

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Ins) No. 121 of 2024

[Arising out of the Order dated 10.11.2023, passed by the 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad, Court-II), in IA No. 54/NCLT/AHM/2022 in CP (IB) No. 397/NCLT/AHM/2018]

IN THE MATTER OF:

UNION BANK OF INDIA
(ERSTWHILE ANDHRA BANK)
STRESSED ASSET MANAGEMENT
BRANCH, 104, GROUND FLOOR,
BHARAT HOUSE, M.S. MARG, FORT,
MUMBAI-400023

E-MAIL:

samvmumbai@unionbankofindia.bank

...Appellant

Versus

MR. KIRAN SHAH,
RESOLUTION PROFESSIONAL OF KSL &
INDUSTRIES LTD.
OFFICE AT: 608,
SAKAR-I,
NEAR GANDHI GRAM RAILWAY STATION,
OPPOSITE NEHRU BRIDGE, ASHRAM
ROAD,
AHMEDABAD-380009

E-MAIL: kiranshah.ip@gmail.com

...Respondent

Present:

For Appellant : Mr. Arun Kumar Shukla, Mr. Naman Shukla, Ms. Komal Chhabra & Mr. Navin Kumar, Advocates.
For Respondent : CA Kiran Shah & Mr. Arjun Sheth, for RP.

J U D G M E N T
(Hybrid Mode)

[Per: Justice Mohd. Faiz Alam Khan, Member (Judicial)]

The instant appeal has been preferred by the Appellant-Union Bank of India under Section 61 of the Insolvency and Bankruptcy Code, 2016 (Code) against the order dated 10.11.2023, passed by Ld. Adjudicating Authority, NCLT Ahmedabad Court-II, whereby the application bearing IA No. 54 of 2022 moved in CP IB) No. 397 of 2018 filed by the appellant under Section 60 (5) of the Code has been dismissed and the claim of the appellant has been rejected and without including the appellant as member of the committee of creditor (CoC), resolution plan has been approved.

2. Ld. Counsel for the appellant submits that appellant is a body corporate constituted under the banking companies (acquisition and transfer of undertakings) Act, 1970, carrying business of banking and having its diverse branches throughout India. The appellant had extended loans to Krishna Knitwear Technology Ltd. (KKTL) and Eskay Knit India Ltd. (EKIL) and in order to secure the credit facilities the Corporate Debtor (CD) i.e. KSL and Industries Ltd. stood as a Corporate Guarantor and extended guarantee pursuant to guarantee deed dated 25.03.2011 to secure the claim of the appellant and in this regard the CD also mortgaged its asset in favour of the appellant.

3. It is also submitted that the accounts of the Principal borrower namely KKTL and EKIL were classified as non-performing assets (NPA) on 13.11.2015 and 23.11.2015, respectively.

4. It is submitted that the repayment obligation of the credit facilities is co-extensive so far as the principal borrowers and guarantors are concerned.

The CD along with other entities executed and undertaking dated 25.03.2011 and a general form of guarantee was executed on 25.03.2011 for Rs. 16 crores and a part from it the CD also deposited original documents of the title deeds of the property on 28.03.2011 with an intent to secure the repayment.

5. It is submitted that the principal borrower KKTL failed to repay the loan despite repeated request and the guarantors including the CD also failed to honor their commitment and liabilities and therefore the appellant was compelled to file an original application bearing no. 150 of 2016 under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 (Debt Recovery Act) for recovery of Rs. 63,53,24,130.08/- before, Ld. Debts Recovery Tribunal-II Ahmedabad against Principal Borrower KKTL along with guarantors including the CD and the same is pending.

6. It is also submitted that another Principal Borrower EKIL and its guarantors including CD failed to repay the loan and in this regard the appellant file an original application bearing no. 329 of 2016 under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 (Debt Recovery Act) for recovery of Rs. 1749835714.45/- before, Ld. Debts Recovery Tribunal-II Ahmedabad against Principal Borrower KKTL along with guarantors including the CD and the same is pending.

7. It is further submitted that an application under Section 10 of the Code, Company Petition No. 397 of 2018 was filed by the CD namely KSL and Industries and the same was admitted by Ld. Adjudicating Authority on 06.09.2019 and the Interim Resolution Professional was appointed and on 19.09.2019 the claims of the creditors of the CD were invited.

8. It is further submitted that appellant filed its claim for an amount of Rs. 76,25,34,655.55/- by way of Form C on 29.11.2019 and the same was admitted by the IRP and appellant was included in the CoC and also attended meetings of the same from 5th to 8th meeting.

9. It is also submitted that the Respondent No. 1 vide email dated 07.09.2021, when the CIRP was in its concluding phase rejected the claim of the appellant on the ground that the appellant has not invoked the guarantee as furnished by the CD and vide email dated 12.10.2021, also informed that appellant is no more part of the CoC, however, the appellant replied the same vide its letter dated 11.11.2021, and placed all the record and evidence before the Respondent No. 1 but the Respondent No. 1 has not considered the same in right perspective.

10. It is further submitted that appellant in order to invoke the guarantee of the CD has served a demand notice dated 19.05.2016, under Section 13 (2) of the SARFAESI Act to M/s KKTL as well as to its guarantors and mortgagers including the CD clearly indicating the property of the CD which was charged to the bank and therefore clearly calls upon the borrower and their guarantors and mortgagers, including the CD, to pay the default amount and therefore for all purposes the guarantee was invoked against the CD.

11. It is further submitted that aggrieved by the decision of the Respondent No. 1 appellant filed an IA No. 54 of 2022 before the adjudicating authority which has been dismissed by Ld. Adjudicating authority by passing impugned order without appreciating the merits and pleadings on record.

12. It is submitted that Ld. Adjudicating authority while dismissing the application of the appellant has relied on two judgments of this appellate tribunal namely, ***Aashray Social Welfare Society and Ors. Vs. Saha Infratech Pvt. Ltd. & Ors. And Judgment of the Hon'ble Apex Court in Ghanshyam Mishra and Sons Pvt. Ltd. vs. Edelweiss Assets Reconstruction Company Ltd.*** which were not at all relevant for the dispute before the adjudicating authority.

13. It is further submitted that ld. Adjudicating authority failed to appreciate that the mortgage debt becomes payable in the event of default without any demand and even otherwise since notice under Section 13 (2) of the SARFAESI Act was issued which was admittedly a notice of demand the finding of the Ld. Adjudicating Authority there is no invocation of guarantee is patently wrong.

14. It is further submitted that the finding recorded by Ld. Adjudicating Authority that the claim of the appellant is not maintainable in absence of invocation of guarantee is against the settled view of this appellate tribunal and Hon'ble Supreme Court as there is difference between a 'claim', 'debt' and 'default' and this fine distinction has not been appreciated by the Ld. Adjudicating authority. Moreover, the liability of the principal borrower and guarantor/mortgager is co-extensive and the notice to the principal borrower would also be deemed to be a notice to the guarantor/mortgager. Reliance in this regard has been placed on ***Laxmi Pat Surana vs. Union Bank of India (2021) 125 taxmann.com 394 (SC)*** and judgment of this appellate tribunal passed in ***Andhra Bank vs. FM Hammerle Textile Ltd 2018 SCC Online NCLAT 883.***

15. In the end it is vehemently submitted that even if there is no default committed by the CD, a claimant may file a claim without invoking corporate guarantee and the duty of the IRP is only to collate and verify the claim and no power has been vested in him to adjudicate the claim thus the impugned judgment is liable to be set aside and the appeal of the appellant be allowed.

16. Ld. Counsel for the Respondent submits that the appeal has been preferred without any merit and the same is liable to be dismissed as the claim of the appellant was rejected as the guarantee was not invoked and therefore the debt was not payable.

17. It is further submitted that so far as the contention of the appellant that by sending notice under Section 13 (2) of the SARFAESI Act the guarantee against the CD was invoked is against settled law as any demand without reference to the guarantee deed and without specific invocation of guarantee cannot be treated as an invocation of the same. Moreover, the name of the CD does not reflect under the name of the guarantors of the notice dated 19.05.2016. In this regard reliance has been placed on ***Amanjyot Singh vs. Navneet Kumar Jain & Ors., CA (AT) (Ins.) No. 961 of 2022*** as well as on ***State Bank of India vs. Mr. Deepak Kumar Singhania, (2025) ibclaw.in 153 NCLAT***.

18. It is submitted with considerable force that in case of guarantee the right to payment only accrues when the demand is specifically made which is absent in the instant case, in absence of any breach of contract and in absence of any demand/invocation notice there is no occasion to claim payment from the CD. Reliance has been placed on the law laid down by the

Hon'ble Supreme Court in Ghanshyam Mishra (supra), ***State Bank of India vs. Orissa Manganese and Minerals Ltd.***, order dated 20.06.2018 in CA No. 402 of 2018 by Ld. NCLT Kolkata Bench, judgment of this appellate tribunal passed in ***IDBI Trusteeship vs. Abhinav Mukherjee, (2022) SCC Online NCLAT 267***, dated 12.07.2022. While the judgments relied on by the appellant is not having any relevance.

19. It is further submitted that under various provisions of the Code it is the duty of the IRP or the RP to verify the documents supplied by a claimant in support of the claim while the claim of the appellant could not be verified at first on the score that clause 10 of the guarantee deed categorically provides for issuance of demand notice in writing which has not been given and the RP vide email dated 24.04.2021, had sought certain documents and reminder of the same was also sent on 09.06.2021 and again emails were sent on 17.07.2021, 21.07.2021 and 26.07.2021 and it was only on 26.07.2021 the appellant informs the RP two original applications were filed against the two companies as well as the CD under relevant provisions of the SARFAESI Act and a reminder notice was also sent by the RP on 13.08.2021 to supply corporate guarantee invocation notice to which the appellant replied on 18.08.2021 that demands has been made through original applications filed before the Ld. DRT, Ahmedabad and since no demand notice for invoking guarantee was provided the RP was constrained to issue an email on 07.09.2021 stating that RP would be unable to accept the claim of the appellant and thereafter on 12.10.2021, further informed the appellant that he is no more a member of the CoC.

20. It is further submitted that since the guarantee of the CD was not invoked by the appellant and no notice of demand addressed to the CD for the purpose of invocation of guarantee has been given or produced his claim has been rightly rejected by the RP as well as by the Ld. Adjudicating Authority and the appeal is liable to be dismissed.

21. Having heard Ld. Counsel for the parties and having perused the record including the written submissions we find that majority of the facts alleged by the parties are not in dispute.

22. It is admitted to the parties that the appellant had extended loan to KKTL and EKIL and in order to secure these credit facilities the corporate debtor extended guarantee to secure the loan extended by the appellant. In addition to the same, CD also created mortgage of its assets.

23. It is also not in dispute that the CD was admitted into CIRP vide order passed by Ld. NCLT on 06.09.2019 and the application for the same was filed under Section 10 of the Code.

24. It is also not in dispute that initially the interim resolution professional namely Anil Kumar was appointed and the appellant in pursuance of the invitation of claims by the IRP has submitted its claim in Form C dated 29.11.2019 and the same was admitted by the IRP. The aforesaid IRP was subsequently, removed and the instant RP i.e. Kiran C. Shah was appointed as such vide order 28.07.2020 passed by the adjudicating authority in IA No. 691 of 2019 moved in aforesaid company petition.

25. It is also not disputed that appellant was invited at first to attend the 4th CoC meeting which it did not, however, the appellant was part and parcel of the 5th to 8th meetings of the CoC of the CD.

26. It is also not in dispute that vide email dated 07.09.2021, the claim of the appellant was rejected by the Respondent on the ground that the appellant has not invoked the guarantee as furnished by the CD and it is also not in dispute that vide email dated 12.10.2021, the RP also conveyed to the appellant that it is no more part of the CoC of the CD and thereafter the CoC was reconstituted and a resolution plan was approved by the CoC.

27. The appellant admittedly has moved an IA No. 54 of 2022 before Ld. Adjudicating Authority against the decision of the Respondent/Resolution Professional as it was aggrieved by the rejection of its claim and also of not including it as the member of the CoC of the CD.

28. The adjudicating authority however dismissed this application of the appellant on the ground that the appellant has not invoked the guarantee as per the terms of the guarantee deed executed between the appellant and the CD and therefore the claim could not be admitted without such invocation.

Relevant part of the impugned judgment is reproduced as under:

“18. In this case, it is not that the applicant has brought in an insolvency under the Section 7 of the IBC but has submitted the claim to the RP who has been appointed on initiation of CIRP against the corporate debtor who is also a guarantor to one of the associated entities.

19. Claims, which are due and payable before the commencement of the CIRP can only be taken into consideration. In case of a guarantee, the debt becomes due only when a creditor invokes a guarantee. The Hon’ble NCLAT differentiated the difference between the definition of ‘default’ and ‘claim’ under the IBC. Existence of ‘default’ is a condition precedent for admission of insolvency proceeding under IBC. Any person who has right to claim

payment, under the IBC, is supposed to file the claim, whether matured or immature. The question as to whether there is a default or not is not relevant. As on date of CIRP and till date, the applicant has not invoked the guarantee, but retain the recovery suit.

20. In a landmark judgment before Hon'ble NCLAT Aashray Social Welfare Society & Ors. vs. Saha Infratech Pvt. Ltd. & Ors., CA (AT) (Ins) No. 904 of 2021 dismissed a company appeal held that when a corporate debtor as a Guarantor has not invoked the Corporate Guarantee before the initiation of CIRP under the provisions of IBC 2016 then the 'right to payment' cannot be accrued by the corporate debtor. Further the bench placed reliance on the judgment of the Hon'ble Supreme Court in Ghanshaym Mishra and Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Co. Ltd. (2021) 9 SCC 657 and held that when the 'Corporate Debtor' is a 'Guarantor' and the 'Corporate Guarantee' was not invoked before the commencement of the CIRP, as on the date of filing the claims, the "Right to Payment" cannot be accrued. In view of the above the Tribunal is passing the following order:

ORDERS

The application IA No. 54 of 2022 is dismissed".

29. The issue which arises for our consideration is, as to whether a financial creditor can maintain its claim in the CIRP of the CD without invocation of the guarantee and also as to whether in the instant case the guarantee has been properly invoked as claimed by the appellant. If the answer to the first issue would be in affirmative, then there would not be any occasion for us to proceed further as the matter would end there. Thus, we proceed to adjudicate as to whether a financial creditor can maintain its claim before the IRP/RP in the CIRP of CD even without invoking the guarantee against the guarantor.

30. Ld. Counsel for the appellant has relied on the law laid down by this appellate tribunal in **Andhra Bank v. F.M. Hammerle Textiles Ltd.,**

Company Appeal (AT)(Insolvency) No.61 of 2018, wherein it was held as under:

"11. For example, if there is a default, a 'Financial Creditor' or 'Operational Creditor' may file application under Sections 7 or 9 for initiation of 'Corporate Insolvency Resolution Process'. Once it is initiated, order of 'Moratorium' is passed and the advertisement is issued all claimants whether his claim is matured or not are supposed to file claim before the 'Resolution Professional'. The 'Resolution Professional' cannot reject one or other claim on the ground that only the person whose claim has been matured can be looked into and other claim not matured cannot be entertained.

12. The only thing which is to be ascertained is whether the person who claimed to be 'Financial Creditor', whether his debt owed to him come within the meaning of 'Financial Debt' as defined under Section 5(8)"

31. In **Export Import Bank Of India vs RP of JEKPL Private Ltd. ,Company Appeal (AT) (INS) 304 of 2017** , this appellate tribunal while considering whether unmatured claim at the time of insolvency commencement cannot be accepted and also whether without invoking guarantee the creditor cannot be treated as Financial Creditor, it was held that Default of Debt has nothing to do with the claim of a person and in Paragraph No. 56 that maturity of claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of the claim.

32. Hon'ble Supreme Court in **China Development Bank v. Doha Bank Q.P.S.C. and Ors.,(2024)ibclaw.in 340 SC** held as under: -

“3. Definitions: -

(6) “claim” means – (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured; (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to

judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;”

Sub-section (11) of Section 3 of the IBC defines “debt” which reads thus:

“3. Definitions: -

(11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;”

(8) “financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes–

(a) **money borrowed against the payment of interest;**

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or

any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause.”

(emphasis added)

In terms of sub-section (11) of Section 3, debt is a liability or obligation in respect of a claim which is due from any person and includes a financial debt or operational debt. As noted earlier, a claim is a right to payment whether or not, such right is reduced to judgment and whether it is disputed or undisputed. The right to payment can be legal, equitable, secured or unsecured. Therefore, if there is a liability or obligation in respect of a payment which is disputed, it still becomes a claim. Once there is a liability or obligation in respect of a claim, it becomes a debt. Once there is a financial debt, the person to whom a debt is owed, becomes a Financial Creditor.

49. *The appellants are claiming that their case is covered by clause (i) of sub-section (8) of Section 5 of the IBC. Under clause (i), the amount of any liability in respect of any guarantee of the items referred to in clauses (a) to (h) becomes a financial debt. Therefore, when clause (i) of Section 5(8) is applicable, it is not necessary that the Financial Creditor actually tenders any amount to the Corporate Debtor. In this case, the appellants are claiming that the amount of liability covered by clause (i) is in respect of money borrowed by the RCom entities (excluding the Corporate Debtor) against payment of interest under the facility agreements. There is no dispute that facilities were granted by the appellants to RCom entities. The amount of any liability in respect of any of the guarantees for money borrowed against the payment of interest is a financial debt under Section 5(8) of the IBC.*

50. *“Guarantee” is defined under Section 126 of the Contract Act, which reads thus:*

“126. “Contract of guarantee”, “surety”, “principal debtor” and “creditor”. —A “contract of guarantee” is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the “surety”; the person in respect of whose default the guarantee is given is called the “principal debtor”, and the person to whom the guarantee is given is called the “creditor”. A guarantee may be either oral or written.”

A contract becomes a guarantee when the contract is to perform the promise or discharge the liability of a third person in case of default. Thus, when a person enters into a contract to perform or discharge the liability of a third party, the contract becomes a contract of guarantee.

51. Section 127 of the Contract Act reads thus:

“127. Consideration for guarantee. - Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

Hence, any promise made or anything done for the benefit of principal debtor may be sufficient consideration to the surety for giving guarantee.

REQUIREMENT OF OCCURRENCE OF ‘DEFAULT’

61. There is an argument canvassed before us that default under the DoH has not occurred. We have already quoted the definition of ‘financial debt’ under Section 5(8) of the IBC. There is no requirement incorporated therein that a debt becomes financial debt only when default occurs. Under Section 5(7) of the IBC, any person to whom financial debt is owed becomes a Financial Creditor even if there is no default in payment of debt. Therefore, this argument deserves to be rejected.

62. On this aspect, we may also note that under Section 3(12), ‘default’ has been defined. This definition of ‘default’ becomes relevant only while invoking the provisions of Section 7(1) of the IBC when the CIRP is sought to be initiated by the Financial Creditor. Section 7(1) provides that a Financial Creditor can initiate CIRP against the Corporate Debtor when there is a default on the part of the Corporate Debtor. There is no requirement under Section 5(8) of the IBC that there can be a debt only when there is a default. The moment it is established that the financial debt is owed to any person, he/she becomes a Financial Creditor. In this case, we are concerned with the claim made by the appellants. A public announcement of CIRP under Section 15(1) must contain the last date of submission of claims as may be specified. **Thus, if a person has a claim within the meaning of Section 3(6), he can submit it on public announcement contemplated by Section 15 being made. A Financial Creditor has a claim as explained earlier. Therefore, for submitting the claim by a Financial Creditor, there is no requirement of actual default”**

(Emphasis Our)

33. Ld. Counsel for the Respondent has relied on the law laid down in **Ghansyam Mishra (Supra)**, which has also been followed by ld. tribunal in order to negate the claim of the appellant, however we notice that in **Ankur Sharma Vs Sustainable Agro Commercial Financial Ltd.,Company Appeal (AT) (Insolvency) No. 484 of 2023** this appellate tribunal relying on **Ghansyam Mishra (Supra)** has taken a view that after imposition of moratorium the guarantee could not be invoked and on the basis of invoked guarantee, prior to the initiation of CIRP, no claim can be admitted. However, in **Company Appeal (AT) (Insolvency) No.1039 of 2024, Hemant Sharma, Resolution Professional Today Homes and Infrastructure Pvt. Ltd. vs Indian Renewable Energy Development Agency Ltd.,** wherein the identical issue was involved, this appellate tribunal relying on **China Development Bank (Supra)** has taken the view that invocation of guarantee is not necessary to maintain a claim and it is held in paragraph No. 13, 20, 21 and 23 of the judgment as under: -

*"13. Regulations 7 of the CIRP Regulations deals with "Claims by operational creditors"; Regulation 8 with "Claims by financial creditors" and Regulation 9A with "Claims by other creditors". There is a difference between 'claim', 'debt' and 'default', which was noticed by Hon'ble Supreme Court in **Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. - (2019) 4 SCC 17**. The Hon'ble Supreme Court in paragraph 65 of the judgment laid down following:*

"65. In this context, it is important to differentiate between "claim", "debt" and "default". Each of these terms is separately defined as follows:

*"3. Definitions. —In this Code, unless the context otherwise requires— * * **

(6) "claim" means— (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

*(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured; * * **

(11) “debt” means a liability or obligation in respect of a claim which is due from any Company Appeal (AT) (Ins.) No.1039 of 2024 10 person and includes a financial debt and operational debt;

(12) “default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;”

Whereas a “claim” gives rise to a “debt” only when it becomes “due”, a “default” occurs only when a “debt” becomes “due and payable” and is not paid by the debtor. It is for this reason that a financial creditor has to prove “default” as opposed to an operational creditor who merely “claims” a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors under Section 7 and by operational creditors under Sections 8 and 9 of the Code becomes clear.

*20. Now, we come to the judgment of the Hon’ble Supreme Court in **China Development Bank**, which has been relied by both the parties. The Hon’ble Supreme Court in the above case had occasion to consider whether default in payment of debt can be a reason for not accepting the claim in the CIRP of the CD. The Hon’ble Supreme Court in the above case, after noticing the definition of ‘claim’, ‘debt’ and ‘default’ as well as provisions of Contract Act, came to the conclusion that even if right cannot be enforced by reason of the applicability of the moratorium, the claim will still exist. It was held that whether the cause of action for invoking the guarantee has arisen or not is not relevant for considering the definition of claim. It is useful to extract paragraph 65 of the judgment, where following was laid down:*

“65. Another argument was canvassed based on the definition of “claim” under section 3(6) of the Insolvency and Bankruptcy Code, 2016. If the right to payment exists or if a breach of contract gives rise to a right to payment, the definition of claim is attracted. Even if that right cannot be enforced by reason of the applicability of the moratorium, the claim will still exist. Therefore, whether the cause of action for invoking the guarantee has arisen

or not is not relevant for considering the definition of claim.”

21. The above judgment clearly lays down that even if right cannot be enforced by reason of applicability of the moratorium, the claim will still exist. In the present case, the claim was filed by Respondent No.1, even though the guarantee was not invoked. The acceptance of consideration of such claim is, thus, clearly permissible as per the law laid down by the Hon’ble Supreme Court in paragraph 65 as noted above.

23. We notice that judgment of the Ankur Kumar was delivered on 06.02.2025, whereas judgment of the Hon’ble Supreme Court in China Development Bank was delivered earlier on 20.12.2024 and the judgment of the Hon’ble Supreme Court in China Development Bank was neither placed before this Tribunal, nor noticed by this Tribunal in Ankur Kumar’s case. We, thus, need to follow the judgment of the Hon’ble Supreme Court in China Development Bank with respect to definition of ‘claim’ and the claim submitted by Respondent No.1”

(Emphasis Provided)

Therefore, this appellate tribunal after considering **Ghanshyam Mishra (Supra)** and other relevant judgments was of the considered view that the invocation of guarantee is not required for maintaining a claim as the same would only be necessary for initiation of CIRP. We do not have any occasion to take a different view other than taken by a coordinate bench in **Hemant Sharma (Supra)**. Thus above placed law reports would show that the claim on the basis of guarantee deed is maintainable even if the guarantee has not been invoked. Thus the RP as well as the Adjudicating authority appears to have committed a patent illegality in rejecting the claim of the appellant.

34. Ld. Counsel for the Respondent has relied on **Amanjyot Singh vs. Navneet Kumar Jain, Company Appeal (AT) (Insolvency) No. 961 of 2022, decided on 5th January, 2023 and Company Appeal (AT) (Insolvency) No.191 of 2025, State Bank of India vs Mr. Deepak Kumar**

Singhania decided on 28th February, 2025, wherein the Adjudicating Authority rejected the Applications filed under Section 94 of the IBC by passing the impugned orders and in this background this appellate tribunal dismissed the appeals for the reasons contained therein. These cases may not be of any help to the respondent as in the case in hand the issue of admission of claim is involved. We have already noticed the difference between 'Debt' and 'Default' and recall that for admission of a claim the default is not required while the same would be required for initiation of insolvency process against a guarantor.

35. Ld. Counsel for the Respondent has also relied on law laid down by this appellate tribunal in 2022 SCC Online NCLAT 267, Company Appeal (At) (Insolvency) No. 356 of 2022, IDBI Trusteeship Services Limited vs Abhinav Mukherji and Others with Company Appeal (AT) (Insolvency) No. 358 of 2022, ECL Finance Limited and Others vs Abhinav Mukherji and Others, Company Appeal (At) (Insolvency) No. 356 of 2022 and Company Appeal (AT) (Insolvency) No. 358 of 2022 Decided on July 12, 2022. We notice that these appeals have been decided on July 12, 2022 whereas judgment of the Hon'ble Supreme Court passed in **China Development Bank** (Supra) was delivered on 20.12.2024. We, thus, need to follow the judgment of the Hon'ble Supreme Court passed in **China Development Bank** with respect to the definition of 'claim' and the claim submitted by appellant.

36. Having considered all the facts and circumstances of this case we are of the considered view that the Hon'ble Supreme Court in **China Development Bank**, case had an occasion to consider whether non-

occurrence of default in payment of debt can be a reason for not accepting the claim of a creditor in the CIRP of the CD and after noticing the difference between 'claim', 'debt' and 'default' as well as provisions of Contract Act, came to the conclusion that even if the right cannot be enforced by reason of the applicability of the moratorium, the claim of the creditor will still exist and it was held that whether the cause of action for invoking the guarantee has arisen or not is not relevant for considering the claim. Therefore, whether the cause of action for invoking the guarantee has arisen or not, in our considered opinion is not relevant for considering the claim of the appellant. In the present case, the claim was filed by appellant even though the guarantee was not invoked. The acceptance of such claim is, thus, clearly permissible as per the law laid down by the Hon'ble Supreme Court in **China Development Bank (Supra)** noted above. Resultantly the view adopted by the Tribunal could not be endorsed and Appeal filed by the appellant is thus having merits and is **allowed** in following terms:

(i) The impugned judgment passed by Ld. Tribunal is set aside.

(ii) RP is directed to consider the claim of the appellant and after verifying the same, admit without any proof of invocation of guarantee.

(iii) RP is further directed to reconstitute the CoC allotting suitable vote share to appellant and convene a fresh meeting of the same for reconsideration of the plan and for this purpose the resolution plan is sent back to CoC for re-consideration.

37. There is no order as to costs.
38. Pending IA's if any are also closed.

[Justice Mohd. Faiz Alam Khan]
Member (Judicial)

[Indevar Pandey]
Member (Technical)

New Delhi.
08.12.2025.

sr