NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.658 of 2020

[Arising out of Order dated 9th June, 2020 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in I.A. (IB) No……/KB/2020 in CP(IB) No.1671/KB/2019]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
Ascot Realty Private Limited Flat No.601, A-Wing, Nilgiri Hill, Gawandbaug, Near Upvan, Pokhran Road No.2 Thane, Maharastra – 400610 Through its Director Mr. Pankaj Singh	Applicant	Appellant
Vs.		
1. Ajay Kumar Agarwal, Interim Resolution Professional, 9, Mangoe Lane, 2nd Floor, Room No.12, Kolkata – 700001	Respondent No.1	Respondent No.1
2. (Oriental Bank of Commerce – Substituted by) Punjab National Bank E-Block, Harsha Bhawan, Connaught Place, New Delhi – 110001	…	Respondent No.2
3. India Bulls Housing Finance Limited,	Respondent No.3	Respondent No.3

	Bangur BFL Estates, 31, Jawaharlal Nehru Road, 3rd Floor, Kolkata – 700016	
4. Fullerton India Credit Company Limited, Megh Towers, 3rd Floor, Old No.307, New No.165, Poonamallee High Road, Maduravoyal, Chennai – 600095	Respondent No.4	Respondent No.4
5. Swarna Technology Private Limited, 3A, Shakespeare Sarani, Kolkata - 700071	Respondent No.5	Respondent No.5
6. Eskay Enclave Private Limited, Mukti Chambers, Clive Row, 4th Floor, Room No.412, Kolkata – 700001	Respondent No.6	Respondent No.6
7. Yuthika Trading Company Private Limited, 62A, Netaji Subhas Road, 4th Floor, Kolkata – 700001	Respondent No.7	Respondent No.7
8. Pandey Chemical Private Limited, 103/5, B.L. Saha Road, Gupta Niketan, 1st Floor, Kolkata – 700053	Respondent No.8	Respondent No.8

9. Actual Dresses, U24/1, Karbala Road, Kolkata – 700018	Respondent No.9	Respondent No.9
10. GM Dresses, U24/1, Karbala Road, Kolkata – 700018	Respondent No.10	Respondent No.10
11. GD Dresses, U24/1, Karbala Road, Kolkata – 700018	Respondent No.11	Respondent No.11
12. Krystal Dresses, U24/1, Karbala Road, Kolkata – 700018	Respondent No.12	Respondent No.12
13. Queen Dresses, U24/1, Karbala Road, Kolkata – 700018	Respondent No.13	Respondent No.13
14. RDH Technologies Private Limited, Plot No.F1, Block – GP, Sector -4, Salt Lake City, Kolkata – 700091	Respondent No.2	Respondent No.14

For Appellant: **Shri Anand Sukumaran and Shri Mainak Bose, Advocates**

For Respondents: **Shri Ajay Kr. Agarwal, IRP**
Shri Sourojit Dasgupta and Ms. Meghna Rao, Advocates
Shri Ankit Rai, Shri Piyush Beriwal and Shri Arik Banerjee, Caveators
Shri Amit Kumar Das, Advocate

J U D G E M E N T

(15th October, 2020)

A.I.S. Cheema, J. :

1. This Appeal has been filed by the Appellant against Impugned Order dated 9th June, 2020 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata). The Appellant had filed I.A. (IB) No……/KB/2020 in CP(IB) No.1671/KB/2019 under Rule 11 of National Company Law Tribunal Rules, 2016 read with Section 60(5) of Insolvency and Bankruptcy Code, 2016 (IBC – in short) before the Adjudicating Authority. The Appellant is one of the Financial Creditors who filed claim before the Respondent No.1 – Ajay Agarwal, the Resolution Professional (RP) in Corporate Insolvency Resolution Process (CIRP) which was initiated against RDH Technologies Private Limited – (Corporate Debtor) (Respondent No.14) when Application under Section 7 filed by Oriental Bank of Commerce (now, Punjab National Bank) – Respondent No.2, was admitted by Order dated 28.08.2019. The Appellant submitted claim before RP on the basis of an Arbitral Award which was accepted and he was permitted to attend third COC (Committee of Creditors) Meeting onwards. The Appellant after becoming Member of COC, objected to part claim of Respondent No.2 – Oriental Bank of Commerce (OBC), to the extent it is based on corporate guarantees given by the Corporate Debtor for third party dues – debts.

Appellant objected that, such part of the claim is not Financial Debt and to that extent voting right percentage of OBC should be reduced.

2. The Appellant claims that the Respondent No.2 (OBC, now Punjab National Bank [PNB]) claimed to be having financial debt of Rs.40.08 Crores before the Resolution Professional which was admitted. Out of this amount, only Rs.7.54 Crores were relating to direct borrowing by the Corporate Debtor (Respondent No.14) from the Respondent No.2 (OBC – now PNB – hereafter referred as – Bank). According to the Appellant, the remaining Rs.32.54 Crores were towards corporate guarantees which were extended by the Corporate Debtor towards debts of seven separate third party Companies (in arguments in Appeal, it is mentioned that there were seven third party Companies. Before the Adjudicating Authority, it appears that five Companies were referred. The Respondent No.2 also in its argument, has referred about seven Companies. For the present Appeal, we are concerned with the question of law involved). The Appellant claimed before the Adjudicating Authority that the Respondent No.2 – OBC/PNB – Bank could not be said to be having financial debt with regard to corporate guarantees given of third party debts and the percentage of voting right of the Respondent No.2 should be corrected.

3. The Appellant also claimed before RP and Adjudicating Authority that the Respondent No.3 – India Bulls Housing Finance Ltd. was also not a Financial Creditor and should not be in the COC. The Resolution Professional had not agreed with the Appellant and the Appellant moved

the Adjudicating Authority claiming that the Resolution Professional should be directed to reconstitute the COC and the claim of Respondent No.2 Bank to the extent of corporate guarantee furnished should be reduced in view of Judgement of the Hon'ble Supreme Court of India in the matter of **"Anuj Jain Vs. Axis Bank Limited and Ors.**" (Civil Appeal Nos.8512 – 8527, 6777 – 6797 of 2019 and Civil Appeal Nos.9357 – 77 of 2019 decided on 26th February, 2020 – Manu/SC/0228/2020 (2020 SCC OnLine SC 237) We will refer to paragraphs from Judgement as reported in Manupatra. The Appellant also claimed before the Adjudicating Authority to exclude the claim of India Bulls Housing Finance Ltd. The Appellant claimed that even the debt claimed by India Bulls Housing Finance Ltd. was towards corporate guarantee given by the Corporate Debtor towards third party debts.

4. The Adjudicating Authority heard the parties. The Appellant claimed before Adjudicating Authority that the claim of Respondent No.2 – OBC to be Financial Creditor to the extent of corporate guarantee furnished by Corporate Debtor for third party debts was illegal as in the matter of "Anuj Jain", Hon'ble Supreme Court has held that security extended by Corporate Debtor towards third party's debt would stand outside the purview of financial debt and the creditor would not qualify as Financial Creditor within the meaning of Section 5(8) of IBC.

5. The Resolution Professional had claimed before the Adjudicating Authority that the guarantees concerned had been invoked on

26.09.2018 and the Corporate Debtor was directed to make payments of the security and about Rs.40 Lakhs and odd partly due from the Corporate Debtor and partly due as guarantor upon invocation of the corporate guarantee on 26.09.2018. RP claimed before Adjudicating Authority that there was no illegality in including entire claim of OBC and the proposition laid down in "Anuj Jain" was not applicable to the facts of the case. The RP also pointed out with regard to the claim of Respondent No.3 - India Bulls that the Corporate Debtor was a co-borrower and had also mortgaged its property to secure the loan. RP claimed that the Corporate Debtor had availed loan from Respondent No.3 - India Bulls and thus the claim of India Bulls was admitted as financial debt.

6. The Adjudicating Authority considered the submissions of Counsel for OBC that it had merged in PNB and application of Appellant was not maintainable. Other objection raised was that Appellant was related party of corporate Debtor. The Adjudicating Authority, however, observed that the application was maintainable even if name of OBC was not changed in Application. It observed regarding related party that the issue did not arise for consideration in the Application. Thus, the submissions on these counts of OBC were discarded (see Para 10 of the Impugned Order).

7. The Adjudicating Authority took note of the fact that there was a Term Loan Agreement admittedly executed by the Corporate Debtor in

favour of OBC for availing loan by third parties. OBC claimed before Adjudicating Authority that out of Rs.40 Crores, Rs.7.54 Crores and odd due was relating to default in payment of term loan and Rs.33 Crores and odd was on account of corporate guarantee which was invoked by letter dated 26.09.2018. OBC claimed that in addition to executing term loan availed by Corporate Debtor, Corporate Debtor had stood guarantor by executing corporate guarantee for availing loan by five Companies (names of which are mentioned in the Impugned Order) which was invoked. OBC claimed that the Corporate Debtor was liable to pay those amounts and these are financial debts under Section 5(8)(i) of the Code. It was claimed that the Judgement of Hon'ble Supreme Court in the matte of "Anuj Jain" was not helpful to the Appellant.

8. The Adjudicating Authority also heard Counsel for Respondent No.3 (India Bulls) which claimed that the Corporate Debtor was one of the borrower of the loan sanctioned on 31st March, 2016 and had executed Term Loan Agreement. The Directors of the suspended Board of the Corporate Debtor claimed that invocation of the corporate guarantee was not factually correct and Rs.19.04 Crores were relating to corporate guarantees of five Companies which had not been invoked till filing of the Application by OBC.

9. The Adjudicating Authority in Para – 15 of the Impugned Order raised question whether the entire claim of OBC and the claim of India Bulls was contrary to the proposition laid down in the matter of "Anuj

Jain" as alleged. The Adjudicating Authority took note of the rival contentions and claims and record and referred to the Judgement in the matter of "Anuj Jain" and observed in Para – 19 as under:-

> "19. In the present case the debt due to the OBC appears to me falls under the definition of financial debt and the lender is therefore a financial creditor. Because the lender/OBC had invoked the corporate guarantee even before the CIRP (i.e. on 26.09.2018). The concepts of financial debt as discussed in the above cited judgment is different from the debt claimed by the OBC in the case in hand. In this regard it appears to me that once a guarantee is invoked against the Guarantor, the Guarantor steps into the shoes of the principal borrower, the debt that originally is a "financial debt" under section 5(8) towards the principal borrower becomes a "financial debt" towards the guarantor and the same could be enforced as if it were being enforced against the principal borrower. The above said view also seems to have strengthened from the very same judgment cited by the applicant. The Hon'ble SC has discussed at length section 127 and 128 of the Contract Act and referred to a judgment of the High Court in State Bank of India vs. Kusum Vallabhdas Thakkar, 1994CivilCC89. It is good to read para 10 of the decision in Smt. Kusum: It read as follows:
>
> > 10. As regards consideration, it is true that no direct consideration flowed from the plaintiff to the defendant who has made the promise to create a mortgage. But in such tripartite arrangement, anything done for the benefit of the principal debtor is a sufficient consideration to the surety for giving guarantee as expressly provided in Section 127 of the Contract Act. Thus, even though there is no consideration to the third party surety for mortgage, the consideration of having done anything for the benefit of the principal debtor is a sufficient consideration."
>
> This position of law appears to me not altered by the Hon'ble Supreme Court in the cited decision of Anuj Jain. In para 43 of Anuj Jain, the Hon'ble SC holds

that 'financial debt' may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h). For broadening the above view of the Hon'ble SC, I extract para 43 of the judgment as follows:

> 43. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become 'financial debt' for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein…"

In view of the foregoing discussion and the proposition of law, I am of the view that inclusion of the entire claim of the financial creditor/Oriental Bank of Commerce, by the RP is not illegal, as their claims fall under the definition of the financial debt 5(8)(i) and not contrary to the proposition laid down by the Hon'ble Supreme Court of India in the case of Anuj Jain."

10. Even regarding India Bulls, the Adjudicating Authority found that it was a case of Corporate Debtor availing a loan facility as one of the co-

borrower in the Loan Agreement. It found that Corporate Debtor was a co-borrower of the loan and was principal borrower of Respondent No.3 – India Bulls and had even created mortgage on its property to secure the loan and thus, it was a financial debt. Consequent to such findings, Adjudicating Authority did not find fault with the entire claim of OBC and the claim of India Bulls being included by RP for the calculation of voting percentage of members of COC. Consequently, the Application of the Appellant was dismissed. Thus, the present Appeal has been filed.

11. In this Appeal before us, we have heard the learned Counsel for the Appellant and it is argued by the Appellant that out of the claim made by OBC before the RP, only Rs.7.54 Crores related to direct borrowing of Corporate Debtor and the remaining Rs.52.54 Crores were towards corporate guarantees extended by the Corporate Debtor towards debts of seven separate third party Companies which Companies were the principal debtors of OBC. It is argued that the Corporate Debtor was not a corporate guarantor to initial disbursement made by OBC to any of the seven Companies and it was during pendency of recovery proceedings that the Corporate Debtor had agreed to give guarantee on behalf of the said seven borrowers in the event OBC agreed to restructure proposal of the borrowers. The Agreement of Guarantee was executed on 2nd September, 2014 and one of the copies is on record. Thus, it is claimed that there was no disbursement to the seven Companies after the execution of the guarantees and the guarantees were also bipartite

between OBC and the Corporate Debtor. The principal debtors were not parties to the Agreements of Guarantee. Thus, the learned Counsel for the Appellant is finding fault with the invocation of the said guarantees. According to him, such contract of guarantee involves three parties and each must be privy to such contract. Those principal debtors were not party to the said documents of guarantee. It is also argued that in the matter of **"Brahmayya and Company vs. K. Srinivasan"** reported in AIR 1959 Madras 122, it was held that privity of contract is necessary in all cases of suretyship between three parties. It is claimed that Hon'ble Supreme Court also in **"Punjab National Bank vs. Shri Vikram Cotton Mills"** reported in AIR 1970 Supreme Court 1973 has held the same.

12. The Appellant has argued that it has been held in the matter of "Anuj Jain" that for a debt to be a financial debt under Section 5(8) of IBC, there has to be a disbursal against consideration for the time value of money which is root ingredient of the financial debt; that, even if a debt is a secured debt, the same would not qualify to be a financial debt. The learned Counsel relied on Para – 43 to 47.2(2) (Para – 205 – 213 in SCC OnLine) of "Anuj Jain". It is argued that in that matter, Hon'ble Supreme Court dealt with situation where Corporate Debtor - Jaypee Infratech Ltd. (JIL) had mortgaged its property towards the debt of another Company which was holding Company of Corporate Debtor namely, Jaiprakash Associates Ltd. (JAL). Argument is that Hon'ble Supreme Court found that the lenders of JAL were not Financial

Creditors of Jaypee. Argument is that this principle fairly applies to the facts of present case also as here also, Corporate Debtor has secured debts of third party Companies by furnishing corporate guarantees. It is argued that the learned NCLT wrongly referred to the Judgement in the matter of "Smt. Kusum" to justify the liability of principal guarantor to be co-extensive liability. Argument is that the Hon'ble Supreme Court has in the matter of "Anuj Jain" held that the decision in the case of "Smt. Kusum" cannot be stretched and applied to the definition of financial debt under Section 5(8) of the IBC. Learned Counsel stressed that disbursement against consideration for time value of money was the main element required to be looked into and this element was missing in the present matter and thus, it was not a financial debt. According to the learned Counsel, financial debt inter alia includes counter indemnity obligation under Section 5(8)(h) of the IBC; that, Clause (i) is not independent Clause and relates to liability that may arise in respect of guarantee or indemnity or any of the items referred to in Sub-Clauses (a) to (h) of Sub-Section (8). Thus, it is argued that Clause (i) should not be read in isolation. It is also argued that the Adjudicating Authority rejected the contention with regard to present Appellant being related party to Corporate Debtor and such issue cannot be now argued as no Appeal has been filed against such observation.

13. Counsel for Respondent No.1 has supported the Impugned Order claiming that the corporate guarantee furnished by Corporate Debtor was

invoked by Respondent No.2 – Bank on 26th September, 2018 and Respondent No.2 became entitled to claim the value of such security. Corporate Debtor is one of the co-borrowers with regard to the claim made by Respondent No.3 and there was also mortgage of property by Corporate Debtor to secure the loan from India Bulls. Thus, the RP is supporting the Impugned Order.

14. The Respondent No.2 Bank (OBC, now PNB) has argued that although the Appellant is purporting to be Financial Creditor, it is a set up Financial Creditor; that, Appellant and the Corporate Debtor are one and the same and both are being controlled by same group of persons and this is apparent from the fact that Advocate Anand Sukumaran is lawyer for the erstwhile Director of Corporate Debtor - Saurav Mukherjee in Supreme Court in Civil Appeal No.2696 of 2020 which was filed when CIRP was initiated. It is claimed that the arguing Counsel for Appellant before this Tribunal - Mr. Mainak Bose had settled the said Civil Appeal No.2696 of 2020 and thus, these are related parties. Respondent No.2 also tried to argue that there was fraudulent transaction setup between the Appellant and the Corporate Debtor to highjack the CIRP.

15. These aspects do not appear to have been raised appropriately before the Adjudicating Authority and vaguely related party argument was raised which Adjudicating Authority declined to go into. (See Para – 10 of Impugned Order). As such, we will not enter into these aspects in this Appeal as there is no Appeal filed by OBC against the finding

recorded by the Adjudicating Authority. We are, however, considering the claim of being Financial Creditor made by OBC which has been objected to by the Appellant with regard to the corporate guarantees given by the Corporate Debtor.

16. The learned Counsel for the Respondent No.2 – Bank submitted that if the facts of the case in the matter of "Anuj Jain" are seen, in that case, the Corporate Debtor – JIL had mortgaged its properties as collateral securities for the loans and advances made by lender banks and financial institutions to JAL which was holding Company of JIL. It was in the set of those facts that on strength of mortgage created by the Corporate Debtor - JIL, as collateral security of debts of the holding Company - JAL, the Applicants in that matter were found not to be Financial Creditors of Corporate Debtor - JIL. Referring to various paragraphs in the matter of "Anuj Jain", it is argued that, that was not a case of Agreement of Guarantee like present case and the present facts are totally different. It is argued that in the present matter, Corporate Debtor had executed several Agreements of Guarantee with the OBC on 2nd September, 2014, copy of one of which is filed to show contents. The argument is that in the present case, Corporate Debtor's liability was regarding the term loan it has taken and is also relating to debt owned by seven Companies for which Corporate Debtor had signed Agreement of Guarantee with OBC. Thus, it is claimed that Corporate Debtor is liable to pay the debts for which it had given guarantee and the same could be

realised from the Corporate Debtor. The argument is that in the present matter, the debt has been disbursed along with interest for consideration of time value of money, repayment of which debt has been guaranteed by the Corporate Debtor and the matter falls under Section 5(8)(i) of IBC and thus, is a financial debt. Argument is that the Judgement in the matter of "Anuj Jain" is not helpful in the present matter as in the matter of "Anuj Jain", it was case of mortgaged properties with the Bank and debt amount could have only been realised by sale of mortgaged properties but not from the Corporate Debtor - JIL. In "Anuj Jain", it was not a case of giving guarantee to repay or indemnify repayment of loans. It is also argued that observations of the Court in a given Judgement are always required to be read in the context in which they appear. Reference is made to the Judgement in the matter of **"Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr.**" 2002 3 SCC 496. (This Judgement has been discussed by Hon'ble Supreme Court in the matter of "Anuj Jain" in Para – 41.1.5). Thus, the learned Counsel for the OBC has argued that the Appeal deserves to be dismissed.

17. In Rejoinder, Counsel for the Appellant submitted that the allegations made against the Appellant and Advocates are baseless. The allegations of Appellant being related parties has been rejected by the Adjudicating Authority and as submitted earlier, there is no Appeal against that part of the Order. The Counsel submitted that the Civil Appeal filed by the Advocate on record on behalf of the suspended Board

of Directors against admission of CIRP was done inadvertently and no ulterior motive can be attributed. It is stated that there is no conflict of interest also. It is added that in view of the objections taken by Respondent No.2 – OBC and without prejudice, as sole Appellant in Civil Appeal has passed away, Advocate on record does not desire to represent anyone in the said Appeal which is filed in Supreme Court and it is requested by the learned Counsel for the Appellant that this may be treated as bona fide inadvertent mistake.

18. We are not entering into the allegations made against the Counsel for Appellant. Related party issue was not duly raised nor decided before the Adjudicating Authority.

19. We proceed to refer to the Judgement of Hon'ble Supreme Court of India in the matter of "Anuj Jain" on which both the parties are relying on the basis of their arguments.

20. In the matter of Anuj Jain, the Corporate Debtor – JIL had mortgaged properties as collateral securities towards the loans and advances which had been made by the lender banks and financial institutions to holding Company JAL. Para – 2.2 of the Judgement (we are referring to Judgement as reported in Manupatra) reads as under:-

> "2.2. For what has been indicated in the introduction, it is evident that two major issues would arise in these appeals. One, as to whether the transactions in question deserve to be avoided as being preferential, undervalued and fraudulent, in terms of Sections 43,

> 45 and 66 of the Code; and second, as to whether the respondents (lender of JAL) could be recognized as financial creditors of the corporate debtor JIL on the strength of the mortgage created by the corporate debtor, as collateral security of the debt of its holding company JAL."

Hon'ble Supreme Court in Para – 12.4 noted:-

> "12.4. The provisions contained in Sections 124, 126 and 127 of the Indian Contract Act, 1872 shall also have bearing on the issues at hand and hence, the same may also be noted as follows:-
>
> > "124. "Contract of indemnity" defined.- A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."
> >
> > 126. 'Contract of guarantee', 'surety', 'principal debtor' and 'creditor' – A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.
> >
> > 127. Consideration for guarantee.- Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee."

Thus, it was noticed that Section 127 of the Indian Contract Act provides that anything done, or any promise made for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

21. After dealing with the first issue, Hon'ble Supreme Court found that it was a case of preferential transaction hit by Section 43 of IBC. (See Paragraphs – 26 and 27). The second issue (relevant for the present matter) was discussed by the Hon'ble Supreme Court from Para – 30 of the Judgement onwards. In Para – 31, Hon'ble Supreme Court took up the second issue raised by ICIC Bank and Axis Bank claiming that they were required to be recognized as Financial Creditors of the Corporate Debtor – JIL on account of securities provided by JIL for the facilities granted to JAL. The learned NCLT had held that these banks could not be treated as Financial Creditors of the Corporate Debtor - JIL. In Para – 33 of the Judgement, Hon'ble Supreme Court referred to the observations made by NCLT in its Judgement as under:-

> "33. The Adjudicating Authority, NCLT, in its order dated 09.05.2018 as passed on the application moved by ICICI Bank Limited, with reference to the nature of transaction in question, whereby JIL had extended collateral security towards the facility extended to its holding company JAL as also with reference to the definition and connotations of the expressions 'financial debt' and 'financial creditor' as occurring in IBC, essentially proceeded to find that in such a transaction, as regards the corporate debtor JIL, no consideration for time value for money was involved; and hence, the transaction in question did not qualify as 'financial debt' qua the corporate debtor JIL. The NCLT, inter alia, observed as under:-
>
> > "9. In the present case undisputedly corporate debtor has mortgaged its property for creating collateral security for the debt of its holding company JAL. The Corporate debtor is not a borrower, it has created a mortgage in favour of financial institutions for creating collateral

security for the money borrowed by its holding company JAL. In the said transaction time value of money is not involved. The corporate debtor's liability is not regarding the debt owed by its holding company JAL. In case of default in making payment by the principal borrower, for which security interest has been created by the corporate debtor by mortgaging its property in favour of Applicant bank, the debt amount can be realized from the sale of the mortgaged property but not from the corporate debtor, i.e. Jaypee Infratech Ltd.

*** *** ***

9.2 In this case, the applicant has not disbursed the debt along with interest against the consideration for the time value of money. It is also not the case of the applicant that the corporate debtor has borrowed money against payment of interest from the applicant. It is also not the case that the corporate debtor has raised any amount from the applicant under any credit facility. It is not the case of the applicant that there is any liability towards the corporate debtor in respect of any lease or higher purchase contract. It is further not the case of an applicant that any receivables been sold or discounted. It is further not the case of the applicant that any amount has been raised for the corporate debtor under any other transaction having the commercial effect of borrowing to the corporate debtor. It is not the case of the applicant that any derivative transaction has been entered with the corporate debtor. It is also not the case of the applicant that any counter indemnity obligation in respect of a guarantee, indemnity, bond, documentary, letter of credit or any other instrument issued by a bank or a financial institution for the corporate debtor. Further, no amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to above has been issued by the corporate debtor."

(Underlined to note distinction)

Relevant portion of Para – 33.2 of "Anuj Jain" is as under:-

> "33.2. Yet further, the NCLT rejected the contentions that the transaction in question could be termed as either 'guarantee' or 'indemnity' while observing, inter alia, as under:-
>
> > "13. The contention of the applicant that mortgage created by the corporate debtor can be termed as either a guarantee or indemnity is not tenable. In terms of the mortgage deeds the corporate debtor has created a mortgage over its immovable properties, which is either *(Sic. read "neither")* money borrowed against payment of interest nor indemnity or a guarantee as claimed by the applicant and therefore, the same does not fall within the definition of the financial debt in terms of Sec. 5 (8) of IBC. It is stated that the corporate debtor has neither issued any guarantee nor has provided an indemnity to the applicant in respect of the financial assistance granted to JAL."

Para – 33.3 of "Anuj Jain" reads as follows:-

> "33.3. While observing that in the scheme of the Code and CIRP Regulations thereunder, the claims are invited from the creditors of the corporate debtor i.e., financial creditors, operational creditors and other creditors, and not from any person or creditors of the holding company of the corporate debtor; and while further observing that the resolution professional had righty observed that the mortgages in questions were not like guarantee or indemnity, NCLT observed that the basic ingredient of financial debt i.e., 'debt alongwith interest disbursed against time value of money' was lacking in the impugned transactions. NCLT also referred to the interpretation of the expression 'financial creditors' by NCLAT in the case of Nikhil Mehta and Sons v. AMR Infrastructure Ltd. Company: Appeal (AT) (Insolvency) No. 07 of 2017 and endorsed the decision of IRP while holding that,-
>
> > "15. ….On the above basis, we are of the view that The Resolution Professional has correctly

> rejected the claim of the applicant on the ground that the Applicant is not a financial creditor of the corporate debtor concerning the Mortgages and the Mortgaged Debt. The resolution professional has rightly observed that guarantee and indemnity are distinct documents under the relevant laws and the mortgages executed by the corporate debtor are not like guarantee and indemnity. The basic ingredient of the financial debt as defined under the Code is that debt along with interest disbursed against time value of money lacks in the impugned transaction…."

22. From the above, the distinction between matters which came up for consideration before Hon'ble Supreme Court in the matter of "Anuj Jain" and the present matter became clear. There the attempt to get Mortgage treated as if it is in the nature of guarantee, was not accepted. Even before Supreme Court similar effort was made (See Para – 37.4) but it did not succeed. Banks knew that if it is treated as guarantee, they could sail through.

23. It was in the context of examining mortgage executed and the contents of the mortgage. Hon'ble Supreme Court made following observations (part of which Adjudicating Authority reproduced):-

> "43. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become 'financial debt' for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8);

and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the time value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said sub- clauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money."

"47.2. Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third party securities), even if falling within the description of 'secured creditor' by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of 'financial creditors' as per the definitions contained in Sub- sections (7) and (8) of Section 5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of 'debt' under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character

> of a 'financial debt' within the meaning of Section 5(8) of the Code.
>
> The respondent mortgagees are not the financial creditors of corporate debtor JIL."
>
> [Emphasis supplied]

24. For the above reasons, the Hon'ble Supreme Court found that the mortgagees in that matter were not financial creditors of Corporate Debtor JIL.

25. Before us, the learned Counsel for the Appellant has tried to read Para – 43 of the Judgment in the matter of "Anuj Jain" (reproduced supra) to insist that Hon'ble Supreme Court has held that the requirement of disbursement against consideration for time value of money is essential ingredient and this should be read in context of a guarantee also. At the same time, it has also been argued that Section 5(8)(i) is not a stand alone provision. We refer to observations made by Hon'ble Supreme Court in this very Judgement of "Anuj Jain" in Para – 41.1.5 which reads as follows:-

> "41.1.5. For taking into comprehension the ratio of Pioneer Urban (supra) and for its application to the question at hand, appropriate it would be to recount the basic principles expounded and explained by a three-Judge Bench in the case of Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr. MANU/SC/0056/2002 : (2002) 3 SCC 496 <u>that the observations of the Court in a judgment are always required to be read in the context in which they appear.</u> This Court has said,-

"19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark upon lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton : 1951 AC 737 (at p. 761) Lord MacDermot observed: (All ER p. 14C-D)

> The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge."

20. In Home Office v. Dorset Yacht Co. MANU/UKHL/0014/1970 : (1970) 2 All ER 294 Lord Reid said (at All ER p. 297g-h), "Lord Atkin's speech … is not to be treated as if it were a statutory definition. It will require qualification in new circumstances". Megarry, J. in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board MANU/UKHL/0014/1972 : (1972) 2 WLR 537 Lord Morris said: (All ER p. 761c)

> There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.
>
> 21. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."
>
> [Emphasis supplied]

26. It is quite clear that observations made in the Judgement must be read in the context in which they appear. While reading above Para – 43 of the Judgement of Hon'ble Supreme Court, we also need to keep in view Section 127 which was referred by Hon'ble Supreme Court in Para – 12.4 (reproduced supra). The learned Counsel for the OBC/PNB has rightly argued that in the present matter, if the guarantee issued by Corporate Debtor is perused, the Corporate Debtor had guaranteed repayment of debts and the guarantees were executable against the Corporate Debtor which is a totally different case in case of mortgage where the Creditor has to proceed against the mortgaged property and cannot directly proceed against the debtor. The Counsel for Appellant argued that the guarantees were given during pendency of recovery proceedings.

27. In Para – VIII of Appeal under the heading "FACTS IN ISSUE AND QUESTION OF LAW", the Appellant has mentioned that the Adjudicating Authority could not have summarily come to a conclusion without

considering the documents of guarantees and whether the principal debtors were parties to the guarantees. It is further stated that Adjudicating Authority failed to consider that the corporate guarantee which was purportedly invoked to the extent of Rs.33 Crores and was admitted as a financial debt was given by the Respondent No.14 (Corporate Debtor) towards third party debt after the debt of such third party was classified as non-performing asset and proceeding for recovery was filed before DRT (Debts Recovery Tribunal). We have on record copy of one of the Agreement of Guarantee executed by the Corporate Debtor in favour of M/s. Safal Dealers Pvt. Ltd. The same has been filed by Respondent No.2 with Diary No.21786 as Annexure - B/3. It was stated by the learned Counsel for the Bank that the other guarantees issued were also similarly worded. If this document (Annexure – B/3) filed by Respondent Bank is perused, it shows that the same was executed by the Corporate Debtor as Guarantor in favour of the Oriental Bank of Commerce on 2nd September, 2014 and the contents show that the guarantor agreed for repayment of the amount/sum due/outstanding to the bank in the loan account of the borrower, i.e. M/s. Safal Dealers Pvt. Ltd. Thus, for the loan taken by the borrower, Corporate Debtor gave guarantee of repayment of the amounts. Even if such guarantee was given after the bank had proceeded against the borrower in DRT, that does not affect the liability when the corporate guarantee is issued assuring payment of the dues outstanding. The argument of the learned Counsel for the Appellant that the borrower had not signed this

document does not make any difference. The learned Counsel himself has referred to Judgement in the matter of **"Punjab National Bank Ltd. Versus Shri Vikram Cotton Mills and Another"** 1970 (1) SCC 60; AIR 1970 Supreme Court 1973 filed with Diary No.22292. The said Judgement is of Hon'ble Supreme Court and perusal of the Judgement shows that in that matter, the Respondent Company had opened cash-credit account with the Appellant bank and to secure the repayment of the balance due at the foot of the account, the company executed four documents – three by the Company's Managing Agents and one was by Ranjit Singh, the Director of the Managing Agents. When winding up proceedings were initiated, bank filed Suit against the Company and Ranjit Singh claiming decree for payment of amount with cost and interest against Ranjit Singh. Ranjit Singh claimed that he was only a guarantor and not a co-debtor and as such he was liable only in case of default by the Company. Para – 11 of the Judgement shows that in that case also, the Company did not execute the bond. The bond was executed by Ranjit Singh. The bond did not expressly recite that the Company was a principal debtor and the Company did not execute the bond. Hon'ble Supreme Court observed:-

> "The bond, it is true, did not expressly recite that the Company was the principal debtor; it is also true and the Company did not execute the bond. But a contract of guarantee may be wholly written, may be wholly oral, or may be partly written and partly oral. The documents which secured repayment of the Bank's claim at the foot of the cash-credit account were executed simultaneously: the bond executed

> by Ranjit Singh was one of them and the conduct of Ranjit Singh and the Company indicates that Ranjit Singh agreed to guarantee payment of the debt due by the Company. We hold, therefore, that the Bank, the Company and Ranjit Singh were parties to the agreement under which for the dues of the Company, Ranjit Singh became a surety."

Thus, in the present matter also, even if the borrower did not join the document of guarantee, it would not make any difference to the liability of the Corporate Debtor. When Corporate Debtor guaranteed the payments and the payment has been invoked as per letter dated 26th September, 2018 vide Annexure - B/4 (Reply of Respondent No.2 – Diary No.21786), the Corporate Debtor is liable for the financial debt.

28. Para – 43 of the Judgement of Hon'ble Supreme Court in the matter of "Anuj Jain" requires us to consider if the debt carries the essential elements stated in the principal clause of Section 5(8) or at least has the features which could be traced to such essential elements in the principal clause. In the present matter, there was disbursal of debt by the bank to the third parties and the Corporate Debtor gave guarantee for repayment of such debt when it became outstanding. Clearly, the loan advanced carried the element of consideration for time value of money and when such disbursal was guaranteed, it has to be treated as a financial debt under Section 5(8)(a) read with (i) of IBC.

29. The third party was advanced debt which was admittedly given by the Financial Creditor to the said third party. Even if Corporate Debtor

issued guarantee in recovery proceeding for the financial debt of third party and in default the said guarantee/s have been invoked by the Financial Creditor, the Corporate Debtor is liable to pay the amount being amount of liability in respect of guarantee issued which falls in the definition of Section 5(8)(i) of IBC.

30. The learned Counsel for the Appellant argued that the Adjudicating Authority wrongly relied on Judgement in the matter of **"State Bank of India vs. Kusum Vallabhdas Thakkar."** In Para 19 (reproduced supra) of the Impugned Order, the Adjudicating Authority referred to the said Judgement and observed that the position of law is not altered by Hon'ble Supreme Court in the decision of "Anuj Jain". Judgment in the matter of "Smt. Kusum" was referred in the Judgement of Hon'ble Supreme Court in "Anuj Jain" in Para – 51 and after discussing the ratio of the said Judgement, Hon'ble Supreme Court in Para – 51.4 observed that it was difficult to stretch the ratio of the said decision which appears to be applied to the issue at hand concerning definition of financial debt. The issue in that case was in the context of mortgage. In any case, even if we do not refer to the Judgement in the matter of "Smt. Kusum", in the facts of the present matter, we find that the Impugned Order has rightly concluded that the claim as made by Respondent No.2 – OBC and Respondent No.3 – India Bulls was correctly admitted by RP treating them as Financial Creditors for the amounts stated.

31. At the time of arguments, Counsel for Appellant did not show as to how findings as recorded by the Adjudicating Authority with regard to India Bulls were not sustainable. Going through the record, we do not find any reason to interfere with the findings as recorded by the Adjudicating Authority in connection to the claim entertained of India Bulls.

32. For above reasons, we agree with the Adjudicating Authority that inclusion of entire claim of Oriental Bank of Commerce (now PNB) and India Bulls (Respondent No.3) and the determination of the voting percentage of the members of COC on the basis of admitted claims of these Financial Creditors, is legal and proper.

There is no substance in the Appeal.

The Appeal is dismissed. No Orders as to costs.

[Justice A. I. S. Cheema]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

rs