapidly gaining popularity in India, as investors are becoming more conscious of the impact their investments can have on the environment,

society, and other stakeholders of companies. ESG investing focuses on companies that have strong ESG practices. Such companies are considered to be more sustainable and are likely to be more profitable in the long run.

Due to its increasing relevance, Indian corporations are facing increasing pressure to disclose information about their ESG performance and to meet certain performance standards. The Government of India ("**GoI**") has been working on creating a framework to encourage more companies to adopt ESG practices. The Ministry of Corporate Affairs has issued a draft National Action Plan on Corporate Social Responsibility ("**CSR**"), which aims to promote sustainable and inclusive growth by mandating companies to undertake CSR activities. GoI has also launched various schemes like 'Swachh Bharat Abhiyan' and 'Make in India' to promote sustainable practices and inclusive growth in the country.

The Securities and Exchange Board of India ("**SEBI**") under its Business Responsibility and Sustainability Reporting ("**BRSR**") mandate has issued guidelines and the companies listed on Indian stock exchanges are now required to disclose their ESG performance in the annual reports. This move is aimed at increasing transparency and encouraging companies to adopt sustainable practices. Companies that fail to meet these standards may be at risk of reputational damage and potential financial penalties.

The Dow Jones Sustainability Indices ("**DJSI**") are a benchmark for ranking companies in 61 industries, scoring them based on their responses to questionnaires called the S&P Global Corporate Sustainability Assessment. DJSI is seeing greater adoption amongst Indian companies for assessing ESG performances.

Companies that prioritize ESG issues are likely to see benefits such as improved risk management and increased access to capital. Data shows that the top performers in terms of 10-year returns are those companies that are ESG compliant. For example, companies that have strong environmental practices are less likely to face penalties for environmental violations and are more likely to be able to access capital from socially responsible investors. Similarly, companies with strong governance practices are less likely to face corruption scandals and are more likely to be able to access capital from investors looking for companies with good governance.

It is important to be cognizant of 'greenwashing' which is the act of making false, misleading, unsubstantiated or otherwise incomplete claims about the sustainability of a product, service, or business operation. The SEBI on February 2, 2023 reviewed the framework of Green Debt Securities ("**GDS**") and introduced changes to the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 requiring the issuer of any GDS to: (i) continuously monitor the operations against sustainability standards disclosed in the offer document, (ii) utilize the funds only for categories of operations set out in the definition of GDS, (iii) undertake complete and continuous disclosure of data from research when highlighting green practices, (iv) quantify the negative externalities of utilizing funds raised, (v) adhere to the highest standards for issue of GDS and associated ratings, and (vi) not make any misrepresentations about certification by a third-party entity.

Today, prior to entering into any contractual arrangements, investors and contracting parties proactively undertake searches on robust databases and information services to examine public reputation, undertake review of public profiles including social media presence and political affiliations, credit ratings, carbon trading and bankruptcy history, international sanctions, and money laundering, bribery or corruption allegations/ issues. Carrying out holistic analysis of the company's operations will help

dispel any apprehensions of misrepresentations or 'greenwashing' and provides for an additional level of comfort between contracting parties, prior to entering into M&A transactions, joint ventures or private equity investments.

In conclusion, ESG investing is gaining traction in India and it's becoming increasingly important for Indian corporations to understand the implications of ESG investing and take steps to meet the growing demand for sustainable investments. This can be achieved by disclosing ESG performance in the annual reports, adopting sustainable practices and by following the guidelines and regulations framed by SEBI and GoI.

VA View:

Aside from regulatory requirements, GoI in its Annual Budget 2022-23 has implemented soft measures to support sustainable business practices, encouraging a shift towards renewable energy and more eco-friendly business methods through policies, financial incentives, and favorable tax treatment. All of this is aimed at the goal of achieving carbon neutrality by 2070.

Indian corporations need to be aware of the growing trend of ESG investing and the potential impact on their businesses through a comprehensive review of their existing policies and prepare a roadmap to guide future action.

Contributors:

Aayush Jain, Mahir Shaparia, Navya Shukla and Rishabh Chandra

Disclaimer:

While every care has been taken in the preparation of this Newsletter to ensure its accuracy at the time of publication, Vaish Associates, Advocates assume no responsibility for any errors which may inadvertently appear. The Newsletter is circulated with the understanding that the author/ publisher are not rendering legal or professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use.

NEW DELHI
1st, 9th and 11th Floor,
Mohan Dev Bldg,
13 Tolstoy Marg,
New Delhi - 110001, India
Phone: +91-11-42492525
Fax: +91-11-23320484
delhi@vaishlaw.com

MUMBAI
106, Peninsula Centre,
Dr. S.S. Rao Road, Parel,
Mumbai - 400012, India
Phone: +91-22-42134101
Fax: +91-22-2134102
mumbai@vaishlaw.com

BENGALURU
105-106, Raheja Chambers,
#12, Museum Road,
Bengaluru - 560001, India
Phone: +91-80-40903588/89
Fax: +91-80-40903584
bangalore@vaishlaw.com