HIGH COURT OF GUJARAT (*D.B.*)

PRASHANT SHASHI RUIA
Versus
STATE BANK OF INDIA

Date of Decision: 16 December 2021

Citation: 2021 LawSuit(Guj) 4610

Hon'ble Judges: J B Pardiwala, Niral R Mehta

Case Type: Special Civil Application; Civil Application (For Joining Party); Civil Application (For Amendment)

Case No: 11199 of 2019, 11716 of 2019, 11713 of 2019, 11985 of 2019, 11715 of 2019, 19901 of 2019; 1 of 2021; 1 of 2019

Subject: Civil, Constitution, Contract, Direct Taxation

Acts Referred:
Constitution Of India Art 227, Art 226
Income Tax Act, 1961 Sec 281
Contract Act, 1872 Sec 140, Sec 126, Sec 133, Sec 141, Sec 134, Sec 136, Sec 135, Sec 128
Insolvency And Bankruptcy Code, 2016 Sec 1(3), Sec 7, Sec 30(6), Sec 31(1), Sec 31
Recovery Of Debts And Bankruptcy Act, 1993 Sec 19, Sec 2(g), Sec 17

Final Decision: Application disposed

Advocates: Mihir Thakore, Mihir Joshi, Keyur Gandhi, Raheel Patel, Nanavati Associates, Navin Pahwa, Shardul Amarchand Mangaldas And Co, Rashesh Sanjanwala, Nirag N Pathak, Aditya J Pandya, Vishwas K Shah, Kuldeep K Adesara, K M Parikh, Anip A Gandhi

Cases Referred in (+): 47

J.B.Pardiwala, J.

[1] Since the issues raised in all the captioned writ applications are the same, those were taken up for hearing analogously and are being disposed of by this common judgement and order.

[2] For the sake of convenience, the writ application being the Special Civil Application No.11199 of 2019 is treated as the lead matter.

[3] By this writ application under Article 226 of the Constitution of India, the writ applicants have prayed for the following reliefs:

> "(A) That this Hon'ble Court may be pleased to issue a writ of prohibition and / or an appropriate writ, order and / or direction, directing the Respondent No.2 to not proceed with the final hearing and adjudication of Original Application No.648 of 2018, till such time that the Resolution Plan is finally approved / confirmed by the Appellate Authorities under the provisions of the Insolvency and Bankruptcy Code, 2016.
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> (B) Pending hearing and final disposal of the present petition, this Hon'ble Court may be pleased to direct the Respondent No.2 to adjourn the scheduled hearings of Original Application No.648 of 2018 pending before the Respondent No.2;
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> (C) Ex-parte ad interim relief in terms of prayer (B) above may be granted;
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> (D) Such other and further reliefs as deemed just and expedient may be granted."

[4] The writ applicants are the promoters of one ESSAR Steel India Limited. The writ applicants executed personal guarantee(s) towards the various credit facilities availed by the principal borrower i.e. the company namely ESSAR Steel India Limited.

[5] The respondent No.1 herein is one of the largest Public Sector Banks in the country and is the lead lender of the principal borrower.

[6] It appears from the materials on record that pursuant to an application preferred by the respondent No.1 - Bank under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short, "the Code, 2016"), the National Company Law Tribunal, Ahmedabad Bench (for short, "the NCLT") initiated the Corporate Insolvency Resolution Process (for short, the "CIRP") under the provisions of the Code vide an order dated 2nd August 2017.

[7] During the pendency of the CIRP against the principal borrower, the respondent No.1 - Bank submitted its Claim Form as prescribed in the provisions of the Code before the Insolvency Resolution Professional of the Principal Borrower.

[8] It is not in dispute that the Committee of Creditors of the principal borrower (COC) constituted under the provisions of the Code accepted with requisite majority the resolution plan of M/s. ArcelorMittal India Private Limited for the revival and resolution

of the principal borrower. The financial package offered by the ArcelorMittal to the lender including the respondent No.1 is to the tune of Rs.42,000 Crore.

[9] In accordance with the provisions of the Code, the Resolution Professional (RP) preferred an application under Section 30(6) of the Code being the Interlocutory Application No.431 of 2018 for the approval of the resolution plan of ArcelorMittal by the NCLT.

[10] The resolution plan of ArcelorMittal was approved by the NCLT vide its order dated 8th March 2019. The I.A. No.431 of 2018 came to be conditionally allowed. We quote para 28 of the order passed by the NCLT as under:

> "28. In the light of the above stated discussions, present I.A. No.431 of 2018 is conditionally allowed. The Resolution Plan submitted by ArcelorMittal India Pvt. Ltd. being H-1, is approved, as per Section 31(1) of the I&B Code, subject to the aforesaid observations and conditions and with the following statutory directions under Section 31(3) of the I&B Code:-
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> (a) that the moratorium order passed by the Adjudicating Authority under Section 14 of the I&B Code shall cease to have effect; and
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> (b) that the Resolution Professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be record in its database."

[11] It appears that the aforesaid order passed by the NCLT dated 8th March 2019 came to be challenged by way of separate appeals filed by the various stakeholders such as the Standard Chartered Bank, Operational Creditors of ESIL, etc., before the National Company Law Appellate Tribunal, New Delhi. It further appears that the writ applicant No.1 herein also challenged the order dated 8th March 2019 passed by the NCLT before the Appellate Tribunal. We quote the relevant observations made by the Appellate Tribunal as regards the appeal filed by the writ applicant No.1 herein is concerned:

> "27. The issue of eligibility of 'ArcelorMittal India Pvt. Ltd.' has been adjudicated upon after considering all the arguments by the Hon'ble Supreme Court and could not be re-opened before the Appellate Authority at a stage where the 'Resolution Plan' approval is being considered by this Appellate Authority on grounds other than Section 29A ineligibility.
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> 28. The present appeal is also barred by delay and laches as the facts stated above, were within the knowledge of Promoters and Shareholders of 'Essar Steel

Asia Holdings Limited', since the application filed the 'Resolution Professional' of 'GPI Textiles' was admittedly filed on the basis of the letter dated 15 th October, 2018 issued by 'Numetal Limited'. Further, the present Applicant was a party to the proceedings before the Adjudicating Authority when the application was filed by the 'Resolution Professional' of 'GPI Textiles' and subsequently withdrawn. Hence, the said application suffers from an ex-facie inordinate delay of 6-7 months from the judgment of the Hon'ble Supreme Court. Therefore, the present application which is clearly barred by delays and laches has been filed to sabotage the 'Resolution Process'.

29. Apart from the aforesaid facts, we find that the 'Resolution Plan' was considered by the Adjudicating Authority in view of the decision and directions of the Hon'ble Supreme Court under Article 142 of the Constitution of India in "Arcelormittal India Private Limited" (Supra). Hence, at this stage, we are not inclined to re-open the question of eligibility or ineligibility of 'ArcelorMittal India Pvt. Ltd.', which stands closed in view of the decision and directions of the Hon'ble Supreme Court.

30. So far as the Appellant Mr. Prashant Ruia's right of subrogration under Section 140 of the Contract Act and right to be indemnified under Section 145 of the said Act is concerned, the question of exercising such right does not arise in the present case.

31. The Appellant - Mr. Prashant Ruia has executed a 'Deed of Guarantee' between the lenders and the 'Corporate Debtor'. Such guarantee is with regard to clearance of debt. Once the debt payable by the 'Corporate Debtor' stands cleared in view of the approval of the plan by making payment in favour of the lenders ('Financial Creditors), the effect of 'Deed of Guarantee' comes to an end as the debt stands paid. The guarantee having become ineffective in view of payment of debt by way of resolution to the original lenders ('Financial Creditors), the question of right of subrogation of the Appellant's right under Section 140 of the Contract Act and the right to be indemnified under Section 145 of the Contract Act does not arise.

32. We find no merit in this appeal preferred by Appellant Mr. Prashant Ruia or submissions made on behalf of Intervenor - Essar Steel Asia Holdings Limited'. It is accordingly dismissed. No costs."

[12] The litigation, ultimately, reached to the Supreme Court. Various Civil Appeals and Writ Petitions were filed before the Supreme Court and those came to be disposed of vide judgement and order dated 15th November 2019. The judgement is reported titled as the **Committee of Creditors of ESSAR Steel India Limited through**

Authorised Signatory vs. Satish Kumar Gupta and others,2019 SCCOnline1478. The first paragraph of the judgement would give an idea about the questions that were raised before the Supreme Court:

> "This group of appeals and writ petitions raises important questions as to the role of resolution applicants, resolution professionals, the Committee of Creditors that are constituted under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code"), and last, but by no means the least, the jurisdiction of the National Company Law Tribunal (hereinafter referred to as "NCLT"/"Adjudicating Authority") and the National Company Law Appellate Tribunal (hereinafter referred to as "NCLAT" / "Appellate Tribunal"), qua resolution plans that have been approved by the Committee of Creditors. The constitutional validity of Sections 4 and 6 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 (hereinafter referred to as the "Amending Act of 2019") have also been challenged. These appeals and writ petitions are an aftermath of this Court's judgment dated 04.10.2018, reported as ArcelorMittal India Private Limited v. Satish Kumar Gupta, 2019 2 SCC 1."

[13] As regards the extinguishment of personal guarantees and undecided claims, the Supreme Court observed the following from paras 63 to 67 as under:

> "63. Shri Gopal Subramanium and Shri Rakesh Dwivedi have also appealed against the extinguishment of the rights of creditors against guarantees that were extended by the promoters/promoter group of the corporate debtor. According to them, this was done by a side wind by the Appellate Tribunal without any reasons for the same.
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> 64. Shri Prashant Ruia a promoter/director of the corporate debtor in his personal guarantee dated 28.09.2013, specifically stated as follows:
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> "7. The obligations of the Guarantor under this Guarantee shall not be affected by any act, omission, matter or thing that, but for this Guarantee, would reduce, release or prejudice any of its obligations under this Guarantee (without limitation and whether or not known to it or any Secured Party) including :
>
> xxx xxx xxx
>
> (g) any insolvency or similar proceedings."
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> Also, under the caption "terms of settlement", the final resolution plan dated 02.04.2018, as approved on 23.10.2018, specifically provided:
>
> "Financial Creditors:

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

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

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

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

Issue such letters and communications, and take such other actions, as may be required or deemed necessary for the release, assignment or novation of (i) the Encumbrance over the assets of the Corporate Debtor; and (ii) the pledge over the shares of the Corporate Debtor; within 5(five) Business Days from the Effective Date; and

Be deemed to have waived all claims and dues (including interest and penalty, if any) from the Corporate Debtor arising on and from the insolvency Commencement Date, until the effective Date."

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

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

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

(emphasis supplied)

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

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

"22. Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, Under Section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above,

require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the Respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him."

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

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

[14] Thus, the Supreme Court, while holding that the NCLT judgement was quite contrary to Section 31(1) of the Code, refrained from saying anything as regards the invocation of the guarantees in view of the pending litigation.

[15] Upon the Resolution Plan, ultimately, attaining finality; the entire debt of the principal borrower (ESIL) came to be assigned to ArcelorMittal.

[16] The respondent No.2 herein, thereafter, preferred an application under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 (for short, "the RDB Act, 1993") against the writ applicants herein in their capacity as the guarantors, which came to be

registered as the original application No.648 of 2018. The following reliefs have been prayed for by the Bank:

"(i) Defendant No.1 be ordered and decreed to pay to the Applicant the following sums, as on the date as mentioned below, along with interest, default, interest, premia, cost, charges, etc. until payment / realisation in terms of the particulars of claim mentioned hereinabove, with applicable interest thereon till payment and/or realisation:

Principal Amount as on 2 August, 2017 : Rs. 200,00,00,000 (Rupess Two Hundred Crores).

Interest Amount and other charges as on 30 June, 2018: Rs.73,36,49,623.59 (Rupees Seventy Three Crores Thirty Six Lakhs Forty Nine Thousand Six Hundred and Twenty Three and Fifty Nine Paise).

(ii) Defendant No. 2 be ordered and decreed to pay to the Applicant the following sums, as on the date as mentioned below, along with interest, default, interest, premia, cost, charges etc. until payment/realisation in terms of the particulars "of claim mentioned hereinabove, with applicable interest thereon till payment and/or realisation: Principal Amount as on 2 August, 2017: Rs.200,00,00,000 (Rupees Two Hundred Crores).

Interest Amount and other charges as on 30 June, 2018: Ks. 73,36,49,623.59 (Rupees Seventy Three Crores Thirty Six Lakhs Forty. Nine Thousand Six Hundred and Twenty Three and Fifty Nine Paise).

(iii) That Recovery Certificate be issued by this Hon'ble Tribunal in favour of the Applicants as against the Defendant No. 1 to pay the Applicant, the amounts as mentioned in above paragraph 6 (i) till payment and/or realization;

(iv) That Recovery Certificate be issued by this Hon'ble Tribunal in favour of the Applicants as against the Defendant No.2 to pay the Applicant, the amounts as mentioned in above paragraph 6 (ii) till payment and/or realization;

(v) That the Defendant No.1 and 2 be directed to disclose on oath, the properties and assets, both movables and immovables, including intangible properties, belonging to the Defendants within 4 weeks from the date of the order of disclosure by this Hon'ble Tribunal or within such period as this Hon'ble Tribunal may deem fit and proper;

(vi) That upon the relief in terms of prayer (iii) above being granted, this Hon'ble Tribunal be pleased to appoint a Receiver to take possession and control of the

assets so disclosed, with all powers under the provisions of RDB Act as well as under Order XL Rule 1 of the Civil Procedure Code, 1908 including power to take possession thereof and if required, to take forcible possession of the said properties from the Defendant No.1 and Defendant No.2 by breaking upon the locks, taking physical possession / occupation and if necessary with the help of police, to take inventory thereof and to sell the same by public auctin or by private treaty and the net sale proceeds thereof be ordered to be paid over to the applicant towards satisfaction of its claim in the original application;

(vii) that all receivables and realization of such securities be paid over to the Applicant towards satisfaction of all its dues claimed herein:

(viii) that the Hon'ble Tribunal may be pleased to allow the Applicant to make publication in relation to the filing of the present Application, and the grant of any reliefs herein;

(ix) for all necessary orders, directions to secure full and effective reliefs to the Applicant as sought herein;

(x) for costs of this Original Application; and

(xi) for such further and other reliefs as the nature and circumstances of the case may require.

7. **REASONS FOR RELIEF SOUGHT:**

(i) The applicant submits that it has to recover a debt of following amounts from the Defendant No.1 as on with further interest thereon till its relialization:

Principal Amount as on 2 August, 2017 : Rs.200,00,00,000 (Rupees Two Hundred Crores).

Interest amount and other charges as on 30 June, 2018 : Rs.73,36,49,623.59 (Rupees Seventy Three Crores Thirty Six Lakhs Forty Nine Thousand Six Hundred and Twenty Three and Fifty Nine Paise).

(ii) The applicant submits that it has to recover a debt of following amounts from the Defendant No.2 as on with further interest thereon till its reliazation:

Principal Amount as on 2 August, 2017 : Rs.200,00,00,000 (Rupees Two Hundred Crores).

Interest Amount and other charges as on 30 June, 2018: Rs.73,36,49,623.59 (Rupees Seventy Three Crores Thirty Six Lakhs Forty Nine Thousand Six Hundred

and Twenty Three and Fifty Nine Paise).

(iii) The Applicant verily believes that Defendants may dispose-off their properties to avoid satisfaction of the Applicant's claim herein. Hence, grave harm and 'prejudice would be caused to the Applicant if orders in terms of prayer in paragraph 6 are not allowed. The Applicant has an excellent prima facie case and the balance of convenience is in favor of the Applicant.

(iv) The Application being an Application by a financial: institution to recover a large sum to the tune of over Rupees 273,36,49,623.59 (Rupees Two Hundred Seventy Three Crores Thirty Six Lakhs Forty Nine Thousand Six Hundred and Twenty Three and Fifty Nine Paise), a Receiver/Commissioner should be appointed as a matter of course.

(v) The present Application has been filed after due deliberation and mature consideration of the need for appointment of Receiver/ Commissioner as public money and funds are at risk and that in the instant case, public interest is required to be protected and that would only be done by appointing a Receiver/Commissioner of the properties in question.

(vi) The applicant submits that there is an overwhelming case for appointment of Receiver / Commissioner in respect of the properties of the Defendants.

(vii) There is no dispute regarding the indebtedness of the Defendants and/or its liability to pay to the Applicant. The Applicant has therefore an excellent chance of succeeding in the Original Application.

8. **INTERIM RELIEFS:**

(i) that pending hearing and final disposal of the application, the Defendant No.1 be directed to forthwith deposit, with the applicant, the following amount that is outstanding under the Personal Guarantees, as applicable to Defendant No.1:

Principal Amount as on 2 August, 2017 : Rs.200,00,00,000 (Rupees Two Hundred Crores)

Interest amount and other chargers as on 30 June, 2018 : Rs.73,36,49,623.59 (Rupees Seventy Three Crores Thirty Six Lakhs Forty Nine Thousand Six Hundred and Twenty Three and Fifty Nine Paise)

(ii) that pending hearing and final disposal of the application, the Defendant No.2 be directed to forthwith deposit, with the applicant, the following amounts that is outstanding under the Personal Guarantees, as applicable to Defendant No.2:

Principal Amount as on 2 August, 2017 : Rs.200,00,00,000 (Rupees Two Hundred Crores)

Interest amount and other charges as on 30 June, 2018: Rs.73,36,49,623.59 (Rupees Seventy Three Crores Thirty Six Lakhs Forty Nine Thousand Six Hundred and Twenty Three and Fifty Nine Paise)

(iii) that pending the hearing and final disposal of the Original Application, Receiver/Commissioner be appointed as Receiver of the immovable and movable (including intangible) properties of the Defendants with all powers under the provisions of Recovery of Debts Due to Bank and Financial Institution Act, 1993, as amended, including under Order XL Rule 1 of the Civil Procedure Code, 1908 including power to take possession thereof and if required, to take forcible possession of the said properties from the Defendant No. 1 and Defendant No. 2 by breaking open the locks, taking physical possession/occupation and if necessary with the help of police. to take inventory thereof and to sell the same by public auction or by private treaty and the net sale proceeds thereof be ordered to be paid over to the Applicant towards satisfaction of its claim in the Original Application;

(iv) That pending the hearing and final disposal of the Original Application, each of the Defendants be ordered to furnish further securities of the Applicant's claim with interest within such time as this Hon'ble Tribunal may direct,

(v) That till such securities in terms of prayer (b) above is furnished by the Defendants, this Hon'ble Tribunal be pleased to issue the Warrant of Attachment before Judgment under Order XXXVIII of the Code of Civil Procedure, 1908 attaching the properties of the Defendants including those properties that may be disclosed by the Defendants;

(vi) That pending the hearing and final disposal of the Original Application, the Defendants, by themselves, their servants, officers and agents be restrained by an order and injunction of this Hon'ble Tribunal from in any manner disposing of, selling, transferring, alienating, encumbering, parting with possession of creating third party right, title interest and claim of any nature whatsoever in the immovable and movable (including intangible) properties of the Defendants;

(vii) That pending the hearing and final disposal of the Original Application, the Defendants be directed to disclose on oath, the properties and assets, both movables and immovables, including intangible assets, belonging to Defendants, within such time as may be fixed by this Hon'ble Tribunal and upon such disclosure Defendants, by themselves, their servants or agents be restrained by an order and injunction of this Hon'ble Tribunal from in any manner disposing off, selling,

transferring, alienating, encumbering, parting with possession, creating third party right, title interest and claim of any nature whatsoever in their immovable and movable properties;

(viii) That pending hearing and final disposal of the Original Application, the Defendants be restrained from leaving the country;

(ix) That pending hearing and final disposal of the Original Application, each of the Defendants be directed to deposit their passports with this Hon'ble Tribunal;

(x) That pending hearing and final disposal of the Original Application, each of the defendants be required to submit their respective taxation, Permanent Account Number, and details related to any or all bank accounts, held by them or their affiliates with any banking company or financial institution.

(xi) for ad-interim reliefs in terms of prayers (a) to (i) above;

(xi) for costs of this Application, and

(xii) for such other and further reliefs as the nature and circumstances of the case may require.

REASONS FOR INTERIM RELIEFS:

The Applicant submits that on following amongst other grounds, it is not only convenient but slso absolutely just and necessary that the interim/ad-interim reliefs/orders as prayed for hereinabove, be granted to the Applicant. It is submitted that if the interim reliefs as prayed for by the Applicant is not granted, grave and irreparable harm, loss, injury and prejudice would be caused to the Applicant:

(i) The Defendant No.1 is liable to pay to the Applicant, amounts in excess of Rs. 273,36,49,623.59361 (Rupees Two Hundred Seventy Three Crores Thirty Six Lakhs Forty Nine Thousand Six Hundred and Twenty Three and Fifty Nine Thousand Three Hundred and Sixty One Paise), which he has failed and neglected to pay to the Applicant, and the Defendant No. 2 is liable to pay to the Applicant, amounts in excess of 'Rs. 273,36,49,623.59361 (Rupees Two Hundred Seventy Three Crores Thirty Six Lakhs Forty Nine Thousand Six Hundred and Twenty Three and Fifty Nine Thousand Three Hundred and Sixty One Paise), which he has failed and neglected to pay to the Applicant. The liabilities of Defendants are likely to exceed his current TR assets or expected realization of assets.

(ii) The Applicant further apprehends that Defendants in order to defeat and:/or delay the execution of the Recovery Certificate that may be passed by this Hon'ble Tribunal in this Original Application, may attempt to dispose of or create third party rights over their properties. It is therefore essential for appointment of Receiver over their properties with a direction to make on, inventory of the said properties. It is also essential that the Defendants either through their servants or agents be restrained by an order and injunction as sought for herein;

(iii) The applicant is a bank and a huge amount as set out hereinabove is due and payable by the Defendants to the applicant. Public money is at risk and in the instant case public interest is required to be protected. If the reliefs sought by the applicant are not granted, the same would cause grave prejudice, irreparable loss, injury and hardship to the Applicant, its depositors and other stakeholders. The Applicant being the custodian of public money, its interest are required to be protected by this Hon'ble Tribunal and any delay in granting the reliefs would adversely impact the interest of the public. Hence, public interest demands that the reliefs as prayed for by the Applicant are granted.

(iv) The Applicant submits that, in the present case, where there are no valid disputes in respect of the liability of Defendants to pay to the Applicant, it is just and in the interest of justice that the reliefs as prayed for by the Applicant be granted.

(v) The Applicant apprehends that Defendants are likely to attempt to leave the country to evade the jurisdiction of this Hon'ble Tribunal, and payment of the amounts claimed by the Applicant.

(vi) The Applicant has an excellent chance of succeeding on merits, since Defendants have no tenable defense.

(vii) It is just and in the interest of justice that the reliefs as prayed for by the Applicant be granted.

(viii) The Applicant submits that if the orders, as prayed for are not granted grave harm and irreparable loss, prejudice and injury would be caused to the Applicant. The balance of convenience is entirely in favour of the Applicant."

[17] It is the aforesaid action on the part of the respondent No.2 - Bank in filing the Section 19 application before the Debts Recovery Tribunal that has given rise to the present litigation before us.

[18] The writ applicants have come before this Court saying that the proceedings initiated by the respondent No.2 - Bank before the Debts Recovery Tribunal are not maintainable as the Tribunal has no jurisdiction to proceed against the writ applicants in their capacity as guarantors in view of the fact that the entire debt of the Bank came to be assigned to the ArcelorMittal and with such assignment, the personal guarantees furnished by the writ applicants now cannot be enforced by the Bank. In other words, as no debt exists on the books of account of the Bank, the personal guarantees cannot be enforced. In such circumstances, by this writ application, the writ applicants seek for a writ of prohibition against the Debts Recovery Tribunal from proceedings further with the original application filed by the Bank under Section 19 of the RDB Act, 1993.

- **SUBMISSIONS ON BEHALF OF THE WRIT APPLICANTS:**

[19] Mr. Mihir Thakore and Mr. Mihir Joshi, the two learned Senior Counsel appearing for the writ applicants submitted that the resolution plan being confirmed and implemented has a direct impact on the proceedings initiated by the Bank before the Tribunal inasmuch as the Bank is seeking to recover from the writ applicants the amount due and payable by the Principal borrower i.e. ESIL. The principal and the only argument canvassed before us by both the learned Senior Counsel is that as the entire debt of the principal borrower came to be assigned to the Arcellor Mittal, no debt could be said to be due on the books of account of the Bank. In other words, the argument is that no debt exists as on date so far as the respondent No.2 - Bank is concerned. To put it succinctly, the argument is that the entire debt owed by the principal borrower to the Bank stood completely extinguished in light of the resolution plan. In the absence of any debt remaining to be paid to the Bank, the question of enforcing the personal guarantees in relation thereto would not survive.

[20] It was argued before us that there is a fine distinction between the "assignment of debt" and "discharge or payment of debt". By way of illustration, it was sought to be explained to us that had it been a case of some adjustment of the amount and pursuant to such adjustment, if there would have been some payment, then, it could not be said that the debt stood assigned. According to the learned Senior Counsel, the case on hand is not one of discharge of debt or part payment of the debt, but the same is one of assignment of debt.

[21] Mr. Thakore and Mr. Joshi brought to our notice a Full Bench decision rendered by the High Court of Australia in the case of **Hutchens v. Deauville Investments Pty Ltd** reported in **68 Australian Law Reports 367** and relying on the same, it was argued that it is preposterous to suggest that the liability of the writ applicants as guarantors could be transformed into an independent liability to a different creditor from the creditor to whom the guaranteed debt remained owing. Such suggestion

would seem to lie ill with the basic principle that the debt owed by a guarantor, upon default by the principal borrower, is and remains the same debt as that owing by the principal debtor. To put it succinctly, it would seem to simply impossible, according to both the learned Senior Counsel, as a matter of basic principle, to assign the benefit of a guarantee or the security for it, (as distinct from the property secured) while retaining the benefit of the guaranteed debt and thereby to convert the one debt owing by both i.e. the principal debtor and guarantor to the one creditor into two debts, one owing by the principal debtor to the creditor and the other owing by the guarantor to the assignee.

[22] To make the above more explicit clear, a chart was provided to us to understand the transactions under the Resolution Plan. We quote it as under:

"CHART OF TRANSACTIONS UNDER THE RESOLUTION PLAN

I. 1st Stage

Essar Steel India Limited (Liability)	Outstanding Loan ----------→ INR 45,000 (approx)	Banks / Financial Creditors (Assets)

Supported by Guarantees (security given by :
(1) Prashant Ruia
(2) Ravi Ruia of an amount of INR 10,000 Crores (approx.)

Therefore at this stage, the Banks / Financial Creditors can recover from ESSAR Steel India Limited and the Guarantors upto INR 10,000 Crores – the debt recoverable is one only.

II. 2nd Stage – Assignment under the Resolution Plan

Banks/Financial Creditors	Assigns / Sells the Loan Asset ----------→ INR 45,000 (approx)	ArcelorMittal India Private Limited

Assignment of Loan Assignment is with all underlying securities, excluding Personal Guarantees (security) by Guarantors.

III. **3rd Stage – Banks seek to enforce the Guarantees.**

(i) ArcelorMittal India Private Limited can recover the total amount of INR 45,000 (approx.) from Essar Steel India Limited; and

(ii) Banks/ Financial Creditors propose to recover INR 10,000 Crores from the Guarantees.

Therefore, for the same debt of INR 45,000 Crores, as total recovery of INR 55,000 Crores is proposed to be effected.

(iii) The Banks has no dues recoverable from ESSAR Steel India Limited not because of a compromise but because the Loan Asset is transferred to ArcelorMital India Private Limited.

(iv) When the loan asset is not existing in the books of the Banks at all, no portion of the Loan Asset can be recovered by the Banks from any one, Essar Steel India Limited and/or its Guarantees."

[23] In the aforesaid context, our attention was invited to the decision of the Supreme Court in the case of ICICI Bank Limited vs. Official Liquidator of APS Star Industries Limited, 2010 10 SCC 1, wherein the Supreme Court observed as under:

"46. **As stated above, an outstanding in the account of a borrower(s) (customer) is a debt due and payable by the borrower(s) to the bank. Secondly, the bank is the owner of such debt. Such debt is an asset in the hands of the bank as a secured creditor or mortgagee or hypothecatee. The bank can always transfer its asset. Such transfer in no manner affects any right or interest of the borrower(s) (customer). Further, there is no prohibition in the BR Act, 1949 in the bank transferring its assets inter se. Even in the matter of assigning debts, it cannot be said that the banks are trading in debts, as held by the High Court(s). The assignor bank has never purchased the debt(s). It has advanced loans against security as part of its banking business. The account of a client in the books of the bank becomes Non Performing Asset when the client fails to repay. In assigning the debts with underlying security, the bank is only transferring its asset and is not acquiring any rights of its client(s). The bank transfers its asset for a particular agreed price and is no longer entitled to recover anything from the borrower(s). The moment ICICI Bank Ltd. transfers the debt with underlying security, the borrower(s) ceases to be the borrower(s) of the ICICI Bank Ltd. and becomes the borrower(s) of Kotak Mahindra Bank Ltd. (assignee).**

47. At this stage, we wish to once again emphasize that debts are assets of the assignor bank. The High Court(s) has erred in not appreciating that the assignor bank is only transferring its rights under a contract and its own asset, namely, the debt as also the mortgagee's rights in the mortgaged properties without in any manner affecting the rights of the borrower(s)/mortgagor(s) in the contract or in the assets. None of the clauses of the impugned Deed of Assignment transfers any obligations of the assignor towards the assignee.

48. In the case of Khardah Company Ltd. v. Raymon & Co. (India) Private Ltd., 1963 3 SCR 183 the Supreme Court has held that the law on the subject of assignment of a contract is well settled. An assignment of a contract might result by transfer either of the rights or by transfer of obligations thereunder. There is a well recognized distinction between the two classes of assignments. As a rule, obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. That, rights under a contract are always assignable unless the contract is personal in its nature or unless the rights are incapable of assignment, either under the law or under an agreement between the parties. A benefit under the contract can always be assigned. That, there is, in law, a clear distinction between assignment of rights under a contract by a party who has performed his obligation thereunder and an assignment of a claim for compensation which one party has against the other for breach of contract.

49. In the case of Camdex International Ltd. v. Bank of Zambia, 1998 QB 22(CA) the following observation which is relevant to the present case needs to be quoted:

"The assignment of a debt will not be contrary to public policy solely on the grounds that the assignee has purchased the debt for a considerably discounted price or because that price is only payable after a period of credit. Nor will the assignment be contrary to public policy simply because the assignee may make a profit on the transaction at the end of the day. If there was no prospect of a profit, Hobhouse LJ observed, commercial entities would never purchase debts."

50. Similarly, the following proposition in Chitty on Contracts, 27th edn. (1994) at para 19.027 is relevant to be noted.

"It is also well established that a claim to a simple debt is assignable even if the debtor has refused to pay. The practice of assigning or 'selling' debts to debt collecting agencies and credit factors could hardly be carried on if the law were otherwise. "

51. In view of the above exposition of law, we find that under the impugned Deed of Assignment only the Account Receivables in the books of ICICI Bank Ltd. has been transferred to Kotak Mahindra Bank Ltd. The obligations of ICICI Bank Ltd. towards its borrower(s) (customer) under the loan agreement secured by deed of hypothecation/mortgage have not been assigned by ICICI Bank Ltd. to the assignee bank, namely, Kotak Mahindra Bank Ltd. Hence, it cannot be said that the impugned Deed of Assignment is unsustainable in law. The obligations referred to in the impugned Deed of Assignment are the obligations, if any, of ICICI Bank Ltd. towards Kotak Mahindra Bank Ltd. (assignee) in the matter of transfer of NPAs. For example, when an Account Receivable is treated as NPA and assigned to the assignee bank, the parties have to follow certain Guidelines issued by RBI. If there is a breach of the Guidelines or statutory directions issued by RBI by Assignor in regard to transfer of NPA then the assignee bank can enforce such obligations vis-'-vis the assignor bank. It is these obligations which are referred to in the impugned Deed of Assignment. That, an Account Receivable becomes an NPA only because of the default committed by the borrower(s) who fails to repay. Lastly, it may be mentioned that the said SARFAESI Act, 2002 was enacted enabling specified SPVs to buy the NPAs from banks. However, from that it does not follow that banks inter se cannot transfer their own assets. Hence the said SARFAESI Act, 2002 has no relevance in this case."

[24] By placing strong reliance on the aforesaid observations, it is argued that the moment the State Bank transferred the debt, the principal borrower ceased to be the borrower of the State Bank and became the borrower of the assignee i.e. the Arcellor Mittal.

[25] Our attention was, thereafter, invited to the provisions of the RDB Act, 1993, more particularly, the definition of the term "debt" as defined under Section 2(g) of the RDB Act, 1993. The same reads thus:

"2. Definitions.- In this Act, unless the context otherwise requires, -

(g) **"debt"** means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application [and includes any liability towards debt securities which remains unpaid in full or part after notice of ninety days served upon the borrower

by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of debt securities or;]"

[26] Thereafter, our attention was drawn to Section 17 of the Act, which is with respect to the jurisdiction, powers and authority of the Tribunals. Reading Section 17, it was argued that the Tribunal can exercise jurisdiction only for recovery of debts due to the Banks and financial institutions, but if there is no existing debt, then there is no question of any recovery. Our attention was also drawn to Section 19 of the Act, 1993. It provides for filing of the application to the Tribunal. Again, it was sought to be argued that if any Bank or a financial institution has to recover any debt, it may make an application, but since there is no debt in the present case, as the same came to be assigned to the Arcellor Mittal, the application under Section 19 itself is not maintainable.

[27] Both the learned Senior Counsel vehemently argued that this is a fit case in which this Court should issue a writ of prohibition to the Tribunal not to proceed further with the original application as the Tribunal has no jurisdiction to adjudicate such application in the absence of any debt.

[28] The following case law has been relied upon to make good the case for issue of a writ of prohibition to the Tribunal:

1	**Bengal Immunity Co. Ltd v. State of Bihar and others**	AIR 1955 SC 661
2	**Sri Lakshmindra Theertha Swamiar of Shri Shirur Mutt and another vs. The Commissioner, Hindu Religious Endowments, Madras and others**	AIR 1952 Madras 613
3	**Gouri Shankar Jain vs. Punjab National Bank another**	2019 SCC Online Cal 7288 : AIR Cal 90
4	**Calcutta Discount Co. Ltd vs. Income Tax Officer, Companies District I, Calcutta and another**	AIR 1961 SC 372
5	**Shantaram D. Salvi vs. M. M. Chudasama and others**	AIR 1954 Bombay 361
6	**HUTCHENS V. DEAUVILLE INVESTMENTS PTY LTD**	68 Australian Law Reports 367

[29] In such circumstances referred to above, Mr. Thakore and Mr. Joshi prayed that there being merit in their writ applications, those may be allowed and a writ of prohibition be issued to the Tribunal.

- **SUBMISSIONS ON BEHALF OF THE BANK:**

[30] Mr. Navin Pahwa, the learned Senior Counsel assisted by Mr. Vishwas Shah, the learned counsel appearing for the Bank, on the other hand, has vehemently opposed all the writ applications submitting that no case worth the name has been made out for issue of a writ of prohibition. Mr. Pahwa would submit that the case on hand is not one wherein it could be said that there is an inherent lack of jurisdiction in the Tribunal to adjudicate the original application. Mr. Pahwa would argue that the issue as regards jurisdiction can always be raised before the Tribunal and the Tribunal has the power to decide whether it should proceed with the adjudication of the original application or not.

[31] Mr. Pahwa would submit that mere assignment of debt by itself may not absolve the writ applicants of their liabilities as guarantors and the law permits the Bank to enforce the personal guarantees. With the assignment of debt, the Bank may not be in a position to proceed against the principal borrower i.e. the ESIL, but nothing precludes the Bank from proceeding against the guarantors i.e. the writ applicants herein, more particularly, in view of certain clauses of the resolution plan itself.

[32] Mr. Pahwa, in support of his aforesaid submissions, seeks to rely upon a recent pronouncement of the Supreme Court in the case of **Lalit Kumar Jain vs. Union of India and others,2021 SCCOnlineSC 396**, wherein the Supreme Court upheld the provisions of the Code 2016 relating to the insolvency of personal guarantees by way of a Notification under 2019. Mr. Parikh would submit that in the said case, the writ applicants, being the personal guarantors of the corporate debtors, argued before the Supreme Court that since the liability of the guarantor is co-extensive with the corporate debtors, once a resolution plain is approved by the Committee of Creditors (COC) of a corporate debtor, the guarantors along with the corporate debtors stand discharged of the liability towards the creditors. It was argued before the Supreme Court that in such circumstances, the Creditors cannot proceed against them separately. Mr. Pahwa would submit that the Supreme Court negatived such argument holding that the liability of the guarantors subsisted against the creditors and an approved resolution plan can only lead to a "revision of amount or exposure for the entire amount". Mr. Pahwa submitted that the Supreme Court also rejected the argument as regards the discharge of surety upon variance in the terms of the contract under Section 131 of the Contract Act, 1972 by relying on its earlier decision in the case of State Bank of India vs. V. Ramakrishnan and others, 2018 17 SCC 394, wherein the Supreme Court had clarified that Section 31 of the Code made it clear that an approved resolution plan was binding on a guarantor specifically to avoid any attempt to escape liability under the provisions of the Contract Act.

[33] Mr. Pahwa submitted that the Supreme Court relied upon the case of the Committee of Creditors of ESSAR Steel India Limited (supra) where it had refused to interfere with the proceedings initiated by the financial creditors to enforce personal guarantees.

[34] Mr. Pahwa would submit that a writ of prohibition can normally be issued only when the Tribunal or inferior Court (a) proceeds to act without or in excess of jurisdiction, (b) proceeds to act in violation of rules of natural justice, (c) proceeds to act under law which is itself ultra vires or unconstitutional, or (d) proceeds to act in contravention of fundamental rights. Mr. Pahwa, placing reliance on the decision of the Supreme Court in the case of Thirumala Tirupati Devasthanams and another vs. Thallappaka Ananthacharyulu and others, 2003 8 SCC 134, would argue that the principles, which govern the exercise of such power has got to be strictly observed. A writ of prohibition must be issued only in the rarest of rare cases and not on mere asking.

[35] Mr. Pahwa seeks to rely on the observations made in para 14 of the said judgement, which reads thus:

> "14. On the basis of the authorities it is clear that the Supreme Court and the High Courts have power to issue writs, including a writ of prohibition. A writ of prohibition is normally issued only when the inferior Court or Tribunal (a) proceeds to act without or in excess of jurisdiction, (b) proceeds to act in violation of rules of natural justice, (c) proceeds to act under law which is itself ultra vires or unconstitutional, or (d) proceeds to act in contravention of fundamental rights. The principles, which govern exercise of such power, must be strictly observed. A writ of prohibition must be issued only in rarest of rare cases. Judicial disciplines of the highest order has to be exercised whilst issuing such writs. It must be remembered that the writ jurisdiction is original jurisdiction distinct from appellate jurisdiction. An appeal cannot be allowed to be disguised in the form of a writ. In other words, this power cannot be allowed to be used "as a cloak of an appeal in disguise". Lax use of such a power would impair the dignity and integrity of the subordinate Court and could also lead to chaotic consequences. It would undermine the confidence of the subordinate Court. It was not even argued that there was total lack of jurisdiction in the civil Court. It could not be denied that the civil Court, before which the suit was pending, had powers to decide on the maintainability of the suit and to decide on questions of its jurisdiction. The civil Court had jurisdiction to decide whether the suit was barred by Section 14 of the said Act or on principles of res judicata/estoppel. Thus unless there was some very cogent or strong reason the High Court should not have prevented the Court of competent jurisdiction from deciding these questions. In other words the High Court should not usurp the

jurisdiction of the civil Court to decide these questions. In the impugned Judgment no reason, much less a cogent or strong reason, has been given as to why the civil Court could not be allowed to decide these questions. The impugned Judgment does not state that the civil Court had either proceeded to act without or in excess of jurisdiction or that it had acted in violation of rules of natural justice or that it had proceeded to act under law which was ultra vires or unconstitutional or proceeded to act in contravention of fundamental rights. The impugned Judgment does not indicate as to why the High Court did not consider it expedient to allow the civil Court to decide on questions of maintainability of the suit or its own jurisdiction. The impugned judgment does not indicate why the civil Court be not allowed to decide whether the suit was barred by virtue of Section 14 of the said Act or on principles of res judicata/estoppel. To be remembered that no fundamental right is being violated when a Court of competent jurisdiction is deciding, rightly or wrongly, matters before it."

[36] Mr. Pahwa would submit that all that the Tribunal has done so far is to issue summons to the writ applicants. No sooner the summons was receive by the writ applicants, then, they came to this Court by filing the writ applications and obtained interim relief getting the proceedings stayed before the Tribunal.

[37] In the last, Mr. Pahwa submitted that the writ applicants may ask the Tribunal to frame a preliminary issue as regards jurisdiction and decide the same considering the materials on record. Mr. Pahwa seeks to rely upon decision of a Coordinate Bench of this Court in the case of **Shirpur Power Pvt Ltd vs. State Bank of India [Special Civil Application No.10476 of 2019 decided on 28th August 2019]**, more particularly, the observations made in para 7.2, which are as under:

"Therefore, prima facie, the Act does not contemplate deciding issues as preliminary issues by the Debts Recovery Tribunal. This is more so considering the object behind the enactment, viz., setting up of Special Tribunals for recovery of dues of the banks and financial institutions by following a summary procedure. The intention of the legislature in enacting the Act is to provide for expeditious adjudication and recovery of debts due to banks and financial institutions; therefore, if all the provisions of the Code are applied to proceedings before the Debts Recovery Tribunal, it would defeat the very object of the enactment. Nonetheless, while ordinarily the Debts Recovery Tribunal should not decide issues as preliminary issues, in the opinion of this court, if the issue raised is one which goes to the root of the matter and strikes at the very jurisdiction of the Tribunal to decide the application, the court is of the view that the Tribunal is not barred from deciding such issue as a preliminary issue merely because section 22 of the Act does not specifically refer to the power to frame and decide preliminary issues.

However, such power should be exercised sparingly, only in cases where the question of the jurisdiction of the Debts Recovery Tribunal to decide the case is involved."

[38] Mr. Pahwa also took us through various clauses of the Resolution Plan including the terms of the personal guarantee to make good his submission that mere assignment of debt by the State Bank of India in favour of the Arcellor Mittal would not absolve the writ applicants of their personal liabilities.

[39] In such circumstances referred to above, Mr. Pahwa prays that there being no merit in the present writ applicants, those may be rejected.

[40] We also heard Mr. Vishwas K. Shah, the learned counsel appearing for the Canara Bank in one of the connected writ applications. Mr. Shah submitted that he would adopt all the arguments canvassed by Mr. Pahwa.

- **ANALYSIS:**

[41] Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether any case for issue of a writ of prohibition has been made out?

- **WRIT OF PROHIBITION:**

[42] Before adverting to the submissions canvassed on either side, it is relevant to extract few judgments of the Supreme Court, as to when a Writ of Prohibition could be issued by the High Courts. A writ of prohibition is issued only when a patent lack of jurisdiction is made out. It is true that a High Court acting under Article 226 is not bound by the technical rules applying to the issuance of prerogative writs like the Certiorari, Prohibition and Mandamus in the United Kingdom, yet the basic principles and norms apply to the writ must be kept in view, as observed by the Supreme Court of India in T. C. Basappa vs. Nagappa, 1954 AIR(SC) 440.

[43] A writ of prohibition and a writ of certiorari are two complementary writs. A writ of certiorari is issued requiring that the record of the proceedings in some cause or matter pending before an inferior Court be transmitted to the superior Court to be dealt with, for rectifying an order of proceeding. A writ of prohibition is issued for preventing a Tribunal from continuing a proceeding pending in it on the ground that it has no jurisdiction to hold the proceeding. A writ of certiorari is remedial where as writ of prohibition is preventive.

[44] In **Short and Mellor's Practice of the Crown Office, 2nd Edition**, a writ of prohibition is explained as being a judicial writ or process issuing out of a Court of

superior jurisdiction, directed to an inferior Court of superior jurisdiction, directed to an inferior Court for the purposes of preventing the inferior Court from usurping a jurisdiction with which ti is not legally invested or to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction.

[45] In M/s. East India Commercial Company Ltd. Calcutta v. Collector of Customs, Calcutta, 1962 AIR(SC) 1893 at 1898 (paragraph 26), following Mackonochie v. Lord Penzance,1881 6 AC 424, it was held by the Supreme Court that a "writ of prohibition is an order directed to an inferior Tribunal forbidding it from continuing with proceeding therein on the ground that the proceeding is without or in excess of jurisdiction or contrary to the laws of the land, statutory or otherwise."

[46] In S. Govindan Menon vs. Union of India, 1967 AIR(SC) 1274, the Supreme Court held that the jurisdiction for grant of **Writ of Prohibition** is primarily supervisory and object of the Writ is to restrain courts or inferior Tribunals from exercising jurisdiction which they do not possess at all or else to prevent them from exceeding the limits of their jurisdiction. In other words, the object is to confine the Court or Tribunals of inferior or limited jurisdiction within their bounds. The **writ of prohibition** lies not only for excess of jurisdiction or for absence of jurisdiction but also in a case of departure from the rules of natural justice. But the Writ does not lie to correct the course, practice or procedure of an inferior Tribunal or a wrong decision on the merits of the proceedings. The writ cannot be issued to a court or an inferior Tribunal for an error of law unless the error makes it go outside its jurisdiction. A clear distinction has therefore, to be maintained between want of jurisdiction and the manner in which it is exercised. If there is want of jurisdiction than the matter is coarum non judice and a **writ of prohibition** will lie to the Court or inferior Tribunal forbidding it to continue proceedings therein in excess of jurisdiction. This view was taken following the decision of Regina Versus Controller General of Patents and Designs, 1953 2 WLR 760.

[47] In A. V. Venkateswaran v. Wadhwani, 1961 AIR(SC) 1506, the Supreme Court while referring to the bar to entertainment of a writ petition in the presence of an alternative remedy existing, laid down:

> " .....The contention of the learned Solicitor-General was that the existence of an alternative remedy was a bar to the entertainment of a petition under Article 226 of the Constitution unless (1) there was a complete lack of jurisdiction in the officer or authority to take the action impugned, or (2) where the order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice and could, therefore, be treated as void or non-est. In all other cases, he submitted, Courts should not entertain petitions under Article 226.....The passages in the Judgments of this Court we have

extracted would indicate (1) that the two exceptions which the learned Solicitor-General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive., and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the relief to the petitioner notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."

[48] Again in Isha Beevi v. Tax Recovery Officer, 1975 AIR(SC) 2135, the Supreme Court while dealing with the existence of alternative remedy and the issue of a writ of prohibition held:

"The existence of an alternate remedy is not generally a bar to the issuance of a writ of prohibition. But in order to substantiate a right to obtain a writ of prohibition from a High Court or the Supreme Court, an applicant has to demonstrate total absence of jurisdiction to proceed on the part of the officer or the authority complained against....."

[49] The Supreme Court in M. V. S. Prasada Rao v. State of A. P., 1985 LabIC 438, while explaining the scope and effect of a writ of prohibition, laid down:

"Writ of prohibition is an order directing the inferior Tribunal or authority forbidding to continue the proceedings on the premise that it is in excess of the jurisdiction or without authority of law. In other words, it is one of supervisory power to keep the authorities within the confines of law or jurisdiction."

[50] In Thirumala Tirupathi Devasthanam and another vs. Thallappaka Ananthacharyulu and another, 2003 8 SCC 134 **at paragraph 14**, the Supreme Court held as follows:

"On the basis of the authorities it is clear' that the Supreme Court and the High Court have power to issue writs, including a writ of prohibition. A writ of prohibition is normally issued only when the inferior. Court or Tribunal (a) proceeds to act' without or in excess of jurisdiction, (b) proceeds to act in violation of rules of natural justice, (c) proceeds to act under law which is itself ultra vires or unconstitutional, or (d) proceeds to act in contravention of fundamental right. The

principal which govern exercise of such power must be strictly observed. A Writ of Prohibition must be issued only in rarest of rare cases. Judicial disciplines of the highest order has to be exercised whilst issuing such writs. It must be remembered that the writ jurisdiction is original jurisdiction distinct from appellate jurisdiction. An appeal cannot be allowed to be disguised in the form of a writ. In other words, this power cannot be allowed to be used ''as a cloak of an appeal disguise''. Lax use of such a power would impair the dignity and integrity of the subordinate Court and could also lead to chaotic consequence. It would undermine the confidence of the subordinate Court. It was not even argued that there was total lack of jurisdiction in the civil Court. It could not be denied that the civil Court, before which the suit was pending, had powers to decide on the maintainability of the suit and to decide on question of its jurisdiction. The civil Court had jurisdiction to decide whether the suit was barred by Section 14 of the said Act or on principles of res judicata/estoppel. Thus unless there was some very cogent or strong reason the High Court should not have prevented the Court of competent jurisdiction from deciding these questions. In other words the High Court should not usurp the jurisdiction of the civil Court to decide these questions. In the impugned Judgment no reason, much less a cogent or strong reason, has been given as to why civil Court could not be allowed to decide these questions. The impugned judgment does not state that the civil Court had either proceeded to act without or in excess of jurisdiction or that it had acted in violation of rules of natural justice or that it had proceeded to act under law which was ultra vires or unconstitutional or proceeded to act in contravention of fundamental rights. The impugned judgment does not indicate as to why the High Court did not consider it expedient to allow the civil Court to decide on questions of maintainability of the suit or its own jurisdiction. The impugned judgment does not indicate why the civil Court be not allowed to decide whether the suit was barred by virtue of Section 14 of the said Act or on principal of res judicata/estoppel. To be remembered that no fundamental right is being violated when a Court of competent jurisdiction is deciding rightly or wrongly matters before it."

[51] Thus, the Supreme Court has cautioned that unless there are some very cogent or strong reasons, the High Court should not prevent the competent Forum from deciding the various questions raised before it including the question of "want of jurisdiction". It is also stated that allowing a Court of competent jurisdiction to proceed with the case and decide the same rightly or wrongly, would not result in violation of any Fundamental Rights.

[52] As regards the dictum as laid in **Thirumala (supra)**, Mr. Joshi submitted that the Supreme Court's aforesaid observations fell keeping in mind Section 9 of the Civil

Procedure Code. According to Mr. Joshi, Section 9 of the Civil Procedure Code provides that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. According to Mr. Joshi, Section 17 of the D.R.T. Act is differently worded. The submission is that Section 17 of the D.R.T. Act specifically talks about "debt" and the existence of a legally recoverable "debt" is a sine qua non to confer jurisdiction upon the Tribunal.

[53] In Rex v. Post Master General, 1928 1 KB 291, a Post office workman applied for a writ of certiorari to quash a certificate given by a medical officer who was not entitled to issue it under the Workmen's Compensation Act. The Act itself contained a provision for appeal. Avory J. said as follows:

> "I have throughout the argument certainly entertained the view that the section gives the applicant all the relief which she can require and that she might under that appeal section have the matter determined by the medical referee, whose decision would be final as to whether she is in fact suffering from this disease. But even if that remedy is open to her, it is undoubtedly good law that if the application for a certiorari is made by a party aggrieved, then it ought to be granted ex debito justitiae, and the Court has not the general discretion which it would have, when the application is made by one of the public who is not personally concerned. That was decided long ago in the case of Rex v. Surrey Justices,1870 5 LRQB 466 and on that principle, even although she has the remedy by appeal in this case, I am prepared to agree that the certiorari should go....." Where, want of jurisdiction is patent on the face of the proceedings, writs of certiorari or prohibition are granted as a matter of course and it is no defence to state that there is an alternative remedy. See Halsbury's Laws of England, Vol, 9, p. 879 Farquharson v. Morgan, 1894 1 QB 552. Even in the case of mandamus, the rule is not inflexible: The Queen v. Thomas, 1892 1 QB 426. In Rex v. North Oakey, 1927 1 KB 491, Lord Atkin said as follows:
>
> "I think it is quite plain that the fact of there being a remedy by way of, appeal is no answer to a writ of prohibition where the want of jurisdiction complained of is based upon the breach of a fundamental principle of justice....."
>
> This view is also supported in two cases of this Court, Dorman Long & Co. v. Jagadish Chandra, 62 Cal 596 at p. 605 and 'In re Ramjidas Mahaliram', 62 Cal 1011 at p. 1035. See also R v. Wandsworth,1942 1 AllER 56. But the Court has an undoubted discretion in the matter. If the alternative remedy is an efficient remedy and there is no want of jurisdiction, patent on the face of it, or any breach of natural justice, then the writ may be refused: R v. Kindsland Parish etc,1922 8 TaxCas 327(Halsbury Vol. 9, p. 879 n(s))."

[54] Turning to the English authorities on this point, the most important is the decision of the English Court in - Farquharson v. Morgan, 1894 1 QB 552 (G). In that case a County Court Judge made an order to enforce an award by execution as on an ordinary County Court judgment under Section 24, Agricultural Holdings Act and on the face of the award it was apparent that the compensation had been awarded to the tenant for the matters not within the Act, and the Court of Appeal interfered by a writ of prohibition notwithstanding the fact that there was an agreement contained in the lease between the lessor and the tenant to refer all disputes to arbitration and also the fact that the lessor had by his conduct acquiesced in the exercise of jurisdiction by the County Court. There is a line of case law wherein it has been held that if a party does not object to jurisdiction at the earliest stage and sits on the fence and takes his chance which way the Tribunal will decide, it is not open to him then to come to the Court and challenge the jurisdiction by asking for a writ under Article 226 because he lost before that Tribunal. But as the said judgments point out, those would be cases where the want of jurisdiction would not be apparent, where it may be that some fact would have to be proved by the party or some action to be taken by the party, and the Court would take into consideration the acquiescence of the party in submitting to the jurisdiction of the Tribunal. But as already pointed out, in that case, although the lessor had acquiesced in the exercise of jurisdiction by the County Court, yet the Court of Appeal felt that this was a case where it was obligatory upon the Court to issue a writ of prohibition, and Lord Halsbury at page 556 points out:

> "It has been long settled that, where an objection to the jurisdiction of an inferior Court appears on the face of the proceedings, it is immaterial by what means and by whom the Court is informed of such objection. The Court must protect the prerogative of the Crown and the due course of the administration of justice by prohibiting the inferior Court from proceeding in matters as to which it is apparent that it has no jurisdiction."
>
> And Lord Justice Lopes in his judgment at page 557 points out :
>
> "It seems to me that there has always been recognised a distinction between what I will call a latent want of jurisdiction, i.e., something becoming manifest in the course of the proceedings, and what I will call a patent want of jurisdiction, i.e., a want of jurisdiction apparent on the face of the proceedings.
>
> Whilst in cases of latent want of jurisdiction there has always been a great conflict of judicial opinion, as to whether the grant of the writ was discretionary or not, the authorities seem unanimous in deciding that, where the want of jurisdiction is patent, the grant of the writ of prohibition is of course."

And at page 559 the learned Lord Justice points out:

"The reason why, notwithstanding such acquiescence, a prohibition is granted where the want of jurisdiction is apparent on the face of the proceedings, is explained by Lord Denman in - 'Bodenham v. Ricketts', 6 N & M 170 (H) to be for the sake of the public, lest 'the case might become a precedent if allowed to stand without impeachment', and, I will add for myself, because it is a want of jurisdiction of which the Court is informed by the proceedings before it, and which, the judge should have observed, and of which he himself should have taken notice."

And again at page 563 Lord Justice Davey draws a distinction between the case of a patent and latent want of jurisdiction and the distinction according to this learned Lord Justice is :

".....but the distinction does not, I think, depend on the existence of a formal record, butt is one of substance, whether the defect is apparent or depends on evidence." And a little lower down on the same page he observes :

"In the present case the limits of the jurisdiction appeared, I repeat, on the face of the statute, and the fact of the excess appeared on the face of the amended award which the Court was asked to enforce.""

[55] The Queen's Bench Division reported in - R. v. ComptrollerGeneral of Patents,1953 1 AllER 832 (I), and the observations of the learned Chief Justice at page 365 are very pertinent:

"Objection to jurisdiction can always be taken by plea, and, if an appeal lies from the Court of tribunal in which such a plea is raised, the appellate Court could, no doubt, decide the question of jurisdiction, but it by no means follows that, because there Is an appeal, the power of this Court to issue a prohibition is taken away. There is no technical obstacle to the co-existence of a right to appeal and to a prohibition." And at page 866 he says :

"If the defect of jurisdiction is apparent on the face of the proceedings, the order of prohibition must, go as of right and is not a matter of discretion." And further on the same page:

"Where, however, the defect is not apparent, but depends on some fact in the knowledge of the applicant which he had the opportunity of bringing forward in the Court below and has allowed that Court to proceed without setting up the objection, the same cases show that the Court has a discretion to refuse writ and will leave the objector to his remedy by appeal."

[56] We may refer to a decision of the Bombay High Court in the case of S. C. Prashar vs. Vasantsen Dwarkadas, 1956 AIR(Bom) 530, wherein Justice Chagla, speaking for the Bench, observed thus:

> "Basically and in a broad general sense both tn India under our Constitution and in England where these prerogative writs owe their origin in the prerogatives of the Crown always to be safeguarded by the King's Courts, the grant of them is discretionary. An exception sought to be made in decisions of Court in England, that a writ of prohibition is in case of patent usurpation of Jurisdiction demandable of right ts, if those decisions are scrutinised, a result of the historical background of this prerogative writ. 'The root principle of the English law about jurisdiction is that the judges stand in the place of the sovereign and, therefore, necessarily to be restrained by prohibition. Such usurpation when it is patent has been judicially characterised as in contempt of the Crown. It is with this background that in England it has been held that In such a case the writ of prohibition is demandable of right. But no such considerations need weigh with this Court In appreciating the broad principle that granting of all writs under article 226 of the Constitution Including the writ of prohibition ts always discretionary though of course different considerations may prevail in case of different writs..... The following propositions though not exhaustive of the subject are sufficient for the purposes of this case and I venture to think that rue measure and scope of the exercise of this jurisdiction and the discretion of this Court to issue a writ of prohibition under our law, in respect of proceedings in excess of jurisdiction, may be thus stated :
>
> (i) The High Court has always the power and discretion to grant or refuse to grant this writ which though It is primarily intended for enforcement of fundamental rights must also issue where necessity demands immediate and decisive interposition.
>
> (ii) The considerations that arise when this writ is asked for on the ground that any inferior Court or person or body of persons having legal authority is committing or has committed an error of law apparent on the face of its proceedings and those that arise in a case of excess or usurpation of jurisdiction by any such Court or authority must necessarily be differentiated for in the former case there is an erroneous exercise of jurisdiction which exists while in the latter case there is no jurisdiction at all.
>
> (iii) Absence of jurisdiction may be patent, that is, apparent on the face of the proceedings, or latent in the sense that is not so apparent. Where the defect is not apparent, the Court in its discretion may refuse the writ if the facts or circumstances attending the case show under delay, insufficient materials,

misconduct, leaches or acquiescence on the part of the party applying for it or are such as would render it unjust on the part of the Court to interpose.

(iv) Where, however, there is patent lack of jurisdiction and the Court is immediately satisfied that the inferior Court of authority has exceeded its jurisdiction, the Court will very readily interpose. The discretion to grant or refuse to grant the writ is of course there. But since discretion contemplates an exercise of arbitrium and not arbitrariness the writ must go though not of right or course yet almost as a matter of course unless an irresistible case of withholding the writ is made out."

[57] In **S. C. Prashar (supra)**, Justice Chagla also clarified and explained the expression "complete absence of jurisdiction". The learned Judge proceeded to observe as under:

"If we are dealing with a judicial or quasi-judicial tribunal, the expression "absence of jurisdiction" does not create any difficulty. But we have also to consider cases where the order challenged is the order of an administrative officer or an administrative tribunal and the allegation against him may be that he is acting without authority or beyond his competence. In such a case the expression "absence of jurisdiction" would also apply, but with a different significance as just pointed out. In this particular case what is urged by the petitioner is that the Income-tax Officer in issuing the notice had no authority or competence to do so and that the assessment proceedings which he proposes to initiate pursuant to that notice would be proceedings without ;any jurisdiction at all. What is the meaning to be attached to the expression "complete absence of jurisdiction apparent on the face of the record?" As we shall presently point out, two views are possible. One is that the absence of jurisdiction should be clear beyond any reasonable doubt on the construction of the statute which confers the jurisdiction or confers the power or competence, and that if two views are possible of a construction of a section then it would not be a case of absence of jurisdiction apparent on the face of the record. The other view is that if absence of jurisdiction can be established by reference to statute without more, and no evidence was necessary and no facts had to be proved in order to establish want of jurisdiction, then absence of jurisdiction is one which is apparent on the face of the record, or, as one learned Judge has said, apparent on the face of the statute."

[58] In our opinion, the net result of the authorities discussed above is as follows:

(a) The writs of mandamus, certiorari and' prohibition, and for the matter of that, all high prerogative writs, are ordinarily not issued where there exists an

alternative remedy equally efficient and adequate.

(b) But there is no inflexible rule that such writs cannot be issued where the Court thinks it just and convenient to do so. The fact that it ordinarily does not do so is a question not of want of jurisdiction but of expediency.

(c) Whether the alternative remedy is equally efficacious or adequate is a question of fact to be decided in each case.

(d) Where a complaint is made against any act done or purported to be done under any statutory provision, the fact that there exists in the Statute itself a possible remedy, is an important fact, to be taken into consideration. Where such provisions exist the Court will be extremely reluctant to interfere by way of high prerogative writs and especially so if the applicant has actually taken recourse to his remedy under the Statute.

(e) But the fact that there exists a remedy under the Statute does not take away the jurisdiction of the Courts to issue the writs in appropriate cases.

(f) In the following cases it has been held that a writ of prohibition will be issued notwithstanding an alternative remedy, whether under a statutory provision or otherwise: -

(g) where an inferior tribunal assumes jurisdiction and the want of jurisdiction is patent on the face of it; (ii) where the proceedings complained of are against the principles of natural justice; and (iii) where the alternative remedy is too costly or ineffective or entails such delay that the applicant would be irreparably prejudiced or the remedy might prove valueless.

- **THE RECOVERY OF DEBTS AND BANKRUPTCY ACT, 1993:**

[59] The Recovery of Debts Due to Banks and Financial Institutions Act, 1993, (for short, "the RDDBFI Act") is primarily enacted for the purpose of recovery of loans granted by the Banks and Financial Institutions. As such, if the suit is a suit for recovery of debt and also for sale or realisation of securities which would be ancillary to the purpose of recovery of debt, such a suit would be a suit substantially for recovery of debt and therefore, the said suit is not maintainable before a Civil Court. If the cause of action is such that it can be tried by the Tribunal alone the jurisdiction of the Civil Court would stand ousted. Also that, while determining the matter, the Tribunal can decide peripheral matters. After all, the aim of RDDBFI Act is to provide a speedy mode for the Banks and Financial Institutions to recover their "Debts".

[60] Moreover, when the debt falls under the definition of the Act, in our view, any dispute arising out of the same is to be determined by the Tribunal duly constituted for that purpose. Once a remedy is provided under the RDDBFI Act, 1993 which is a Special enactment, there will be a ouster of jurisdiction by a Debtor or a Guarantor to approach the Civil Court (which was established on 30th November, 1994) (except the Supreme Court, and the High Court exercising jurisdiction under Article 226 and 227 of the Constitution).

[61] It is to be pointed out that the term 'Debt' defined under Section 2(g) of the Act means any liability which is alleged as due from any person by a Bank during the course of any business activity undertaking by the Bank, in cash or otherwise, whether secured or unsecured, subsisting on, and legally recoverable on, the date of the application, as per the decision in the case of Tapan Kumar Mukhoty v. Bank of Madura Limited,2001 DRTC 91 **at page 99 (Cal.)**

[62] It is to be made mention of Section 17 of the RDDBFI Act, 1993 that a Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to them. Section 18 of the Act creates a bar that no Court or other authority can thereafter exercise any jurisdiction, powers or authority (except the Supreme Court, and the High Court exercising jurisdiction under Article 226 and 227 of the Constitution) in relation to the matters specified in Sections 17 as per decision of the Supreme Court in the State Bank of Bikaner and Jaipur v. Ballabh Dass and Company,2001 DRTC 22.

[63] It is to be pointed out that the provisions of the RDDBFI Act, 1993 confer exclusive jurisdiction on the "Tribunal" and the "Recovery Officer" in respect of the Debts Due to the Banks and Financial Institutions Act, 1993. To put it precisely, as on date, when the RDDBFI Act, 1993 came into force on 24th June 1993, the Tribunal (which was established on 30th November, 1994) has ample jurisdiction to deal with the matters in regard to the matters specified for adjudication of disputes.

- **RELEVANT PROVISIONS OF THE INDIAN CONTRACT ACT:**

[64] Section 126 of the said Act, which defines the terms 'contract of guarantee', 'surety', 'principal-debtor' and 'creditor,' provides that 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. In the context of the present case, the bank guarantee is a contract of guarantee.

[65] Section 128 of the Contract Act stipulates that the liability of the surety is co-extensive with that of the principal-debtor, unless it is otherwise provided by the contract. Section 133 makes it clear that any variance made without the surety's consent in the terms of the contract between the principal-debtor and the creditor, discharges the surety as to transactions subsequent to the variance. Section 134 stipulates that the surety is discharged by any contract between the creditor and the principal-debtor, by which the principal-debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal-debtor. However, certain kinds of discharge of the principal-debtor which may operate by operation of law may not ensure to the benefit of the Surety. Such instances being the bankruptcy of the principal-debtor or liquidation in the case the principal-debtor is a company.

[66] Section 134 of the Contract Act reads thus:

> "134. **Discharge of surety by release or discharge of principal debtor.** - The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. - The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor."
>
> **Illustrations:**
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> (a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship. (a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship."
>
> (b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land, and thereby prevents him from raising the indigo. C is no longer liable on his guarantee. (b) A contracts with B to

grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land, and thereby prevents him from raising the indigo. C is no longer liable on his guarantee."

(c) A contracts with B for a fixed price to build a house for B within a stipulated time. B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship. (c) A contracts with B for a fixed price to build a house for B within a stipulated time. B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship."

[67] Section 134 of the Contract Act consists of two parts: (i) that if any contract between the creditor and the principal debtor, by which the principal debtor is released, then the surety is also discharged, and (ii) that the surety is also discharged by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. Indisputably, in the case on hand, there is no contract entered into between the Bank being the creditor and the ESIL being the principal debtor, whereby the principal debtor was released. Therefore, in such circumstances, there was no question of the writ applicants herein being discharged of any contract entered into by the Bank and the ESIL. There has been no act or any omission on the part of the Bank, the legal consequence of which is discharged of the principal debtor. In the instance case, prima facie, it could be said that the principal debtor (ESIL) stood exonerated by the assignment of debt i.e. by operation of law and the discharge of a principal debtor by operation of law may not operate in all cases as a discharge of the sureties.

- **LALIT KUMAR JAIN vs. UNION OF INDIA AND OTHERS (SUPRA):**

[68] The aforesaid takes us now to look into the recent pronouncement of the Supreme Court in the case of **Lalit Kumar Jain vs. Union of India and others,2021 SCCOnlineSC 396**. The common question that fell for the consideration of the Supreme Court was one relating to the vires and validity of a Notification dated 15th November 2019 issued by the Central Government. The other reliefs claimed were one relating to the validity of the Insolvency and Bankruptcy (Application to adjudicating authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 issued on 15th November 2019. The validity of regulations challenged by the Insolvency and Bankruptcy Board of India were also the subject matter of challenge.

[69] The petitioner before the Supreme Court had furnished personal guarantees to the banks and financial institutions which led to release of advances to various

companies with which they were associated as Directors, Promoters or in some instances, as Chairman or Managing Directors. In many cases, the personal guarantees furnished by the writ petitioners were invoked, and proceedings were pending against the companies with which they were associated with, and advances for which they had furnished the bank guarantees. In several cases, recovery proceedings and later insolvency proceedings were initiated.

[70] All the writ petitioners challenged the impugned Notification as having been issued in excess of the authority conferred upon the Union of India (through the Ministry of Corporate Affairs). It was contended on behalf of the writ petitioners that the power conferred upon the Union under Section 1(3) of the Code, 2016 could not have been resorted to in the manner as to extend the provisions of the Code only so far as they relate to the personal guarantors of corporate debtors.

[71] One of the principal arguments before the Supreme Court was that as the liability of a guarantor is co-extensive with that of the principal debtor (Section 128 of the Indian Contract Act, 1872 referred to above), upon conclusion of the insolvency proceedings against a principal debtor, the same would amount to extinction of all claims against the principal debtor, except to the extent admitted in the insolvency resolution process itself. It was argued that the same is evident from Section 31 of the Code, which makes the resolution plan approved by the adjudicating authority binding on the corporate debtor, its creditors and guarantors. It was argued that the impugned Notification allowed the creditors to unjustly enrich themselves by claiming in the insolvency process of the guarantor without accounting for the amount realized by them in the corporate insolvency resolution process of the corporate debtor under Part II of the Code and therefore, untenable.

[72] On behalf of the Union and other respondents, the Solicitor General of India submitted before the Supreme Court that the liability of a guarantor is co-extensive, joint and several with that of the principal borrower unless the contrary is provided by the contract. It was argued that a discharge which a principal borrower may secure by operation of law (for instance on account of winding or the process under the Code) would not absolve the surety from its liability. It was argued by the learned Solicitor General that neither the guarantor's obligations are absolved nor discharged in terms of Sections 133 to 136 of the Contract Act on account of release / discharge / composition of variance of contract which a principal borrower may secure by way of operation of law for instance as under the Code.

[73] The learned Solicitor General invited the attention of the Supreme Court to the decision in the case of the State Electricity Board vs. Official Liquidator, High Court of

Ernakulum, 1982 3 SCC 358 and Punjab National Bank vs. State of U.P., 2002 5 SCC 80].

[74] The Supreme Court also took notice of the Calcutta High Court judgement in the case of **Gouri Shankar Jain vs. Punjab National Bank,2019 SCCOnlineCAL 7288**.

[75] The Supreme Court also took notice of its earlier decision in the case of State Bank of India vs. V. Ramakrishnan, 2018 17 SCC 394].

[76] The Supreme Court, while upholding all the submissions canvassed on behalf of the Union, ultimately, held as under:

> "125. The other question which parties had urged before this court was that the impugned notification, by applying the Code to personal guarantors only, takes away the protection afforded by law; reference was made to Sections 128, 133 and 140 of the Contract Act; the petitioners submitted that once a resolution plan is accepted, the corporate debtor is discharged of liability. As a consequence, the guarantor whose liability is co-extensive with the principal debtor, i.e. the corporate debtor, too is discharged of all liabilities. It was urged therefore, that the impugned notification which has the effect of allowing proceedings before the NCLT by applying provisions of Part III of the Code, deprives the guarantors of their valuable substantive rights.
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> 126. Section 31 of the Code, inter alia, provides that:
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> "31. (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan."
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> 127. The relevant provisions of the Indian Contract Act are extracted below:
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> "128. Surety's liability. - The liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract.
>
> 129. "Continuing guarantee". - A guarantee which extends to a series of transactions, is called a "continuing guarantee".
>
> 130.Revocation of continuing guarantee. - A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

131.Revocation of continuing guarantee by surety's death. - The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

133.Discharge of surety by variance in terms of contract. - Any variance, made without the surety's consent, in the terms of the contract between the principal 1 [debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.

134.Discharge of surety by release or discharge of principal debtor. - The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

****

140.Rights of surety on payment or performance. - Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

141.Surety's right to benefit of creditor's securities. - 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."

128. All creditors and other classes of claimants, including financial and operational creditors, those entitled to statutory dues, workers, etc., who participate in the resolution process, are heard and those in relation to whom the CoC accepts or rejects pleas, are entitled to vent their grievances before the NCLT. After considering their submissions and objections, the resolution plan is accepted and approved. This results in finality as to the claims of creditors, and others, from the company (i.e. the company which undergoes the insolvency process). The question which the petitioners urge is that in view of this finality, their liabilities would be extinguished; they rely on Sections 128, 133 and 140 of the Contract Act to urge that creditors cannot therefore, proceed against them separately.

129. In **Vijay Kumar Jain v. Standard Chartered Bank,2019 SCCOnlineSC 103** , this court, while dealing with the right of erstwhile directors participating in meetings of Committee of Creditors observed that:

"we find that Section 31(1) of the Code would make it clear that such members of the erstwhile Board of Directors, who are often guarantors, are vitally interested in a resolution plan as such resolution plan then binds them. Such plan may scale down the debt of the principal debtor, resulting in scaling down the debt of the guarantor as well, or it may not. The resolution plan may also scale down certain debts and not others, leaving guarantors of the latter kind of debts exposed for the entire amount of the debt. The regulations also make it clear that these persons are vitally interested in resolution plans as they affect them"

130. The rationale for allowing directors to participate in meetings of the CoC is that the directors' liability as personal guarantors persists against the creditors and an approved resolution plan can only lead to a revision of amount or exposure for the entire amount. Any recourse under Section 133 of the Contract Act to discharge the liability of the surety on account of variance in terms of the contract, without her or his consent, stands negated by this court, in V. Ramakrishnan where it was observed that the language of Section 31 makes it clear that the approved plan is binding on the guarantor, to avoid any attempt to escape liability under the provisions of the Contract Act. It was observed that:

"25. 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...."

131. And further that:

"26.1 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."

132. In Committee of Creditors of Essar Steel (I) Ltd. v. Satish Kumar Gupta, 2020 8 SCC 531 (the "Essar Steel case") this court refused to interfere with proceedings initiated to enforce personal guarantees by financial creditors; it was observed as follows:

"106. Following this judgment in V. Ramakrishnan case [SBI v. V. Ramakrishnan, 2018 17 SCC 394], it is difficult to accept Shri Rohatgi's argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile Directors of the corporate debtor. So far as the present case is concerned, we hasten to add that we are saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, N CLAT judgment being contrary to Section 31(1) of the Code and this Court's judgment in V. Ramakrishnan case [SBI v. V. Ramakrishnan, 2018 17 SCC 394], is set aside."

133. It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In **Maharashtra State Electricity Board (supra)** the liability of the guarantor (in a case where liability of the principal debtor was discharged under the insolvency law or the company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realize the same from the guarantor in view of the language of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act. This court observed as follows:

"7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Indian Contract Act, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under Section 134 of the Indian Contract Act by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by

operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability (see Jagannath Ganeshram Agarwala v. Shivnarayan Bhagirath, 1940 AIR(Bom) 247; see also In re Fitzgeorge Exparte Robson, 1905 1 KB 462])."

134. This legal position was noticed and approved later in Industrial Finance Corpn. of India Ltd. v. Cannanore Spg. & Wvg. Mills Ltd., 2002 5 SCC 54 An earlier decision of three judges, Punjab National Bank v. State of U.P., 2002 5 SCC 80 pertains to the issues regarding a guarantor and the principal debtor. The court observed as follows:

"The appellant had, after Respondent 4's management was taken over by U.P. State Textile Corporation Ltd. (Respondent 3) under the Industries (Development and Regulation) Act, advanced some money to the said Respondent 4. In respect of the advance so made, Respondents 1, 2 and 3 executed deeds of guarantee undertaking to pay the amount due to the bank as guarantors in the event of the principal borrower being unable to pay the same.

Subsequently, Respondent 3 which had taken over the management of Respondent 4 became sick and proceedings were initiated under the Sick Textile Undertakings (Nationalisation) Act, 1974 (for short 'the Act'). The appellant filed suit for recovery against the guarantors and the principal debtor of the amount claimed by it.

The following preliminary issue was, on the pleadings of the parties, framed:

'Whether the claim of the plaintiff is not maintainable in view of the provisions of Act 57 of 1974 as alleged in para 25 of the written statement of Defendant 2?'

The trial court as well as the High Court, both came to the conclusion that in view of the provisions of Section 29 of the Act, the suit of the appellant was not maintainable.

We have gone through the provisions of the said Act and in our opinion the decision of the courts below is not correct. Section 5 of the said Act provides for the owner to be liable for certain prior liabilities and Section 29 states that the said Act will have an overriding effect over all other enactments. This Act only deals with the liabilities of a company which is nationalized and there is no provision therein which in any way affects the liability of a guarantor who is bound by the deed of guarantee executed by it. The High Court has referred to a decision of this Court in Maharashtra SEB v. Official Liquidator, High Court, Ernakulam, 1982 3 SCC 358: AIR 1982 SC 1497] where the liability of the guarantor in a case where liability of the principal debtor was discharged under the insolvency law or the company law,

was considered. It was held in this case that in view of the unequivocal guarantee such liability of the guarantor continues and the creditor can realize the same from the guarantor in view of the language of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act.

In our opinion, the principle of the aforesaid decision of this Court is equally applicable in the present case. The right of the appellant to recover money from Respondents 1, 2 and 3 who stood guarantors arises out of the terms of the deed of guarantee which are not in any way superseded or brought to a naught merely because the appellant may not be able to recover money from the principal borrower. It may here be added that even as a result of the Nationalisation Act the liability of the principal borrower does not come to an end. It is only the mode of recovery which is referred to in the said Act."

135. **In Kaupthing Singer and Friedlander Ltd. (supra)** the UK Supreme Court reviewed a large number of previous authorities on the concept of double proof, i.e. recovery from guarantors in the context of insolvency proceedings. The court held that:

"The function of the rule is not to prevent a double proof of the same debt against two separate estates (that is what insolvency practitioners call "double dip"). The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. It is for that reason sometimes called the rule against double dividend. In the simplest case of suretyship (where the surety has neither given nor been provided with security, and has an unlimited liability) there is a triangle of rights and liabilities between the principal debtor (PD), the surety (S) and the creditor (C). PD has the primary obligation to C and a secondary obligation to indemnify S if and so far as S discharges PD's liability, but if PD is insolvent S may not enforce that right in competition with C. S has an obligation to C to answer for PD's liability, and the secondary right of obtaining an indemnity from PD. C can (after due notice) proceed against either or both of PD and S. If both PD and S are in insolvent liquidation, C can prove against each for 100p in the pound but may not recover more than 100p in the pound in all."

136. In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency

proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.

137. For the foregoing reasons, it is held that the impugned notification is legal and valid. It is also held that approval of a resolution plan relating to a corporate debtor does not operate so as to discharge the liabilities of personal guarantors (to corporate debtors). The writ petitions, transferred cases and transfer petitions are accordingly dismissed in the above terms, without order on costs."

[77] As the Calcutta High Court decision in the case of **Gouri Shankar Jain (supra)** has been referred to and relied upon by the Supreme Court in **Lalit Kumar Jain (supra)**, we may also look into few relevant observations made by the Calcutta High Court:

"23. In the facts of the present case, the first respondent initiated a Corporate Insolvency Resolution process of the company under section 7 of the Code of 2016 before the National Company Law Tribunal, Kolkata. The Code of 2016 was enacted to consolidate and amend the laws relating to reorganisation and Insolvency Resolution of corporate persons, partnership firms and individuals in a time bound manner. The Code of 2016 was amended in 2018. Prior to the enactment of the Code of 2016, there were various statutes relating to insolvency and bankruptcy of corporate entities, partnership firms and individuals. The Code of 2016 brought the law governing insolvency of corporate persons, partnerships and individuals under one statute. The Code of 2016 is divided into five parts with each part containing a number of chapters. Section 7 of the Code of 2016 is under Part II which deals with Insolvency Resolution and liquidation for corporate persons, and Chapter II of Part II deals with Corporate Insolvency Resolution process.

24. Right to apply for insolvency does not arise out of a contract between the parties. It is a statutory right. Section 6 of the Code of 2016 specifies the persons who may initiate Corporate Insolvency Resolution process in respect of a corporate debtor. It stipulates that, where a corporate debtor commits default, a financial creditor, an operational creditor or the corporate debtor itself can initiate Corporate Insolvency Resolution process. Therefore, three persons can apply for initiation of Corporate Insolvency Resolution process in respect of a corporate debtor, they being the financial creditor, the operation creditor of the corporate debtor and the corporate debtor itself. In the present case, the first respondent as the secured financial creditor initiated the Corporate Insolvency Resolution process in respect of the company before the National Company Law Tribunal, Kolkata. The prerequisite to make an application under section 7 of the Code of 2016 is the existence of a default by the corporate debtor. The Code of 2016 defines default in Section 3 (12)

to mean non-payment of debt when whole or any part or instalment of amount of debt has become due and payable and is not paid by the debtor or the corporate debtor as the case may be. The Code of 2016 defines debt in Section 3 (11) to mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. When the Adjudicating Authority under the provisions of the Code of 2016 receives an application under section 7 thereof, it has to ascertain the existence of a default in respect of the corporate debtor. It may ascertain such existence either from the records of an information utility or on the basis of the evidence furnished by the financial creditor when the Adjudicating Authority is considering an application under section 7 of the Code of 2016.

25. When a financial creditor approaches the Adjudicating Authority under the provisions of the Code of 2016 and applies under section 7 thereof for initiation of Corporate Insolvency Resolution process in respect of a corporate debtor, the financial creditor is trying to recover the defaulted amount from the corporate debtor. It cannot be said that, the financial creditor when it applies under section 7 of the Code of 2016, does so with the view to enter into any compromise or composition with the corporate debtor in respect of the claim. In a given situation, the Resolution Plan submitted with the resolution professional and accepted by the committee of creditors and ultimately approved by the Adjudicating Authority, may provide for payment of the entirety of the claim of the financial creditor applying for initiation of the Corporate Insolvency Resolution process. In such a situation, no compromise takes place. In a given situation, the financial creditor applying for initiation of the Corporate Insolvency Resolution process may receive a portion of the claim as full and final settlement as against the corporate debtor, in accordance with the Resolution Plan approved under the Code of 2016. In neither of the two situations, can it be said that, the financial creditor entered into a voluntary compromise with the corporate debtor with regard to the quantum of the claim.

26. The Code of 2016 stipulates that, a Resolution Plan in respect of a corporate debt is required to be approved by a vote of not less than 66% of the voting share of the financial creditors. In a given case, the financial creditor applying for initiation of Corporate Insolvency Resolution process in respect of a corporate debtor may be holding more than 66% of the voting share of the financial creditors in respect of such corporate debtor. In such case, the best available Resolution Plan in respect of the corporate debtor may contemplate payment of a portion of the claim of the financial creditors in full and final settlement. Such Resolution Plan may be approved by the financial creditor in the meeting of the committee of creditors. Would such an approval mean that, the financial creditor entered into a

composition with the corporate debtor, thereby impairing the right of the financial creditor to recover the balance amount from the guarantor of the corporate debtor ? In my view, the answer is in the negative.

27. An application under Section 7 of the Code of 2016 once admitted under Section 7(5) thereof has two terminal points for the corporate debtor. The Code of 2016 does not contemplate withdrawal of an application under Section 7 once it is admitted under Section 7(5). The terminal points are, firstly, the approval of a Resolution Plan and secondly, the initiation of liquidation proceeding on a Resolution Plan not being approved. When a financial creditor applies under Section 7 of the Code of 2016 it is exercising a statutory right. The exercise of such statutory right does not depend upon the contractual obligations of the parties bound by the respective contracts between the creditor, principal debtor and the surety. Such contracts cannot be said to have rescinded, novated, frustrated, modified, altered or affected in any manner, on an application under Section 7 of the Code of 2016 being filed. After its admission under Section 7(5) of the Code of 2016, when an order under Section 14 is passed, then also only the statutory right of a financial institution to proceed under the SARFAESI Act, 2002 remains suspended for a limited period. The existing contracts between the surety, principal debtor and the creditor remains unaffected.

28. The Supreme Court in **Maharashtra State Electricity Board, Bombay (supra)** has held that, a discharge which the principal debtor may secure by operation of law in bankruptcy or in liquidation proceedings in the case of a company does not absolve the surety of his liability. In such case, the Supreme Court has considered the interplay of sections 128 and 134 of the Act of 1872. In the facts of that case, a company in respect of which a bank issued a guarantee in favour of the Electricity Board, went into liquidation. The Supreme Court has held that, the fact that the company which is the principal debtor has gone into liquidation would not have any effect on the liability of the guarantor.

29. The Division Bench of this Hon'ble Court in **Modern Stores (India) Ltd. (supra)** has considered the interplay of sections 134 and 137 of the Act of 1872. It has applied the ratio laid down in **Maharashtra State Electricity Board, Bombay (supra)**. It has held as follows: -

"18. Section 134 consists of two parts, The first part of the section speaks that the sureties are discharged by any contract between the creditor and the principal-debtor, by which the principal debtor is released. This part has no application to the present case as in this case there has not been any contract between the plaintiff

being the creditor and the defendant No. 1 being the principal-debtor whereby the principal debtor was released.

19. The second part of Section 134 is to this effect. The sureties are discharged by any act or omissions of the creditor, legal consequence of which is the discharge of the principal-debtor. In this appeal we are to consider whether there has been any act or omission on the part of the appellant being the creditor and the consequence of such act or omission is the discharge of the defendant No. 1, the principal-debtor. In this case, as it appears that the suit is instituted by the appellant against the principal-debtor, the defendant No. 1 and the other defendants who were the guarantors or the sureties. It is not in dispute that the defendant No. 1 during the pendency of the suit was dissolved. According to the appellant, in view of dissolution of the defendant No. 1 the principal debtor, the appellant chose to proceed against the other guarantors. As stated earlier the learned trial Judge held that as the appellant did not choose to proceed against the principal debtor or had released the principal-debtor, the guarantors were also thereby released. It is settled law that the discharge of the principal-debtor by operation of law does not operate as the discharge of the sureties. It is also held by the Supreme Court in the case of Maharashtra State Electricity Board v. Official Liquidator, 1982 AIR(SC) 1497 that dissolution of the principal-debtor would not release or discharge the sureties. Further, we are of the view that in the instant case there has not been any act or omission on the part of the appellant in not proceeding against the defendant No. 1 or releasing the defendant No. 1. In the present case the principal debtor, the defendant No. 1 is discharged by operation of law. Therefore, nothing has been done by the appellant, the result of which is discharge or release of the principal-debtor. It is also pointed out by Dr. Banerjee appearing for the appellant, that in each of the agreement it is provided that nothing done or omitted by the appellant in pursuance of any of the powers, provisions, or authorities contained in this guarantee shall in any way, affect or discharge the liability of the surety. It is also settled that if the creditor expressly reserves his remedy against the surety or generally his securities and remedies against persons other than the principal-debtor, then the release of the principal debtor either by act or omission on the part of the creditor or by operation of law will not discharge the surety. As commented upon by Mulla in his Commentaries on the Contract Act, 10th Edition, page 742, the surety's right to indemnify against a principal-debtor is a necessary result of such a reservation. It is also the opinion of the learned Author that if a creditor without ceasing to hold the principal debtor liable, prefers to sue the more solvent of two sureties for the debt, this still more obviously, does not discharge the other Surety.

20. It will appear from Section 137 of the Contract Act that mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not discharge the surety. Therefore, it appears that mere forbearance on the part of the creditor to sue the principal debtor will not discharge the surety. It has been held by certain decisions that "mere forbearance" to sue may spring from a contract or there may be simple forbearance. If such forbearance springs from a contract that will be a case under Section 135 of the Contract Act but if the plaintiff forbears to sue the principal debtor within the period of limitation that itself would not discharge the surety. 21. Therefore, in our view, mere omission to sue the principal debtor or to proceed against the principal debtor in the suit will not operate as a discharge of the sureties."

30. The Supreme Court in **Canonnore Spinning and Weaving Mills Ltd (supra)** has considered discharge of liability of a guarantee under the provisions of section 141 of the Act of 1872. It has held that, a definite volition on the part of the creditor is required to take place for the guarantor to stand discharged in terms of section 141 of the Act of 1872. It has held that, the liability of the guarantor cannot but be stated to be a strict liability and even if the principal debtor is discharged from his liability unless such discharge is through the act of the creditor without consent of the surety/guarantor, the creditor's right of action against the surety is preserved.

31. **Commercial Bank of Tasmania (supra)** has considered a fact situation where, the original debtor was substituted by another debtor. It is after such substitution that, the creditor sought to proceed against the surety of the original debtor. In such factual scenario, the Court has held that, the action by the creditor against the surety is not maintainable since, the novation of debts operates as a complete release of the original debtor and secondly of the surety. The factual scenario in the present case is different.

32. **Webb (supra)** has recognised that, when, a creditor releases the debtor, he cannot reserve any right against the surety because the debt is gone at law. In an insolvency proceedings initiated by a financial creditor under Section 7 of the Code of 2016, the financial creditor, while applying under Section 7 of the Code of 2016, is not granting any release to the debtor. The financial creditor is exercising a statutory right to recover its debts. The outcome of the proceedings under Section 7 of the Code of 2016 is a product of statute. The financial creditor cannot be said to have voluntarily discharged the principal debtor, in the event, the Resolution Plan sanctioned by the Adjudicating Authority under the Code of 2016, ultimately results in the financial creditor not receiving any part or portion of its claim.

33. **Kundanmal Dabriwala (supra)** has considered a show cause notice issued by a State Financial Corporation, acting under the provisions of the State Financial Corporation Act, 1951, to a surety for the defaults committed by the borrower/principal debtor. In the facts of that case, it was found that, a scheme sanctioned by the Court under Sections 391 and 394 of the Companies Act, 1956 was binding on the creditors whether such creditors assented to it or not. It has taken note of Section 135 of the Act of 1872 and held that, a contract between the creditor and the principal debtor by which the creditor compounds with the principal debtor, discharges the surety.

34. In the facts of the present case, most respectfully, I am unable to accept and apply the ratio of **Kundanmal Dabriwala (supra)**. Firstly, **Kundanmal Dabriwala (supra)** is not binding precedent upon me. **Canonnore Spinning and Weaving Mills Ltd (supra)**, **Maharashtra State Electricity Board, Bombay (supra)** and **Modern Stores (India) Ltd. (supra)** are binding precedents on me. Secondly, the proposition that, as a binding arrangement sanctioned by Court under Section 391 of the Companies Act, 1956 being a deemed and binding contract through operation of law and if it extinguishes the liability of the principal debtor, the same has the effect of preventing the surety from recovering the amount of debt from the debtor and therefore, the creditor cannot recover from the surety, as observed by **Kundanmal Dabriwala (supra)**, requires consideration. Theoretically, as the liability of the surety is coextensive as that of the principal debtor, the creditor can proceed solely against the surety and recover the liability of the debtor from the surety. In such a situation, the subsequent reduction of liability of the debtor to the surety, by virtue of a bankruptcy or insolvency proceeding or otherwise, will not require the creditor to refund the amount recovered from the surety on account of the debtor to the surety. Pre bankruptcy and insolvency, the creditor has the right to recover the entire claim against the debtor from the surety. Post the bankruptcy and insolvency proceeding of the debtor, the pre bankruptcy and insolvency right of the creditor does not undergo any metamorphosis on the principle that, such proceedings emanate out of a statutory right and are involuntary in nature.

35. In a proceeding under Section 7 of the Code of 2016, the consent of the surety is immaterial when, the creditor is dealing with the principal debtor in terms of the Code of 2016. Therefore, when, the Adjudicating Authority sanctions a Resolution Plan in respect of the corporate debtor in an application under Section 7 of the Code of 2016, then, the action taken by the creditor in a proceeding under Section 7 of the Code of 2016 is involuntary. The Corporate Debtor in a proceeding under Section 7 of the Code of 2016 may stand discharged of its liability to its creditors.

Such discharge being had in a proceeding for bankruptcy and insolvency, the same does not absolve the surety of the liability as has been held in **Maharashtra State Electricity Board, Bombay (supra)**. The sanctioned Resolution Plan cannot be construed to be a variation of the terms of the contract between the principal debtor and the creditor, without the consent of the surety, discharging the surety as to transaction subsequent to the variants or at all. Similarly, the action of a financial creditor applying under Section 7 of the Code of 2016 cannot be construed to be an action of creditor in terms of Section 134 of the Act of 1872. When, the financial creditor approaches the National Company Law Tribunal under Section 7 of the Code of 2016, it approaches the Tribunal for the purpose of recovering its claim. An application under Section 7 of the Code of 2016 cannot be construed to be a discharge of the surety in terms of Section 134 of the Act of 1872. On the same analogy, an application under Section 7 of the Code of 2016 cannot be construed to be a discharge of the surety under Section 135 of the Act of 1872. An application under Section 7 of the Code of 2016 and the consequential orders that may be passed under the Code of 2016 cannot also be construed to be a discharge of the surety in terms of Section 139 of the Act of 1872. The implied promise recognised under Section 145 of the Act of 1872 is not impaired by any order that may be passed under the Code of 2016. As noted above, when, a financial creditor approaches the National Company Law Tribunal under the provisions of the Code of 2016, it does so, in exercise of statutory rights. Contractual obligations between the financial creditor and the surety are not obliterated or modified or suspended by the eventual outcome of such proceeding.

36. The Supreme Court in **V. Ramakrishnan & Anr. (supra)** has considered the issue as to whether Section 14 of the Code of 2016 would apply to a personal guarantor of a corporate debtor. It has held that, Section 14 of the Code of 2016 does not apply to a personal guarantor. It has noted that, the object of the Code of 2016 is not to allow personal guarantors to escape from an independent and coextensive liability. It has held as follows:-

".....

20. It is for this reason that sub-section (2) of Section 60 speaks of an application relating to the "bankruptcy" of a personal guarantor of a corporate debtor and states that any such bankruptcy proceedings shall be filed only before the National Company Law Tribunal. The argument of the learned counsel on behalf of the Respondents that "bankruptcy" would include SARFAESI proceedings must be turned down as "bankruptcy" has reference only to the two Insolvency Acts referred to above. Thus, SARFAESI proceedings against the guarantor can continue under the SARFAESI Act. Similarly, sub-section (3) speaks of a bankruptcy

proceeding of a personal guarantor of the corporate debtor pending in any Court or Tribunal, which shall stand transferred to the Adjudicating Authority dealing with the insolvency resolution process or liquidation proceedings of such corporate debtor. An "Adjudicating 21 Authority", defined under Section 5(1) of the Code, means the National Company Law Tribunal constituted under the Companies Act, 2013.

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 22 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 owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above,

require information as to personal guarantees that have been given in relation to the debts of the corporate 23 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 coextensive liability to pay off the entire outstanding debt, which is why 24 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 Ors. v. Mar Appraem Kuri Co. Ltd. and Anr., 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:

"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 25 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, 1964 AIR(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. v. State of Ajmer, 1955 AIR(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 making of the Chit Funds Act, 1982 on 19-8- 1982, [when it received the assent of the President and got published in the Official Gazette] as the Central 1982 Act intended to cover the entire field with regard to the conduct of the chits and further that the State Finance Act 7 of 2002, introducing Section 4(1)(a) into the State 1975 Act, was void as the State Legislature was denuded of its authority to enact the said Finance Act 7 of 2002, except under Article 254(2), after the 26 (Central) Chit Funds Act, 1982 occupied the entire field as envisaged in Article 254(1) of the Constitution."

37. Section 14 of the Code of 2016 does not apply to a personal guarantor. The Code of 2016 does not allow personal guarantors to escape their liability. When an application under Section 7 of the Code of 2016 is admitted by the Adjudicating Authority, the steps taken subsequent thereto flows out of the statute. The two termination points of an application under Section 7 of the Code of 2016, after the admission of such application, do not result in any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor to constitute a discharge of a surety under Section 133 of the Act of 1872."

[78] Thus, the dictum as laid in the case of **Lalit Kumar Jain (supra)** to our understanding is that the release or discharge of a principal borrower from its debt to

its creditor by involuntary process would not absolve a guarantor of its liability that may arise out of an independent contract. The Supreme Court concluded that the sanction of a resolution plan and finality imparted to it by Section 31 of the IBC would not per se operate as a discharge of the guarantor's liability, the nature and extent of which would depend on the terms of the guarantees itself. However, according to Mr. Thakore and Mr. Joshi, in **Lalit Kumar Jain (supra)**, the Supreme Court had no occasion to consider the effect of assignment of debt.

- **HUTCHENS v. DEAUVILLE INVESTMENTS PTY LTD (SUPRA):**

[79] In the earlier part of our judgement, we have referred to the case of **Hutchens (supra)**. This decision is of the Full Bench of the High Court of Australia. The facts, as noted in the judgement, read thus:

> "In July 1977, a proprietary company called The Kenbrite Corporation Pty. Ltd. ("Kenbrite"), of which Hutchens was a director, agreed to borrow money from General Credits Limited ("General Credits"). As security for the repayment of the loan and payment of interest, Kenbrite executed in favour of General Credits a first mortgage debenture ("the first mortgage debenture") containing a floating charge over its assets while Hutchens executed a deed of guarantee and indemnity whereby, among other things, he guaranteed the payment of any moneys then, or thereafter to become, owing by Kenbrite to General Credits on any account whatever. Some twelve months later, General Credits advanced further moneys to Kenbrite and, by way of further security, Hutchens executed the mortgage ("the real property mortgage") which lies at the heart of the present case. That mortgage was in favour of General Credits. It mortgaged the subject land to secure the payment to General Credits of "each and all sums of money in which (Hutchens) may now or hereafter be indebted or liable or contingently indebted or liable to the Mortgagee on any account whatever ... including ... any moneys owing under pursuant to or in connexion with" the guarantee and indemnity executed by Hutchens in July 1977. In October 1979, Kenbrite executed in favour of Helvetic Investment Corporation Pty. Ltd. ("Helvetic") a second-ranking mortgage debenture deed ("the second mortgage debenture") containing a floating charge over its assets to secure its indebtedness in respect of past and future borrowings from Helvetic.
>
> By February 1982, Kenbrite was insolvent. On 5 March 1982, General Credits appointed Messrs. Hodgson and Judson as receivers and managers of the assets and business of Kenbrite under the first mortgage debenture. As at that date, according to a statement of affairs subsequently prepared on behalf of Kenbrite and verified by Hutchens as a director, Kenbrite had estimated realizable assets of

approximately $1.5m., preferred creditors of approximately $0.43m. and secured liabilities of more than $3m. consisting of approximately $0.89m. owing to General Credits (under the first mortgage debenture) and approximately $2.14m. owing to Helvetic (under the second mortgage debenture). If the assets of Kenbrite were applied to discharge its liability to preferred and secured creditors in conformity with the priority of their claims to payment, the indebtedness of Kenbrite to General Credits would, on those figures, have been extinguished and Hutchens would have been under no liability under the guarantee and mortgage given by him in favour of General Credits. Alternatively, if General Credits had obtained payment of the debt owing by Kenbrite from Hutchens pursuant to the terms of his guarantee, Hutchens would, subject to an argument about the effect of cl.2 of the guarantee which we find it unnecessary to pursue, have been subrogated to General Credits' rights against Kenbrite under the first mortgage debenture and would, on those figures, have obtained full reimbursement of the amount which he had been required to pay as guarantor. In that regard, it is relevant to note that there would seem to be no suggestion that Hutchens was or is under any relevant liability otherwise than such as flows from his guarantee of moneys owed by Kenbrite to General Credits. On 12 March 1982, Helvetic appointed Mr. Dulhunty as receiver and manager of the assets and business of Kenbrite under the second mortgage debenture. By a demand dated 16 March 1982, General Credits demanded of Hutchens payment of "all sums of money which are in the definition of 'the principal sum' of the (real property) Mortgage". The demand did not specify the amount alleged to be owing by Hutchens.

On 6 April 1982, General Credits assigned to Helvetic, for a stated consideration of $927,580.35, the moneys owing to it by Kenbrite and "all its right title and interest in and to" the first mortgage debenture. As part of the one overall transaction, General Credits, for the same consideration but by a separate (and subsequently registered) instrument of "Transfer of Mortgage", transferred to Helvetic all its estate and interest as registered proprietor of the real property mortgage given to it by Hutchens as security for his liability as guarantor. On the same day, the receivers and managers appointed by General Credits retired and Mr. Dulhunty was appointed as receiver and manager under the first as well as the second mortgage debenture."

[80] The findings recorded by the High Court of Australia are as under:

"The overall transaction involving the assignment of the principal debt and the securities, including Hutchens' guarantee and supporting mortgage, by General Credits to Helvetic raises no difficulty as a matter of general principle. The effect of it was that Helvetic was substituted for General Credits as creditor. Kenbrite

remained liable as principal debtor; Hutchens remained liable as a guarantor upon whom a demand for payment had been made after default by the principal debtor (cf. Wheatley v. Bastow, at p 279 (p.109 of ER)). Where the difficulty in general principle arises is in the suggestion that the benefit of Hutchens' liability as guarantor and the real property mortgage to secure it were alone transferred to Deauville with the result that Kenbrite remained liable as principal debtor to Helvetic. As we followed the argument, it was suggested that, by such a transaction, Hutchens' liability as a guarantor could be transformed into an independent liability to a different creditor from the creditor to whom the guaranteed debt remained owing. That suggestion would seem to lie ill with the basic principle that the debt owed by a guarantor, upon default by the principal debtor, is and remains the same debt as that owing by the principal debtor. Put differently, it would seem to be simply impossible, as a matter of basic principle, to assign the benefit of a guarantee or the security for it (as distinct from the property secured) while retaining the benefit of the guaranteed debt and thereby to convert the one debt owing by both principal debtor and guarantor to the one creditor into two debts, one owing by the principal debtor to the creditor and the other owing by the guarantor to the assignee. If it were otherwise, the position would seem to be that, by assigning the benefit of a guarantee and the guarantor's security and retaining the benefit of a principal debtor's indebtedness and the principal debtor's security, a creditor could effectively divorce the guarantor's liability from that of the principal debtor and effectively deprive the guarantor of the rights which flowed from his position as such including (where available) his rights of subrogation. In that regard, the case of a purported assignment of the debt of a guarantor while retaining the benefit of the guaranteed debt is, subject to one qualification, analogous to that to which Jacobs J.A. referred in International Leasing Corp. Ltd. v. Aiken,1967 2 NSWR 427, at p 439:

"If the debt is assigned but the guarantee is not assigned then the right in the original creditor to recover under the guarantee must at least be suspended so long as the debt is assigned. There cannot be two persons entitled to recover the amount of the same debt, one from the principal debtor, and so long as the principal debtor was in default, another from the surety. Let it be assumed otherwise and suppose that the original creditor, the assignor of the principal debt, could show that it was overdue and thereupon sued the surety. Let it be assumed that the surety paid. Then, the assignee sues the principal debtor. He must be entitled to succeed unless there are some special circumstances of estoppel in the particular case, a factor which I place to one side. The assignee under an absolute assignment could not be deprived of his right to recover from the debtor because the assignor had recovered from the surety."

The qualification is that the analogy (and the legal consequences) would be less clear if, in the case of assignment of the debt but purported retention of the benefit of the guarantee (to which Jacobs J.A. referred), the assignee of the debt had rights of recourse against the original creditor in the event of default by the principal debtor.

It has not been argued, on behalf of Deauville, that the conceptual difficulties involved in the suggestion that the benefit of the real property mortgage and of Hutchens' indebtedness under it could be assigned independently of Kenbrite's liability as principal debtor were purely theoretical for the reason that the consideration paid by Deauville for the transfer of the mortgage should be treated as having been applied to discharge the principal debt originally owed by Kenbrite to General Credits. Nor is the factual basis for such an argument to be found in the evidence. Moreover, such an argument would encounter additional difficulties. It would involve treating the transfer of the instrument of mortgage as the equivalent of the execution of the security which it contains and the novel proposition that Hutchens' indebtedness as guarantor could survive the discharge by payment of the principal debt.

It may well be that the abovementioned difficulties of principle would be avoided if, on investigation of the facts at a trial, the proper inference was that there had been an equitable transfer by Helvetic to Deauville of the benefit of the principal debt and of the first mortgage debenture. Even if that were to prove to be the case or if those difficulties were otherwise to be surmounted, however, there would remain at least one further matter which Hutchens is entitled to have investigated upon a trial. If the receiver has, by arrangement between Helvetic and himself, appropriated moneys which have come to his hands as receiver to the payment of the debt owing under the second mortgage debenture in preference to the payment of moneys owing under the prior security, there would, at least prima facie, appear to be grounds for inferring, as Hutchens asserts, that Helvetic and the receiver have so acted for the purpose of enhancing Helvetic's position under the second mortgage debenture by subverting and rendering valueless Hutchens' rights of subrogation to the benefit of the first mortgage debenture. If such an inference were found to be warranted and subject to possible intervening questions (e.g. notice, estoppel or the effect of particular contractual terms), a serious issue would arise about whether there had been active connivance of a kind which would entitle Hutchens to be discharged from his obligations as guarantor or, at the least, to have his liability under the guarantee, and hence under the mortgage, reduced by the amount which would ordinarily have been, but which was not in fact, appropriated by the receiver to the discharge of the debt owing by Kenbrite under

the first mortgage security (cf., e.g., O Day v. Commercial Bank of Australia Ltd.,1933 50 CLR 200, at pp 223-224)."

[81] As noted above in para - 21 of this judgement, the submission canvassed on behalf of the writ applicants relying on the decision of **Hutchens (supra)** is that the liability as a guarantor cannot be transformed into an independent liability to a different creditor from the creditor to whom the guaranteed debt remained owing. In other words, the banks have no due recoverable from ESIL, not on account of any compromise arrived at, but on account of the loan asset being transferred to AMIL. When the loan asset does not exist in the books of the bank at all, no portion of the loan asset can be recovered by the banks from any one i.e. ESIL or its guarantees.

The dictum as laid in **Hutchens (supra)** shall be looked into closely by the Tribunal.

• **TERMS OF THE RESOLUTION PLAN:**

[82] We, now, undertake the last part of our exercise by looking into the few relevant clauses of the Resolution Plan which came to be approved:

"I. Upfront Cash Recovery

1. **Secured Financial Creditors**

Payment of INR 42,000 crores to be paid on the effective date as an upfront amount which comprises the following:

• INR 39,500 crores; and

• INR 2,500 crores being the 'Guaranteed Working Capital Adjustment' in accordance with the Revised RFP.

The cost of the committee of creditors amounting to INR 20 crores out of the Upfront Cash Recovery shall be paid to State Bank of India for the payment towards the legal cost and any process advisory costs. This shall include the past and the future costs arising out of the CIRP process of the Corporate Debtor.

An amount of INR 10 crores shall be paid to the Resolution Professional out of the Upfront Cash Recovery amount for the legal cost and other charges which may have been incurred in connection with the CIRP Process of the Corporate Debtor and has not been paid as CIRP cost.

The Resolution Applicant has agreed that the Committee of Creditors will decide the manner in which the financial package being offered by the Resolution Applicant to

the Financial Creditors will be distributed to the Secured Financial Creditors. All such allocations to the Financial Creditors will be binding on all Stakeholders. For the avoidance of doubt, such allocation shall be binding on all Financial Creditors, including dissenting Financial Creditors, if any.

For the sake of clarity, INR 42,000 crores is a committed amount even if the working capital adjustment amount is below INR 2,500 crores.

The Upfront Cash Recovery amount will be paid in accordance with this Resolution Plan within 30 days from the Plan Approval Date.

2. Unsecured Financial Creditors

A. Payment of INR 17.4 crores to the unsecured financial creditors to be paid on the Effective Date as an upfront amount by the Resolution Applicant which shall be divided proportionately to the unsecured financial creditors.

B. Payment of INR 3,055,738 to be paid to the unsecured financial creditors (whose Admitted Claim is less than INR 10 lakhs) to be paid on the effective date as an upfront amount by the Resolution applicant. Such amount shall be paid over and above the amount offered to the Secured Financial Creditors."

"4. Acquisition of Debt

Simultaneously with acquiring 100% equity ownership of the Corporate Debtor, the Resolution Applicant shall acquire the debt, along with all the underlying securities, owed by the Corporate Debtor to the Financial Creditors, other than corporate guarantees and personal guarantees issued for or on behalf of the Corporate Debtor to the members of the Committee of Creditors; and the Financial Creditors shall assign, and cause all the obligors to, acknowledge and accept such assignment of rights under the loan and security documents in favour of the Resolution Applicant and/or its Connected Persons, and/or banks or financial institutions designated by the Resolution Applicant.

The external commercial borrowings of the Corporate Debtor shall be acquired, along with the underlying securities, by an offshore entity nominated in this regard by the Resolution Applicant.

The Resolution Applicant shall acquire the entire debt, along with all the underlying securities, upon the payment of INR 42,000 crores on the Effective Date as an upfront amount."

"XII. Terms of Settlement

General

Notwithstanding anything stated herein, the total liability of the Resolution Applicant or the Corporate Debtor in relation to the Claims, liabilities and obligations of the Corporate Debtor prior to the Plan Approval Date shall not exceed the payments to be made to the Financial Creditors, and Operational Creditors as specified in Section V above. All claims that may arise post the Plan Approval Date including claims under applicable Law, contract judicial / quasi-judicial proceedings, disputed or undisputed, crystallized or otherwise which relate to the period prior to the Plan Approval Date shall be subject to the limit on liability stated under this Section.

Financial Creditors:

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

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

• In relation to the loans and financial assistance provided to the Corporate Debtor; each of the Financial Creditors, as the case may be, shall:

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

- Issue such letters and communications, and take such other actions, as may be required or deemed necessary for the release, assignment or novation of (i) the Encumbrance over the assets of the Corporate Debtor; and (ii) the pledge over the shares of the Corporate Debtor within 5 (five) Business Days from the Effective Date: and

- Be deemed to have waived all claims and dues (including interest and penalty, if any) from the Corporate Debtor arising on and from the Insolvency Commencement Date, until the Effective Date.

- Notwithstanding anything contained in this Resolution Plan, the relevant Financial Creditors and the Resolution Applicant may mutually discuss at a later date, the assignment by the relevant Financial Creditors of such corporate and personal guarantees provided for and on behalf of the Corporate Debtor.

• Any Claims made under any guarantees issued by the Corporate Debtor on behalf of its subsidiaries and third parties excluding the guarantees dealt with above (i.e. as issued in favour of Financial Creditors of the Corporate Debtor), shall not constitute financial debt and all such guarantees shall also stand extinguished as a part of the Resolution Plan and the beneficiaries of such guarantees shall be expected to recover the monies with respect to uninvoked guarantees from the principal borrower and for any shortfall, they shall not have any recourse against the Corporate Debtor and/or the Resolution Applicant. For the sake of brevity. the underlying loans to such principal borrower shall continue with right to full recovery

• In the event that the Corporate Debtor is required to pay any amounts pursuant to the invocation of guarantees given on behalf of the Corporate Debtor or payments made thereunder, The Financial Creditors shall jointly reimburse such amounts to the Corporate Debtor within a period of ninety Cays of any such payment being made by the Corporate Debtor. Further, in the event that the Financial Creditors require the Corporate Debtor to contest any clam on the Corporate Debtor Pursuant to the invocation of guarantees given on behalf of the Corporate Debtor or payments made thereunder the Financial Creditors shall bear all litigation costs for contesting such clam."

"Other Terms of the Resolution Plan

Extinguishment of Claims:

1. Notwithstanding anything contained under Applicable Law or otherwise, the Claims pertaining to the Corporate Debtor shall stand extinguished, settled, abated and satisfied in the manner set out hereinafter:

a. Other than the payments/ settlements under this Resolution Plan, no other payments or settlements (of any kind) will have to be made to any other Person in respect of the Claims filed under the Resolution Process and all Claims (including, for the avoidance of doubt, Rejected Claims Amount and Verification Pending Amounts) against the Corporate Debtor as of insolvency Commencement Date along with any related Proceedings, including Proceedings for enforcement of any security interest, shall stand irrevocably and unconditionally abated, discharged, settled and extinguished in perpetuity on the Plan Approval Date.

b. The payments contemplated in this Resolution Plan shall be the Corporate Debtor's full and final performance, and satisfaction of all Claims (including Rejected Claims Amount and Verification Pending Amounts) against the Corporate Debtor as of the Insolvency Commencement Date and Proceedings for enforcement of any security interest, shall stand irrevocably and unconditionally settled and extinguished in perpetuity on the Plan Approval Date.

c. Subject to Clause (g) below, all contingent liabilities of the Corporate Debtor up to the Plan Approval Date arising out of any Proceedings to which the Corporate Debtor is a party shall, unless otherwise stated in this Resolution Plan and irrespective of the final outcome of such Proceedings, stand irrevocably and unconditionally reduced to and capped at the amounts that would be realizable by the Claimant, if the contingent liability had fructified at any time prior to the Plan Approval Date.

d. With effect from the Plan Approval Date, all Encumbrances created or suffered to exist over the assets of the Corporate Debtor or over the Securities of the Corporate Debtor, whether by contract or by Applicable Law. whether created for the benefit of the Corporate Debtor or any Third Party (except the Security Interest that is created or purported to be created for the benefit of the Resolution Applicant and/ or its Connected Persons, and/or banks or financial institutions designated by the Resolution Applicant), shall stand unconditionally and irrevocably assigned or novated in favour of the Resolution Applicant or released (if required by the Resolution Applicant) upon making the relevant payments under the Resolution Plan on the Effective Date and all enforcement of security by any Persons commenced over any of the assets of the Corporate Debtor or over any Securities of the Corporate Debtor shall stand released and reversed, without the requirement of any further deed or action on the part of the Resolution Applicant or the Corporate Debtor including any priority of claims that could have otherwise been claimed by the Tax Authorities under Section 281 of the Income Tax Act, 1961. The Resolution Applicant shall comply with all necessary procedural requirements for the same.

e. Other than as set out in this Resolution Plan, the Resolution Applicant and the Corporate Debtor shall have no responsibility or liability in respect of any Claims (whether contingent or crystallized, known or unknown, filed or not filed) against the Corporate Debtor attributable to the period prior to the Insolvency Commencement Date, including those relating to any corporate guarantees, indemnities and all other forms of credit support provided by the Corporate Debtor prior to the Plan Approval Date shall stand irrevocably and unconditionally abated, settled and extinguished in perpetuity.

f. Upon the approval of the Resolution Plan by the Adjudicating Authority, all pending Proceedings relating to the winding-up of the Corporate Debtor shall stand irrevocably and unconditionally abated in perpetuity. As on the Plan Approval Date, the Government Creditors and Trade Creditors shall be deemed to have waived all termination rights on account of payment defaults, and rights to payment of penalty, default payment or any payment of like nature under any agreement or arrangement against the Corporate Debtor, including but not limited to any rights arising from any breach, default, act or omission, under any such agreement or arrangement executed by the Corporate Debtor and/ or the Resolution Professional for and on behalf of the Corporate Debtor, till the Plan Approval Date.

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

h. On the Plan Approval Date, all the outstanding negotiable instruments issued by the Corporate Debtor including demand promissory notes, post-dated cheques and letters of credit, shall stand terminated and the Corporate Debtor's liability under such instruments shall stand extinguished - unless otherwise determined by the Corporate Debtor in compliance with the provisions of Section VII or solely for the purpose of operating the Corporate Debtor as a going concern.

i. On the Plan Approval Date, other than as contemplated under Section X, the rights of any Person (whether exercisable now or in the future and whether contingent or not) to call for the allotment, issuance, sale or transfer of shares or Securities or loan capital of the Corporate Debtor, whether On a change of control, or otherwise, shall stand unconditionally and irrevocably extinguished. In addition to the foregoing. on the Plan Approval Date, the right to receive distribution of any shareholder (by way of dividend, coupons etc.) that has accrued or relates to the

period prior to the Plan Approval Date. shall stand unconditionally and irrevocably extinguished. All rights of any shareholder of the Corporate (not being the Resolution Applicant or its affiliates), whether arising under law or contract shall stand abated, suspended during the period between the Plan Approval Date and the Effective Date and the shareholder shall not have any rights to cause the Corporate Debtor to take any actions or restrain the Corporate Debtor from carrying on its activities.

j. All Claims (whether contingent or crystallized, known or unknown, filed or not filed) of Government Authorities in relation to all Taxes which the Corporate Debtor was or may be liable to pay (including with respect to financial years under assessment), all deductions and all withholding Taxes on any payment, as required under Applicable Law and pertaining to the period prior to the Insolvency Commencement Date shall stand extinguished on the Plan Approval Date.

k. All liabilities (whether contingent or crystallized, known or unknown, filed or not filed) in relation to any corporate guarantees, indemnities and all other forms of credit support provided by the Corporate Debtor prior to the Plan Approval Date (whether on behalf of Group Companies or otherwise) shall stand extinguished and discharged with effect from the Plan Approval Date.

l. No person shall be entitled to initiate any proceedings to enforce any Claims or continue any proceedings in relation to any Claims in so far as the Claims relate to the period prior to the Plan Approval Date.

2. With respect to the matters stated in paragraph 1 above, any liabilities and/or Claims that arise till the Effective Date shall stand waived, extinguished, abated, discharged in perpetuity and provisions of paragraph 1 above shall mutatis mutandis apply.

3. Nothing in this Resolution Plan shall affect the rights of the Corporate Debtor to recover any amounts due to the Corporate Debtor from the Third Party (including any Related Party) except in the case of personal and corporate guarantees provided for and on behalf of the Corporate Debtor to the Financial Creditors and there shall be no set off of any such amounts recoverable by the Corporate Debtor or any liability extinguished pursuant to this Resolution Plan. If any person receives any payments pursuant to this Resolution Plan recovers any additional amount from any Third Party including but not limited to recovery on account of any guarantees or other securities issued by any Third Parties, then such person shall be liable to pay such additional amounts to the Corporate Debtor."

[83] Few relevant clauses of the Personal Guarantee furnished by one of the writ applicants herein in favour of the State Bank of India read thus:

"1. If at any time default shall be made by the Borrower in payment of the principal sum together with interest, costs, charges, expenses and/or other monies for the time being due to the Bank in respect of or under the aforesaid credit facilities or any of them the Guarantor shall on demand pay to the Bank the whole of such guaranteed together with interest, costs, charges, expenses and/or any other monies as may be then due to the Bank in respect of the aforesaid credit facilities and shall indemnify and keep indemnified the Bank against all losses of the said principal sum, interest or other monies due and all costs charges and expenses whatsoever which the Bank may incur by reason of any default on the part of the Borrower.

17. The Guarantor agrees that if the Borrower enters into liquidation or winding up (whether compulsory or voluntary) or if the management of the undertaking of the Borrower is taken over under any law or if the Borrower is nationalised under any law or make any composition or arrangement with creditors the Banks (notwithstanding payment to the Bank by the guarantor or any other person of the whole or any part of the amount hereby secured) rank as creditor and prove against the estate of the Borrower for the full amount of all the Bank's claims against the Borrower or agree to and accept any composition in respect thereof and the Bank may receive and retain the whole of the dividends, composition or other payments thereon to the exclusion of all the rights of the Guarantor in competition with the Bank until all the Bank's claims are fully satisfied and the Guarantor will not be paying off the amounts payable by him or any part thereof or otherwise prove or claim against the estate of the Borrower until the whole of the Banks claims against the Borrower have been satisfied and the Bank may enforce and recover payment from the Guarantor of the full amount payable by the Guarantor notwithstanding any such proof of composition as aforesaid. On the happening of any of the aforesaid events, the Guarantor shall forthwith inform the Bank in writing of the same.

18. The Guarantee hereby given is independent and distinct from any security that the Bank has taken or may take in any manner whatsoever whether it be by way of hypothecation and/or mortgage and/or other change over goods, movable or other assets and/or any other property movable or immovable and the Guarantor has not given this Guarantee upon the understanding faith or belief that the Bank has taken and/or may hereafter take any or other such security and that notwithstanding the provisions of Section 140 and Section 141 of the Indian Contract Act, 1872, or other section of that Act or any other law, the Guarantor will

not claim to be discharged to any extent because of the Bank's failure to take any or other such security or in requiring or obtaining any or other such security or losing for any reason whatsoever including reasons attributable to its defaults and negligence benefit of any or other such security or any of rights to any or other such security that have been or could have been taken."

[84] Thus, from the aforesaid, it appears that upon acquiring 100% equity ownership of the corporate debtor, the Resolution Applicant acquired the debt, along with all the underlying securities, owed by the corporate debtor to the financial creditor, other than the corporate guarantees issued for and on behalf of the corporate debtor to the members of the Committee of Creditors. The Resolution Applicant acquired the entire debt along with all the underlying securities upon the payment of INR 42,000 Crores on the effective date as the upfront amount.

[85] The payments to the financial creditors in accordance with the Resolution Plan was to be treated as full and final payment of all the outstanding dues of the corporate debtor to each of the financial creditors as of the effective date and all agreements and arrangements entered into by or in favour of each of the financial creditors, including but not limited to the loan agreements and security agreements other than the corporate or personal guarantees provided in relation to the corporate debtor was deemed to have been assigned / novated to the Resolution Applicant.

[86] The Resolution Plan also provides with a non-obstante clause stating that notwithstanding anything contained in the Resolution Plan, the relevant financial creditors and the Resolution Applicant may mutually discuss at a future date as regards the assignment by the relevant financial creditors of such corporate and personal guarantees provided for and on behalf of the corporate debtor.

[87] The aforesaid will have to be closely looked into by the Tribunal and the Tribunal will have to give a meaningful interpretation to such understanding and agreement between the parties so as to appreciate the arguments canvassed on behalf of the writ applicants that with the assignment of debt by the State Bank to the ArcelorMittal, they in their capacity as the personal guarantors, are relieved or discharged of all their personal obligations under the deed of guarantees.

[88] A surety who seeks to be relieved of the obligation imposed upon him as surety and to be absolved from the liability must not only show that the creditor has, by his acts or conduct, either prevented the debtor from doing the things which he undertook to do, or has connived at the debtor's omission to do those things or has enabled him to do something which he ought not to have done, but he must also show that the creditor has done some act inconsistent with the rights of the surety, or omitted to do

any act which his duty towards the surety required him to do within the meaning of Section 139. Thus, before the surety is discharged the following two conditions must be satisfied (1) the creditor must do an act which is inconsistent with the rights of the surety or he must omit to do any act which his duty to the surety requires him to do; and (2) by the action or inaction of the creditor referred to in ground (one), the eventual remedy of the surety himself against the principal debtor is impaired. Whether the said two conditions are fulfilled in the present case or not will have to be closely examined by the Tribunal keeping in mind the terms of the Resolution Plan, the terms of the guarantee and the legal effect of the assignment of debt vis-a-vis the liability of the guarantors. This aspect shall be examined by the Tribunal bearing in mind the dictum laid in decision of **HUTCHENS (supra)**.

[89] As per the scheme of IBC, once the resolution plan is accepted by the Committee of Creditors (CoC) and the same is approved by the Adjudicating Authority, the CIRP comes to an end. Once the CIRP is concluded and the plan gets approved by the Adjudicating Authority as per Section 31 of the IBC, the debt which was owed by the Corporate Debtor is settled. No proceedings against the Corporate Debtor can be initiated in relation to the debt that has been settled. The resolution plan so approved is binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the Resolution Plan. It is, therefore, understood that once the Resolution Plan is approved by the Adjudicating Authority, the liabilities of the Corporate Debtor come to an end. However, the creditors may retain the right to proceed against the guarantors of the Corporate Debtor. Is there any specific bar under the IBC that a creditor cannot claim its remaining debt due from the guarantor (which has not been recovered from the Corporate Debtor through CIRP)? It is a settled position of law that the liabilities of guarantors are co-extensive with the borrower. Therefore, if the borrower is unable to clear the debt, then the right is accrued in favour of the creditor to proceed against the guarantor. This liability is independent in itself as the contract of guarantee is an independent contract. The guarantors, on the other hand, may take defence of Sections 133, 134 and 140 of the Indian Contract Act. As per Section 134, a guarantor is discharged of its liability towards the creditor if the creditor on its own instance discharges the Principal Debtor. The main ingredient of this section is discharge of the debtor through voluntary act of the creditor and not due to operation of law. Any scheme or plan that is approved by a court or Tribunal becomes a statutory scheme and is, therefore, an act of operation of law. Under the IBC, the position is somewhat different. The Corporate Debtor under the IBC is discharged on the approval and implementation of the resolution plan. The resolution plan is approved by the Adjudicating Authority after it is satisfied that the same is approved by the prescribed majority of the members of CoC and its contents are in accordance with law. Therefore, under the IBC, the Corporate Debtor is discharged by the

operation of law, i.e. approval of the Resolution Plan by the Adjudicating Authority on its satisfaction and not at the instance of a creditor even if one or any of the creditors may or may not be in favour of Resolution Plan. Once the Resolution Plan is approved by the Adjudicating Authority, the Corporate debtor is discharged and the said decision is binding on the creditor. Thus, whether the guarantors could be said to be discharged of its liability towards the creditor on the discharge of principal debtor's liability under the IBC will have to be decided by the Tribunal keeping in mind that the case on hand is one of assignment of debt.

[90] A writ of prohibition is issued only when patent lack of jurisdiction is made out. It is true that a High Court acting under Article 226 is not bound by the technical rules applying to the issuance of prerogative writs like certiorari, prohibition and mandamus in United Kingdom, yet the basic principles and norms applying to the said writs must be kept in view, as observed by this Court in **T. C. Basappa (supra)**. It was observed by Mukherjea, J. speaking for the Constitution Bench :

> "The language used in Articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs in the nature of "habeas corpus, mandamus, quo warrant, prohibition and certiorari" as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of "certiorari" in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

[91] The aforesaid observations were taken note of by the Supreme Court in the case of Union of India (UOI) and others vs. Upendra Singh, 1994 3 SCC 357 and having regard to the same, the Supreme Court observed in para 5 as under:

> "The said statement of law was expressly affirmed by a seven-Judge Bench in Ujjam Bai v. State of UP, 1962 AIR(SC) 1621. The reason for this dictum is selfevident. If we do not keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in 3 (1955) 1 SCR 250: AIR 1954 SC 440 4 AIR 1962 SC 1621, 1625 English law, the exercise of jurisdiction becomes rudderless and unguided,it tends to become arbitrary and capricious. There will be no uniformity of approach and there will be the danger of

the jurisdiction becoming personalized. The parameters of jurisdiction would vary from Judge to Judge and from Court to Court. (Some say, this has already happened.) Law does advance. Jurisprudence does undoubtedly develop with the passage of time, but not by forgetting the fundamentals. You have to build upon the existing foundations and not by abandoning them. It leads to confusion; it does not assist in coherence in thought or action."

[92] Thus, the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting writs like **"Certiorari, Prohibition, Mandamus, Habeas Corpus, Quo Warranto"** should be kept in mind and should not be issued on mere asking.

[93] The upshot of the aforesaid discussion is that the case on hand is not one in which it could be said that there is a patent lack of jurisdiction in the Debts Recovery Tribunal to look into all the issues discussed above. Had it been a case of patent lack of jurisdiction, this Court would have gone into the pivotal issue and answered the same. We are of the view that the Tribunal should be allowed to look into all the relevant aspects of the matter, more particularly, the pivotal issue as regards the assignment of debt vis-a-vis the liabilities of the guarantors under the guarantees deed. The pivotal point raised by the writ applicants is one for which detailed analysis has to be made by the Tribunal itself even to find out as to whether the facts on record would clothe the Tribunal with the necessary jurisdiction to decide the issues raised before it on merits. When we pose a question to ourselves as to instead of issuing a writ of prohibition, as prayed for, by the writ applicants, if by permitting the Tribunal to proceed further, whether any serious prejudice would be caused? We find that by adopting the said course, while no prejudice would be caused to the writ applicants, by issuing a writ as asked for, there is likelihood of a serious injustice being caused to the Bank by preventing a statutory forum from exercising the powers conferred on it by law without there being a strong or convincing grounds for issuing such a prohibition. Therefore, it would be wholly inappropriate at this stage to interfere with the Original Applications preferred by the Bank before the Debts Recovery Tribunal by issuing a writ of prohibition.

[94] Our final conclusions may be summarized as under:

[a] The writs of mandamus, certiorari and' prohibition, and for the matter of that, all high prerogative writs, are ordinarily not issued where there exists an alternative remedy equally efficient and adequate.

[b] But there is no inflexible rule that such writs cannot be issued where the Court thinks it just and convenient to do so. The fact that it ordinarily does not do so is a

question not of want of jurisdiction but of expediency.

[c] Whether the alternative remedy is equally efficacious or adequate is a question of fact to be decided in each case.

[d] Where a complaint is made against any act done or purported to be done under any statutory provision, the fact that there exists in the Statute itself a possible remedy, is an important fact, to be taken into consideration. Where such provisions exist the Court will be extremely reluctant to interfere by way of high prerogative writs and especially so if the applicant has actually taken recourse to his remedy under the Statute.

[e] But the fact that there exists a remedy under the Statute does not take away the jurisdiction of the Courts to issue the writs in appropriate cases.

[f] In the following cases it has been held that a writ of prohibition will be issued notwithstanding an alternative remedy, whether under a statutory provision or otherwise: -

[g] Where an inferior tribunal assumes jurisdiction and the want of jurisdiction is patent on the face of it; (ii) where the proceedings complained of are against the principles of natural justice; and (iii) where the alternative remedy is too costly or ineffective or entails such delay that the applicant would be irreparably prejudiced or the remedy might prove valueless.

[h] Whether any debt within the meaning of Section 17 of the Act, 1993 exists as on date so as to confer jurisdiction upon the Debts Recovery Tribunal under Section 19 of the Act, 1993 to adjudicate the Original Applications, would come within the purview of the D.R.T. Act. The Tribunal will have to adjudicate and decide whether with the assignment of debt by the secured creditor (State Bank of India) to the Resolution Applicant (ArcelorMittal), all other liabilities and obligations of the writ applicants as guarantors stood discharged?

[95] For all the foregoing reasons, we decline to entertain these writ applications as no case for issue of a writ of prohibition has been made out.

[96] In the result, all the writ applications fail and are hereby rejected. We leave it open to the Tribunal to decide the pivotal issue on its own and if the Tribunal fits appropriate or upon request of the parties may frame a preliminary issue as regards the jurisdiction and decide the same [see : **Shirpur Power Pvt Ltd (supra)**].

[97] We clarify that any observation on merits direct or indirect shall be construed as absolutely prima facie in nature and those shall not be construed as an expression of

any final opinion on the issue as regards the jurisdiction of the Tribunal or the pivotal issue of assignment of debt and its effects.

[98] The Tribunal shall now proceed further expeditiously with the adjudication of the Original Applications. The interim relief earlier granted stands vacated forthwith.

[99] All the Civil Applications seeking impleadment as party respondent in the main matters also stand disposed of. We leave it open to the applicant to file an appropriate application before the Debts Recovery Tribunal for being impleaded as a party in the main proceedings. If such applications are filed, those be decided in accordance with law on its own merits.

[100] All other Civil Applications also stand disposed of.

FURTHER ORDER

After the judgment was pronounced, Mr. Joshi, the learned Senior Counsel made a request to stay the operation of this judgment for a period of four weeks and also continue the interim relief which was earlier granted. The request made by Mr. Joshi has been opposed by the learned Senior Counsel appearing for the Bank. In the facts and circumstances of the case, we continue the interim relief earlier granted for a period of four weeks. The Tribunal shall not proceed further with the hearing of the Original Applications for a period of four weeks from today.