



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Orders Reserved on : 31.01.2019

Orders pronounced on : 28.02.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
AND
THE HONOURABLE MR.JUSTICE B.PUGALENDHI

W.P.(MD).Nos.19871 to 19874 of 2018
and
W.M.P.(MD).Nos.17659 to 17662 and 19050 to 19053 of 2018

Mr.B.Pattabhiraman ... Petitioner in W.P.(MD).No.19871 of 2018
Mr.A.R.Regunathan Nair .. Petitioner in W.P.(MD).No.19872 of 2018
Mr.B.Balagopalan .. Petitioner in W.P.(MD).No.19873 of 2018
Mr.T.Achuthan .. Petitioner in W.P.(MD).No.19874 of 2018

Vs.

The Authorised Officer,
State Bank of India,
Stressed Assets Management Branch,
112, Raja Plaza,
Avinashi Road,
Coimbatore-641 037.

.. Respondent in all the Writ Petitions

COMMON PRAYER:

Writ Petitions filed under Article 226 of the Constitution of India, praying for issuance of Writs of Certiorari to call for the records of the respondent relating to the impugned E-Auction Sale Notice, dated 29.08.2018 and quash the same.

For Petitioners : Mr.B.Dhanaraj
For Respondent: Mr.M.Vallinayagam, Senior Counsel for
Mr.V.Meenakshi Sundaram

COMMON ORDER

R.SUBBIAH, J

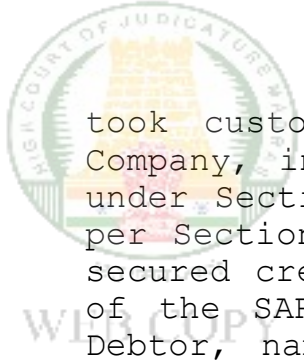
All these Writ Petitions have been filed to call for the records of the respondent relating to impugned E-Auction Sale Notice, dated 29.08.2018 and quash the same.

2. Since the issue involved in all these Writ Petitions, is one and the same, they are disposed of by this common order.

3. The petitioners are the guarantors to the loan facility provided by the respondent-Bank to M/s.GB Engineering Enterprises Private Limited, Trichy. They are also the Directors of the said Company. The said Company had availed various financial facilities with the respondent-Bank for the past 37 years and the Company was given financial facility limit upto Rs.36.28 Crores, out of which, the said Company availed only Rs.36 Crores as loan. As against the said loan, the valuable properties/assets of the said Company were given as "primary security" by creating equitable mortgage with the respondent, totally valued at Rs.87.5 Crores. The said Company remained insolvent and the dues were mounting. Hence, the respondent-Bank initiated measures against the said Company under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'the SARFAESI Act'). Accordingly, a demand notice was issued on 07.07.2017 under Section 13(2) of the SARFAESI Act, calling upon the said Company and its Directors and Guarantors (including the Writ Petitioners herein), demanding repayment of Rs.30,50,63,587.43 as on 07.07.2017, within 60 days from the date of the notice, otherwise, the Bank will exercise their rights under Section 13(4) of the SARFAESI Act. Hence, on 05.09.2017, the said Company (borrower) submitted a detailed representation to the respondent-Bank as envisaged under Section 13(3A) of the SARFAESI Act. It is the stand of the petitioners that the respondent may consider such representation before coming to any conclusion as mandated under Section 13(3A) of the SARFAESI Act. But, contrary to the said mandatory provision, the respondent-Bank did not care to send any communication to the said Company as to whether the representation dated 05.09.2017 was considered by them or rejected.

4. Thereafter, the respondent-Bank proceeded under Section 13 (4) of the SARFAESI Act and issued first E-Auction Sale Notice, dated 28.11.2017, against which, the Company filed appeal (SARFAESI Appeal) under Section 17(1) of the SARFAESI Act before the Debts Recovery Tribunal (for short, 'the DRT'), Madurai. The DRT, by its order dated 04.01.2018 in I.A.No.2606 of 2017 in S.A.No.519 of 2017, refused to grant interim stay of the said E-Auction Notification. Hence, the borrower-Company preferred an appeal before the Debts Recovery Appellate Tribunal (for short, 'the DRAT'), Chennai. The DRAT granted interim stay in I.A.No.139 of 2018 on condition to make pre-deposit of Rs.3,50,000/- within four weeks before the DRAT, and if the Company fails to make the pre-deposit within the said period, it was also made clear that the appeal itself shall stand dismissed automatically without any reference to the Court and the I.A. filed before the DRAT was disposed of accordingly.

5. While so, the borrower-Company filed Company Petition under Section 10 of the Insolvency and Bankruptcy Code, 2016 (for short, 'the IBC') before the National Company Law Tribunal (for short, 'the NCLT'), Chennai, for initiation of Corporate Insolvency Resolution Process (CIRP) in C.P.No.64(IB)/CB/2018. Thereafter, Interim Resolution Professional was appointed by order dated 25.01.2018, who

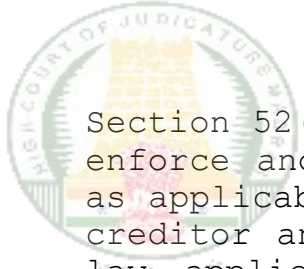


took custody and control of all assets/liabilities of the said Company, including the business records and other actions provided under Section 25 of the IBC. The Moratorium Period was declared as per Section 13 of the IBC. As per Section 14(1)(c) of the IBC, the secured creditor is prohibited from proceeding under the provisions of the SARFAESI Act to recover the amount against the Corporate Debtor, namely the borrower-Company. After the moratorium period, i.e. after 180 days, the NCLT, Chennai passed order of liquidation by order dated 06.08.2018. The prohibition of taking or continuing the action for recovery of dues from the borrower-Company, continues, because of the pendency of the proceedings before the NCLT. In such a situation, the respondent-Bank brought the properties of the guarantors for sale by notice, dated 29.08.2018, under the provisions of the SARFAESI Act. Thus, E-Auction Notice is challenged in the present Writ Petitions.

6. Learned counsel for the petitioners submitted that the NCLT, by its order dated 25.01.2018, initiated the CIRP and subsequently ordered the liquidation on 06.08.2018. The NCLT, vide said order dated 06.08.2018, ordered for liquidation of the corporate debtor, namely M/s.GB Engineering Enterprises Private Limited and one Ms.C.S.Satyadevi Alamuri had been appointed as Liquidator, with a direction that the Company Liquidator shall exercise her powers and duties enumerated under Sections 35 to 50 and 52 to 54 of the IBC read with Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. Besides that, Section 52(1)(a) of the IBC says that a secured creditor in the liquidation proceedings may relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in Section 53 of the IBC and invoking the aforesaid provision, the respondent-Bank opted to relinquish its security interest to the liquidator and preferred to receive its dues from the proceeds of sale of the assets from the liquidator.

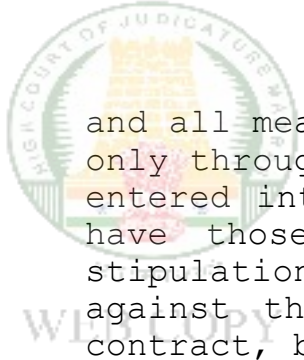
7. In the above context, learned counsel for the petitioners further submitted that the secured creditor in the liquidation proceedings, has two options to recover his debts, namely (i) claims to the liquidator, by which the secured creditor can relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in Clause (b)(ii) of sub-section (1) of Section 53 of the IBC, and (ii) realisation of the security interest -- the secured creditor can realise the security interest in the manner specified under Section 52 of the IBC. Thus, learned counsel for the petitioners submitted that in terms of Section 52 of the IBC, the secured creditor has the option to relinquish its security to the liquidation estate and receive proceeds from the sale of assets from the liquidator or realise its security in the manner specified in that Section. In the contrary, the secured creditor can realise the security interest after informing the liquidator of such security interest and identify the asset, subject to such security interest to be realised. The liquidator shall verify such security interest and permit the secured creditor to realise only such security interest.

8. Learned counsel for the petitioners further submitted that



Section 52(4) of the IBC provides for the secured creditor to opt to enforce and realise the secured assets in accordance with such law as applicable to the security interest being realised by the secured creditor and apply the proceeds to recover the debt due to it. The law applicable here is SARFAESI Act, 2002. In case the sale proceeds are not adequate to recover the debts, the unpaid debts of such secured creditor shall be paid by the liquidator as per Section 53(1)(e)(i) of the IBC. Further, Section 52(5) of the IBC provides for the secured creditor to approach the adjudicating authority, if the secured creditor faces resistance from the corporate debtor or any person connected therewith to take possession of the security interest. Learned counsel for the petitioners further submitted that a comparative study of Sections 52 and 53 of the IBC, would reveal that the secured creditor relinquishing his security interest, has a higher footing and priority in the distribution of sale proceeds, and if there is a shortfall after realisation of security interest, the proximity of being paid by the liquidator, is remote. It is incumbent to point out that when once the secured creditor chooses to realise its security interest as per Section 52(1)(b) of the IBC, the NCLT is vested with powers to facilitate and permit a secured creditor in accordance with law for the time being in force, as per Section 52(6) of the IBC. As such, the secured creditor ought to obtain permission before the NCLT before realising its security interest under the provisions of the SARFAESI Act. Contrary to realisation of security interest, if the secured creditor chooses to relinquish its security interest, the secured creditor shall await the sale of assets by the liquidator and the consequent distribution of assets as per Section 53(1)(b)(ii) of the IBC.

9. In the above background, learned counsel for the petitioners submitted that the measures adhered to by the respondent-Bank invoking the provisions of SARFAESI Act, are required to be examined. In this regard, learned counsel for the petitioners invited the attention of this Court to Section 2(e) of the IBC, which states that the provisions of the IBC applies to the corporate debtors and its guarantors and the amendment of the IBC is effective from 23.11.2017 by the Insolvency and Bankruptcy Code (Amendment) Act, 2018. Therefore, when the provisions of the IBC are applicable to personal guarantors, as in the case on hand, the respondent-Bank is required to approach the adjudicating authority to seek remedies against the personal guarantors. Learned counsel for the petitioners submitted that since the proceedings under the provisions of the IBC are pending against the borrower-Company, namely the corporate debtor and its guarantors, no proceedings can be initiated against the properties of the guarantors, when the provisions of the IBC are applicable to the guarantors. In this regard, learned counsel for the petitioners drew the attention of this Court to a decision of the Supreme Court reported in AIR 1968 SC 1432 (*Amrit Lal Goverdhan Lalan Vs. State Bank of Travencore*), wherein, the Supreme Court relied on a judgment of the Court of Chancery in the case of *Craythorne Vs. Swinburne* (1807) 14 Yes. 160, wherein it was observed that "the surety will be entitled to every remedy which the creditor has against the principal debtor to enforce every security



and all means of payments to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety having a right to have those securities transferred to him, though there was no stipulation for that and to avail himself of all those securities against the debtor. This right of a surety stands not upon the contract, but upon the principles of natural justice".

10. Learned counsel for the petitioners further submitted that the action of the Bank not to realise the primary security interest while it is sufficient, but relinquishing it and simultaneously coming against the properties of the guarantor, is against equity, justice and good conscience. By such conduct, a guarantor cannot step into the shoes of the secured creditor and he is also deprived of his right to property and livelihood. Moreover, the actions of the secured creditor relinquishing his interest to liquidator and coming after the guarantor's property, is prejudicial and impairing the guarantor's eventual remedy, as the principal debtor itself is about to be liquidated. Therefore, learned counsel for the petitioner submitted that the guarantor ought to be discharged for the liability. In this context, learned counsel for the petitioners relied on a decision of the Uttaranchal High Court reported in 2004 (II) BC 241 = 2004 (1) UC 451 = 2004 (1) UD 359 (*Unique Engineering Works Vs. Union of India*), in which, the Division Bench made recommendations to the Reserve Bank of India (RBI) regarding banks choosing to enforce security interest. The relevant portion of the said decision reads as follows:

"30. The impugned NPA Act, 2002 does contain stringent measures. In the circumstances, as a matter of recommendation to the Reserve Bank of India which is empowered to issue directions, we hereby make following suggestions, which suggestions will not provide any cause of action for litigation. The suggestions are as follows :

... ..

(e) As far as sale of residential houses are concerned Banks should try to recover the loan amount from principal borrower. They should try to encash securities other than the residential property in the first instance and it is only if the balance remains after selling other securities that the Banks can sell the residential property after giving notice. In other words, residential house should be sold as a matter of last resort."

11. Learned counsel for the petitioners further contended that it is prudent for the Banks to consider such recommendations despite the fact that they are not mandatory for the cause of equity, justice and good conscience. In the present case, though the primary security was sufficient to realise the dues owed to the Bank, the



action of the Bank not to realise those securities inspite of its value and harassing the petitioners, is nothing but inequity. Therefore, the respondent-Bank, having relinquished its security interest to the liquidation estate under Section 52(1)(a) of the IBC, does not have an unfettered or unbridled power to bring the property of the personal guarantor in auction, without quantifying the proceeds of the properties of the borrower, which is in violation of Article 14 of the Constitution of India and also in gross violation of the provisions of the IBC. The secured creditor having relinquished the security, ought to have awaited the entire sale transaction by the liquidator and thereafter, in the event of shortfall, was entitled to approach the NCLT to seek recourse against the personal guarantors. In this regard, learned counsel for the petitioners invited the attention of this Court to Section 63 of the IBC, as per which, no Civil Court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which NCLT or NCLAT has jurisdiction under the IBC. Likewise, as per Section 64(2) of the IBC, no injunction shall be granted by any Court, Tribunal or Authority in respect of any action taken or to be taken in pursuance of any power conferred on the NCLT or NCLAT under the IBC.

12. Therefore, learned counsel for the petitioners submitted that presently, the NCLT is seized of the Insolvency and Bankruptcy proceedings related with the corporate debtor and its persons connected thereto, which includes the petitioners' capacity as personal guarantors. Thus, the petitioners as personal guarantors, to whom the provisions of the IBC apply, are prevented from approaching the Debts Recovery Tribunal (DRT) after the commencement of insolvency proceedings. The bar of jurisdiction is also specifically provided for in the IBC under Section 231, as per which, no Civil Court shall have jurisdiction in respect of any matter in which the Adjudicating Authority or the Board is empowered by, or under the IBC to pass any order and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority under the IBC. Further, the provisions of the IBC will over-ride other laws in terms of Section 238 of the IBC. Learned counsel for the petitioners relied on a decision of the Supreme Court in the case of *PR.Commissioner of Income Tax Vs. Monnet Ispat and Energy Limited* in Petition(s) for Special Leave to Appeal (C).No.6483 of 2018, wherein, by order dated 10.08.2018, the Apex Court observed that it is obvious that the IBC will over-ride anything inconsistent contained in any other enactment including the Income Tax Act. Thus, as such, when the secured creditor relinquished the security interest and agreed to receive the proceeds from the sale of assets by liquidator, the measures provided under Section 13(4) of the SARFAESI Act would be inconsistent to the provisions of the IBC and as such, the respondent is dis-entitled from realising the residential properties of the petitioners and therefore, the respondent cannot proceed against the personal properties of the petitioners/guarantors, when especially, as per Section 2(e) of the IBC, the provisions of the



IBC will apply to the guarantors also. Thus, learned counsel for the petitioners sought for quashing the impugned E-auction sale notice and to allow the Writ Petitions.

13. Countering the above submissions, the learned Senior Counsel appearing for the respondent-Bank, at the outset, submitted that the Writ Petitions are not maintainable as against the SARFAESI proceedings. In support of this submission, learned Senior Counsel appearing for the respondent-Bank relied upon a judgment of the Supreme Court reported in 2010 (8) SCC 110 (*United Bank of India Vs. Satyawati Tondon and others*). Therefore, on this short ground, the Writ Petitions are liable to be dismissed.

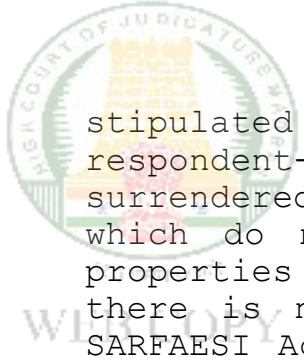
14. With regard to the submission made by the learned counsel for the petitioners that since the proceedings under the IBC are pending against the borrower-Company, which is the corporate debtor, no proceedings can be initiated against the guarantors, and by virtue of Section 2(e) of the IBC, the provisions of the IBC will also apply to the guarantors of the corporate debtor, it is replied by the learned Senior Counsel appearing for the respondent-Bank that the liability of the guarantor and principal debtor is co-extensive and not in alternative, and therefore, it is not necessary for the secured creditor/Bank to proceed first against the borrower and then against the guarantor. In support of this submission, learned Senior Counsel appearing for the respondent-Bank relied on the decisions of the Honourable Supreme Court reported in AIR 1992 SC 1740 (*State Bank of India Vs. Indexport Registered and others*), AIR 1969 SC 297 (*Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and another*) and 2009 (7) MLJ 129 (SC) = 2009 (9) SCC 478 (*Industrial Investment Bank of India Ltd. Vs. Biswanath Jhunjhunwala*).

15. That apart, learned Senior Counsel appearing for the respondent-Bank brought to the attention of this Court to Sections 126 and 128 of the Indian Contract Act and submitted that the term "co-extensive" had been defined in the celebrated book of *Pollock & Mulla on Indian Contract and Specific Relief Act*, Tenth Edition, at page 728, as under:

"Co-extensive: Surety's liability is co-extensive with that of the principal debtor.

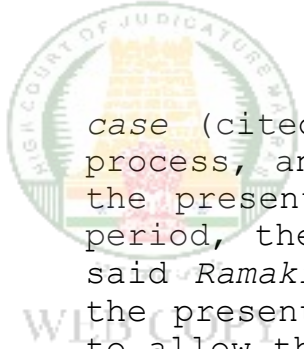
A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued."

16. Learned Senior Counsel appearing for the respondent-Bank also invited the attention of this Court to *Halsbury's Laws of England*, Fourth Edition, Vol.20, paragraph 159 at page 87, wherein, it is observed that "it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay or to sue him, although solvent, unless this is expressly



stipulated for". Thus, learned Senior Counsel appearing for the respondent-Bank submitted that the secured creditor first surrendered only the properties of the borrower to the liquidator, which do not form part of the auction sale and so far as the properties of the personal guarantors are concerned, absolutely there is no impediment in proceeding against the same under the SARFAESI Act. In this regard, learned Senior Counsel appearing for the respondent-Bank relied upon a judgment of the Supreme Court reported in AIR 2018 SC 3876 = 2018 SCC Online SC 963 (*State Bank of India Vs. V.Ramakrishnan and another*) and submitted that there is an amendment to Section 14 of the IBC, which was introduced with effect from 06.06.2018 by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, whereby Section 14(3) was amended, in which it is stated that the provisions of sub-section (1) shall not apply to: (a) such transaction as may be notified by the Central Government in consultation with any financial regulator and (b) a surety in a contract of guarantee to a corporate debtor. Therefore, according to the learned Senior Counsel appearing for the respondent-Bank, absolutely, there is no prohibition for invoking the provisions of the SARFAESI Act by the secured creditor as against the properties of the guarantors. Hence, learned Senior Counsel appearing for the respondent-Bank prayed for dismissal of the Writ Petitions.

17. By way of reply, learned counsel for the petitioners submitted that Section 14 of the IBC deals with the moratorium period and the amended provisions of Section 14(3)(b) of the IBC could be applied only during the moratorium period and not after ordering liquidation. The intent of the Legislature to impose moratorium during the Corporate Insolvency Resolution Process (CIRP) is to facilitate the reorganisation and rehabilitation of the corporate debtor by way of submission of the Resolution Plan by a prospective resolution applicant as per Section 30 of the IBC. Further, during the period of CIRP, if the secured creditor recovers its dues from the personal guarantor, the personal guarantor will step into the shoes of the creditor by way of operation of law. It is incumbent to point out that the said Resolution Plan submitted during the period of CIRP, shall be binding on the guarantors of the corporate debtor, as per Section 31(1) of the IBC. Further, Regulation 38(1A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, mandates that a Resolution Plan shall include a statement as to how it has dealt with the interest of all stakeholders, including financial creditors and operational creditors of the corporate debtor. Therefore, the interest of the personal guarantor is covered under the Resolution Plan, which may not be the case during liquidation, especially when the secured creditor chooses to relinquish its security interest, instead of realisation of such interest under the provisions of the SARFAESI Act. Having relinquished its security interest, the secured creditor shall await the sale proceeds in order to quantify its dues before proceeding against the personal guarantors. The learned counsel for the petitioners submitted that the judgment relied on by the learned Senior Counsel appearing for the respondent-Bank in *Ramakrishnan's*



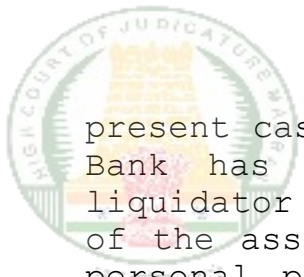
case (cited supra) is only dealing with moratorium period and CIRP process, and not with regard to the stage of liquidation. So far as the present case is concerned, after the expiry of the moratorium period, the liquidation was ordered by the NCLT, and therefore, the said *Ramakrishnan's* case cannot be made applicable to the facts of the present case. Thus, learned counsel for the petitioners prayed to allow the Writ Petitions.

18. Heard the submissions made on both sides. As we have dealt with the factual matrix of the case in detail as above, we are refraining ourselves from reiterating the same any further. However, for the purpose of disposal of these Writ Petitions, certain facts which are absolutely germane and necessary alone, are reiterated hereunder. We have given our anxious consideration to the submissions made on either side and perused the materials available on record.

19. In view of the submissions made on either side, the question that falls for consideration is, when Section 2(e) of the IBC says that the provisions of the IBC are applicable to the personal guarantors to corporate debtor, whether the secured creditor (respondent-Bank) can proceed with the properties of the guarantors (petitioners) under the SARFAESI Act, when the order of liquidation is passed against the borrower-Company by the NCLT as per the provisions of the IBC.

20. In the instant case, the borrower-Company filed a company petition under Section 10 of the IBC before the NCLT, Chennai, vide C.P.No.64(IB)/CB/2018 for initiation of Corporate Insolvency Resolution Process (CIRP). The NCLT, by order dated 25.01.2018, initiated the CIRP and subsequently, after the period of moratorium of 180 days, ordered liquidation on 06.08.2018. Pursuant to the order of liquidation, one Ms.C.S.Satyadevi Alamuri had been appointed as Liquidator, with a direction that the Company Liquidator shall exercise her powers and duties enumerated under Sections 35 to 50 and 52 to 54 of the IBC read with Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

21. The secured creditor relinquished the properties of the borrower-Company in favour of the Liquidator for the purpose of realisation in terms of Section 52(1)(a) of the IBC. As per Section 2 of the IBC, the provisions of the IBC are applicable to companies, partnership, proprietorship and also personal guarantors to corporate debtors. It means that those categories of persons are entitled to invoke the provisions of the IBC. It is the submission of the learned counsel for the petitioners that since Section 2(e) of the IBC says that the provisions of the IBC shall apply to the personal guarantors to corporate debtors, when the liquidation of the corporate debtor is ordered, action cannot be initiated under the provisions of the SARFAESI Act against the properties of the personal guarantors. It is the further submission of the learned counsel for the petitioners that besides that, Section 52(1)(a) of the IBC also says that a secured creditor in the liquidation proceedings, may relinquish its security interest to the liquidation estate and receive the proceeds from the sale of assets by liquidator in the manner specified in Section 53 of the IBC. In the



present case, invoking the aforesaid provision, when the respondent-Bank has chosen to relinquish their security interest to the liquidator and preferred to receive its dues from the sale proceeds of the assets from the liquidator, they cannot proceed against the personal properties of the guarantors under the SARFAESI Act. In this regard, the learned counsel for the petitioners made detailed submissions by inviting the attention of this Court to Section 141 of the Indian Contract Act, as per which, a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not, and if the creditor loses or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security. It is also the further submission of the learned counsel for the petitioners that in the present case on hand, the secured creditor, though capable of realising the entire debt by way of realising the primary security interest, relinquished its interest, thereby subjugating to the IBC as against the SARFAESI Act. Considering the fact that the principal debtor is in the stage of liquidation and by the conduct of the secured creditor to relinquish the primary security, though it is capable of realising the entire debt amount, the rights of the surety are prejudiced, since the surety would not be able to step into the shoes of the creditor and by way of Section 141 of the Indian Contract Act, the liability of the surety is discharged.

22. Per contra, learned Senior Counsel appearing for the respondent-Bank submitted that Section 141 of the Indian Contract Act will apply only when the loss of the secured creditor is already quantified. In the present case, the Bank has not at all lost or parted with any security. In this regard, learned Senior Counsel appearing for the respondent-Bank invited the attention of this Court to Section 128 of the Indian Contract Act and submitted that the liability of the guarantor and the principal debtor is co-extensive and not in alternative. It is not safe to proceed against the borrower first and then against the guarantor. In this context, learned Senior Counsel appearing for the respondent-Bank relied on a decision of the Supreme Court reported in AIR 1969 SC 297 (*The Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and another*). In this decision, the Supreme Court referred to a judgment of the Bombay High Court in the case of *Lachhman Joharimal Vs. Bapu Khandu*, (1869) 6 Bom HCR 241, wherein the Division Bench of the Bombay High Court observed as follows:

"The Court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt."

The Supreme Court, in the above decision, while referring the above said judgment of the Bombay High Court, observed as under:

"... The very object of the guarantee is



defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down. ..."

WEB COPY

23. The learned Senior Counsel appearing for the respondent-Bank also referred to a decision of the Supreme Court reported in AIR 1992 SC 1740 (*State Bank of India Vs. M/s. Indexport Registered*) and submitted that the liability of the surety/guarantor is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract and a decree-holder can execute the decree against the guarantor without proceeding against the principal borrower. Learned Senior Counsel appearing for the respondent-Bank also relied on a decision of the Supreme Court reported in 2009 (7) MLJ 129 (SC) = 2009 (9) SCC 478 (*Industrial Investment Bank of India Ltd. Vs. Biswanath Jhunjhunwala*), wherein also, it was held by the Apex Court that the liability of the guarantor and principal debtors is co-extensive and not in alternative.

24. Therefore, we are of the opinion that, since the liability of the guarantor and principal debtor is co-extensive, it is absolutely not necessary for the Bank to first proceed against the principal debtor and then against the guarantor, and when that being the position, the submission of the learned counsel for the petitioners that the secured creditor has to wait for the completion of the entire sale transaction by the liquidator on the properties of the corporate debtor surrendered by the secured creditor for realising the dues, cannot be accepted. Further, as per Section 14 (3)(b) of the IBC, the provisions of Section 14(1) shall not apply to a surety in a contract of guarantee to a corporate debtor. It is useful to extract Section 14 of the IBC, which reads as follows:

"Section 14: Moratorium:

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and



Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

WEB COPY

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to--

(a) such transaction as may be notified by the Central Government in consultation with any financial regulator;

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

PROVIDED that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

25. In the above background, learned Senior Counsel for the respondent-Bank relied on a decision of the Supreme Court reported in AIR 2018 SC 3876 = 2018 SCC Online SC 963 (*State Bank of India Vs. V.Ramakrishnan*), wherein the Supreme Court made it clear that the proceedings of the NCLT will not stand in the way of invoking SARFAESI Act proceedings as against security given as guarantor to a debt. It is useful to extract the relevant portion of the said judgment of the Supreme Court in the case of *V.Ramakrishnan*:

"18. However, Sections 2(e) and Section 60 are strongly relied upon by learned counsel for the Respondents as, according to them, the Code will apply to personal guarantors of corporate debtors, and by Section 60, proceedings against such personal guarantors will show that such moratorium extends to the guarantor as well.

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



WEB COPY

21. The scheme of Section 60(2) and (3) is thus clear - the moment there is a proceeding against the corporate debtor pending under the 2016 Code, any bankruptcy proceeding against the individual personal guarantor will, if already initiated before the proceeding against the corporate debtor, be transferred to the National Company Law Tribunal or, if initiated after such proceedings had been commenced against the corporate debtor, be filed only in the National Company Law Tribunal. However, the Tribunal is to decide such proceedings only in accordance with the Presidency-Towns Insolvency Act, 1909 or the Provincial Insolvency Act, 1920, as the case may be. It is clear that sub-section (4), which states that the Tribunal shall be vested with all the powers of the Debt Recovery Tribunal, as contemplated under Part III of this Code, for the purposes of sub-section (2), would not take effect, as the Debt Recovery Tribunal has not yet been empowered to hear bankruptcy proceedings against individuals under Section 179 of the Code, as the said Section has not yet been brought into force. Also, we have seen that Section 249, dealing with the consequential amendment of the Recovery of Debts Act to empower Debt Recovery Tribunals to try such proceedings, has also not been brought into force. It is thus clear that Section 2(e), which was brought into force on 23.11.2017 would, when it refers to the application of the Code to a personal guarantor of a corporate debtor, apply only for the limited purpose contained in Section 60(2) and (3), as stated hereinabove. This is what is meant by strengthening the Corporate Insolvency Resolution Process in the Statement of Objects of the Amendment Act, 2018.

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 owned 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.

23. We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a personal guarantor. When an application is filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. Secondly, the protection of the moratorium under these Sections is far greater than that of Section 14 in that pending legal proceedings in respect of the debt and not the debtor are stayed. The difference in language between Sections 14 and 101 is for a reason. Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor--often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor. We may hasten to add that it is open to us to mark the difference in language between Sections 14 and 96 and 101, even though Sections 96 and 101 have not yet been brought into force. This is for the reason, as has been held in *State of Kerala and others Vs. Mar Appraem Kuri Co. Ltd. and another* (2012 (7) SCC 106), that a law 'made' by the Legislature is a law on the statute book even though it may not have been brought into force. The said judgment states:

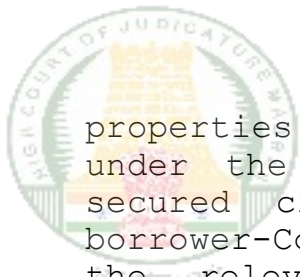


WEB COPY

"79. The proviso to Article 254(2) provides that a law *made* by the State Legislature with the President's assent shall not prevent Parliament from *making* at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so *made* by a State Legislature. Thus, Parliament need not wait for the law made by the State Legislature with the President's assent to be brought into force as it can repeal, amend, vary or add to the assented State law no sooner it is made or enacted. We see no justification for inhibiting Parliament from repealing, amending or varying any State legislation, which has received the President's assent, overriding within the State's territory, an earlier parliamentary enactment in the concurrent sphere, *before it is brought into force*. Parliament can repeal, amend, or vary such State law no sooner it is assented to by the President and that it need not wait till such assented-to State law is brought into force. This view finds support in the judgment of this Court in Tulloch [AIR 1964 SC 1284 : (1964) 4 SCR 461] .

80. Lastly, the definitions of the expressions "*laws in force*" in Article 13 (3)(b) and Article 372(3) Explanation I and "*existing law*" in Article 366(10) show that the laws in force include laws passed or *made* by a legislature before the commencement of the Constitution and not repealed, notwithstanding that any such law may not be in operation at all. Thus, the definition of the expression "*laws in force*" in Article 13(3)(b) and Article 372 (3) Explanation I and the definition of the expression "*existing law*" in Article 366 (10) demolish the argument of the State of Kerala that a law has not been *made* for the purposes of Article 254, unless it is enforced. The expression "*existing law*" finds place in Article 254. In *Edward Mills Co. Ltd. Vs. State of Ajmer* [AIR 1955 SC 25], this Court has held that there is no difference between an "*existing law*" and a "*law in force*".

81. Applying the tests enumerated hereinabove, we hold that the Kerala Chitties Act, 1975 became void on the



properties of the guarantors, even when the borrower-Company is under the order of liquidation. In fact, as stated above, the secured creditor has surrendered only the properties of the borrower-Company alone, which is clear from the following extract of the relevant portion of the impugned E-auction sale notice, dated 29.08.2018:

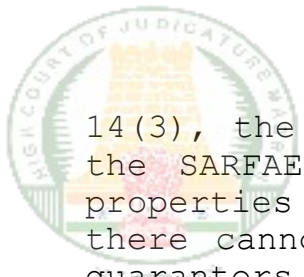
"SALE OF IMMOVABLE ASSETS CHARGED TO THE BANK UNDER THE SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002.

The Authorized Officer of State Bank of India, SME Branch, Thuvakudi issued demand notice dated 07.07.2017 and the undersigned as Authorized Officer of State Bank of India has taken possession of the schedule mentioned properties under Section 13(4) of the SARFAESI Act on 22.09.2017 and 10.11.2017 respectively.

Public at large is informed that e-auction under SARFAESI Act, 2002 of the schedule mentioned charged properties in the names of the below mentioned GUARANTORS, for realisation of Bank's dues, will be held on "AS IS WHWHERE IS BASIS and AS IS WHAT IS BASIS".

Name of Borrower: M/s.G.B.Engineering Enterprises Pvt. Ltd. (under liquidation with effect from the date of order of liquidation, i.e. 06.08.2018 issued by the Hon'ble NCLT, Chennai in MA/285/IB/2018 in CP/64/(IB)/2017 filed u/s.10 of Insolvency and Bankruptcy Code, 2016), represented by its Liquidator Ms.CS Satyadevi Alamuri, having its registered office at D-99, Developed Plots Estate, Thuvakudi, Tiruchirapalli-620015 (hereinafter called as "Borrower"). The charged properties in the name of the borrower herein, do not form part of this auction sale, as the undersigned authorised officer has relinquished the said properties to the liquidator as per the provisions of Section 52(1)(a) of Insolvency and Bankruptcy Code, 2016."

27. Further, as observed earlier, there is no law prohibiting the creditor to take legal action to recover the amount from the guarantors without taking action against the borrower. In fact, the prohibition restraining the secured creditor from enforcing security interest created by the corporate debtor in respect of its property under the provisions of the SARFAESI Act contemplated under Section 14(1)(c) of the IBC, is not applicable to the contract of guarantee of the corporate debtor as per Section 14(3) of the IBC. By Section



14(3), the power of the Bank to proceed against the guarantor under the SARFAESI Act, is not at all affected by the IBC. When the properties of the borrower alone are surrendered to liquidation, there cannot be SARFAESI proceedings against the properties of the guarantors, cannot be countenanced. Thus, at the risk of repetition, we state that the respondent-Bank is entitled to proceed under the SARFAESI Act as against the guarantors' properties, even when the borrower-Company is in liquidation process under the IBC.

28. Further, it is clear that in the above extracted Notification of E-auction sale notice itself, it is stated that the charged properties in the name of the borrower do not form part of the auction sale. Further, we reiterate that when the personal properties of the guarantors stand outside the scope of liquidation, as stated earlier, there is no impediment to proceed against the personal properties of the guarantor.

29. The liability of a guarantor arises as soon as the principal debtor defaults in paying back the loan. It is to be noted that a contract of guarantee focusses upon the breaking of a promise, whereas the IBC focusses upon the existence of a default. Contrary to the proceedings under the IBC which can only be conducted in NCLT, a breach of guarantee contract can be brought into DRT, that too when 'public money' is involved. The rights available to a creditor to proceed against the personal guarantor of a corporate debtor are many-fold, i.e. he can either go to DRT solely for the purpose of debt recovery, or he can file insolvency proceedings against the personal debtor. Therefore, we find no error in proceeding against the personal properties of the petitioners/guarantors under the SARFAESI Act, even though the liquidation process is going on in respect of the properties of the corporate debtor/borrower Company. Therefore, the contention of the petitioners that the secured creditor of the corporate debtor has to wait to initiate proceedings under the SARFAESI Act against the personal guarantors till the liquidation process is over, is unsustainable and not supported by any of the provisions of the IBC.

30. Hence, the question framed in these Writ Petitions is answered in the above terms. The Writ Petitions are liable to be dismissed. Accordingly, the Writ Petitions are dismissed. No costs. Consequently, Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

Sub Assistant Registrar

cs/rsb



To
The Authorised Officer,
State Bank of India,
Stressed Assets Management Branch,
112, Raja Plaza,
Avinashi Road,
Coimbatore-641 037.

4 CC to M/s.B.DHANRAJ, Advocate (SR-50649,50650,50651,50652)
+1 CC to M/s.V.MEENAKSHISUNDARAM, Advocate (SR-50632[F] dated
28/02/2019)

+2 CC to M/s.D.NALLATHAMBI, Advocate (SR-51266[F] dated
04/03/2019)

Order in
W.P.(MD).Nos.19871 to
19874 of 2018

28.02.2019

DS/ /SAR- (22.03.2019) 20P 9C