A STATE BANK OF INDIA

v.

V. RAMAKRISHNAN & ANR.

(Civil Appeal No. 3595 of 2018)

B AUGUST 14, 2018

[R. F. NARIMAN AND INDU MALHOTRA, JJ.]

Insolvency and Bankruptcy Code, 2016: s.14 – Applicability of, in case of personal guarantor – Whether s.14 of the Code which provides for a moratorium for the limited period mentioned in the C *Code, on admission of an insolvency petition, would apply to a personal guarantor of a corporate debtor – Held: s.14 is applicable only in case of corporate debtor – Said section does not mention about the personal guarantor – So far as personal guarantors are concerned, Part III has not been brought into force, and neither* D *has s.243, which repeals the Presidency-Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 – The net result of this is that so far as individual personal guarantors are concerned, they shall continue to be proceeded against under the aforesaid two Insolvency Acts and not under the Code – The scheme of s.60(2)* E *and (3) of the Code is 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* F *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 – Presidency-Towns Insolvency Act, 1909 – Provincial Insolvency Act,* G *1920 – Recovery of Debts Due to Banks and Financial Institutions Act, 1993 – Banks/Banking.*

Allowing the appeals, the Court

HELD: 1.1 Under Part II of the Code, which deals with "Insolvency Resolution and Liquidation for Corporate Persons", H **a financial creditor or a corporate debtor may make an application**

to initiate this process. Once initiated, the Adjudicating Authority, after admission of such an application, shall by order, declare a moratorium for the purposes referred to in Section 14. [Para 16] [989-E-F]

M/s. Sicom Investments and Finance Ltd. v. Rajesh Kumar Drolia and Anr. **(2017) SCC Online Bom 9725;** *Sanjeev Shriya v. State Bank of India and Ors.* **(2018) 2 All LJ 769 (decided on 06.09.2017) – referred to**

1.2 Section 14 refers to four matters that may be prohibited once the moratorium comes into effect. In each of the matters referred to, be it institution or continuation of proceedings, the transferring, encumbering or alienating of assets, action to recover security interest, or recovery of property by an owner which is in possession of the corporate debtor, what is conspicuous by its absence is any mention of the personal guarantor. Indeed, the corporate debtor and the corporate debtor alone is referred to in the said Section. A plain reading of the said Section, therefore, leads to the conclusion that the moratorium referred to in Section 14 does not apply to personal guarantors of a corporate debtor. [Para 17] [989-F-H]

2.1 Section 60 of the Code, in sub-section (1) thereof, refers to insolvency resolution and liquidation for both corporate debtors and personal guarantors, the Adjudicating Authority for which shall be the National Company Law Tribunal, having territorial jurisdiction over the place where the registered office of the corporate person is located. This sub-section is only important in that it locates the Tribunal which has territorial jurisdiction in insolvency resolution processes against corporate debtors. So far as personal guarantors are concerned, Part III has not been brought into force, and neither has Section 243, which repeals the Presidency-Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. The net result of this is that so far as individual personal guarantors are concerned, they will continue to be proceeded against under the aforesaid two Insolvency Acts and not under the Code. Indeed, by a Press Release dated 28.08.2017, the Government of India, through the Ministry of Finance, cautioned that Section 243 of the Code, which provides for the repeal of said enactments, has not been notified till date,

and further, that the provisions relating to insolvency resolution and bankruptcy for individuals and partnerships as contained in Part III of the Code are yet to be notified. Hence, it was advised that stakeholders who intend to pursue their insolvency cases may approach the appropriate authority/court under the existing enactments, instead of approaching the Debt Recovery Tribunals. 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. [Paras 19, 20] [990-B-G]

2.2 The scheme of Section 60(2) and (3) is 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, Section 249, dealing with the consequential amendment of the Recovery of Debts Act to empower Debt Recovery Tribunals to try such proceedings, has also not been brought into force. [Para 21] [991-B-E]

3. Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a personal guarantor. When an application is filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom

insolvency resolution processes may be initiated under Part III. Secondly, the protection of the moratorium under these Sections is far greater than that of Section 14 in that pending legal proceedings in respect of the debt and not the debtor are stayed. The difference in language between Sections 14 and 101 is for a reason. Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor – often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor. It is open 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. [Para 23] [992-C-G]

State of Kerala and Ors. v. Mar Appraem Kuri Co. Ltd. and Anr. **(2012) 7 SCC 106:[2012] 4 SCR 448;** *Madras Petrochem Ltd. and Anr. v. Board for Industrial and Financial Reconstruction and Ors.* **(2016) 4 SCC 1: [2016] 11 SCR 419;** *CIT v. Shelly Products* **(2003) 5 SCC 461 : [2003] 1 Suppl. SCR 79;** *CIT v. Vatika Township* **(2015) 1 SCC 1 : [2014] 12 SCR 1037 – relied on.**

Case Law Reference

[2012] 4 SCR 448	**relied on**	**Para 23**
[2016] 11 SCR 419	**relied on**	**Para 25**
[2003] 1 Suppl. SCR 79	**relied on**	**Para 29**
[2014] 12 SCR 1037	**relied on**	**Para 29**

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3595 of 2018

From the Judgment and Order dated 28.02.2018 of the National Company Law Appellate Tribunal at New Delhi in Company Appeal (AT) (Insolvency) No. 213 of 2017

B WITH

C.A. No. 4553 of 2018

K. V. Vishwanathan, (A.C.), C. U. Singh, Sr. Advs., Abhishek Kaushik, Ms. Vrinda Bhandari, Dhananjay B. Ray, Ravi R. Raghunath, Sanjay Kapur, Ms. Megha Karnwwal, Ms. Sheena Taqui, Ms. Shubhra C Kapur, P. S. Sudheer, Ms. Anne Mathew, Bharat Sood, Ms. Shruti Jose, Ayush Anand, Shubhendu Anand, Arvind Kumar Gupta, Ms. Henna George, G. Balaji, Dilpreet Singh, Rajesh Bohra, Dhaval S. Deshpande, Amir Arsiwala, Arvind Gupta, Rahul Chitnish, Advs. for the appearing parties.

D The Judgment of the Court was delivered by

R. F. NARIMAN, J. 1. The present appeals revolve around whether Section 14 of the Insolvency and Bankruptcy Code, 2016, which provides for a moratorium for the limited period mentioned in the Code, on admission of an insolvency petition, would apply to a personal guarantor of a corporate debtor.

E 2. The factual backdrop of the present appeals is that the Respondent No.1 is the Managing Director of the corporate debtor, namely, the Respondent No.2 Company, and also the personal guarantor in respect of credit facilities that had been availed from the Appellant. The Guarantee Agreement entered into between the Appellant and the F Respondent No.1 is dated 22.02.2014.

3. As the Respondent No.2 Company did not pay its debts in time, the account of Respondent No.2 was classified as a non-performing asset on 26.07.2015. Consequent thereto, the Appellant issued a notice dated 04.08.2015 under Section 13(2) of the SARFAESI Act demanding G an outstanding amount of Rs.61,13,28,785.48 from the Respondents within the statutory period of 60 days. As no payment was forthcoming, a possession notice under Section 13(4) of the SARFAESI Act was issued on 18.11.2016.

4. As matters stood thus, an application was filed by Respondent No.2, the corporate debtor, under Section 10 of the Code on 20.05.2017 H to initiate the corporate insolvency resolution process against itself. On

19.06.2017, this petition filed under Section 10 was admitted, followed by the moratorium that is imposed statutorily by Section 14 of the Code. While the said proceedings were pending, an interim application was filed by Respondent No.1 as personal guarantor to the corporate debtor, in which Respondent No.1 took up the plea that Section 14 of the Code would apply to the personal guarantor as well, as a result of which proceedings against the personal guarantor and his property would have to be stayed. The National Company Law Tribunal, by its order dated 18.09.2017, held that since under Section 31 of the Code, a Resolution Plan made thereunder would bind the personal guarantor as well, and since, after the creditor is proceeded against, the guarantor stands in the shoes of the creditor, Section 14 would apply in favour of the personal guarantor as well. The interim application filed by Respondent No.1 was thus allowed, and the Appellant was restrained from moving against Respondent No.1.

5. An appeal filed to the National Company Law Appellate Tribunal resulted in the appeal being dismissed. By the impugned judgment dated 28.02.2018, the Appellate Tribunal relied upon Section 60(2) and (3) of the Code as well as Section 31 of the Code to find that the moratorium imposed under Section 14 would apply also to the personal guarantor. The reasoning was that since the personal guarantor can also be proceeded against, and forms part of a Resolution Plan which is binding on him, he is very much part of the insolvency process against the corporate debtor, and that, therefore, the moratorium imposed under Section 14 should apply to the personal guarantor as well.

6. Shri Sanjay Kapur, learned counsel appearing on behalf of the Appellant in C.A. No. 3595 of 2018, and Shri C.U. Singh, learned Senior Advocate appearing on behalf of Appellant in C.A. No. 4553 of 2018, both argued that the corporate debtor and personal guarantor are separate entities and that a corporate debtor undergoing insolvency proceedings under the Code would not mean that a personal guarantor is also undergoing the same process. As the guarantor's liability is distinct and separate from that of the corporate debtor, a suit can be maintained against the surety, though the principal debtor has not been sued. For this purpose, they relied upon Section 128 of the Indian Contract Act, 1872. They also relied heavily upon the reasoning contained in a judgment by a Single Judge of the Bombay High Court in **M/s. Sicom Investments and Finance Ltd. v. Rajesh Kumar Drolia and Anr.**[1]

[1] (2017) SCC Online Bom 9725 (decided on 28.11.2017).

A They then referred to Part III of the Code, and in particular, to Sections 96 and 101. Although Part III of the Code has not been brought into force, it is clear that if an insolvency resolution process is to be carried out against a personal guarantor, it can be done only under Part III, which contains a separate moratorium provision, namely, Sections 96 and 101, both of which would attach only if a separate insolvency process were carried out as against the personal guarantor. Shri Singh, in particular, relied heavily upon the difference in language between Section 14 and Section 101. According to the learned senior counsel, Section 14, in all its sub-sections, speaks only of the corporate debtor. When contrasted with Section 101, it becomes clear that Section 14 cannot possibly attach to a personal guarantor as well, as Section 101 does not speak of a 'debtor' but speaks 'in relation to the debt' and is not only wider than Section 14, but would attach only if Part III proceedings were to be instituted against the personal guarantor. They also relied heavily upon the Amendment Ordinance dated 06.06.2018, by which Section 14(3) of the Code was substituted, including a surety in a contract of guarantee to a corporate debtor. They relied upon the Insolvency Law Committee proceedings, which led to the aforesaid amendment, stating that it had been recommended to clarify, by way of an explanation, that all assets of such guarantors to the corporate debtor shall be outside the scope of the moratorium imposed under the Code. The very impugned judgment in the present proceedings was referred to by the Insolvency Law Committee stating that such a broad interpretation of Section 14 would curtail significant rights of the creditor. They relied upon judgments which made it clear that clarificatory statutes, like this amendment, would have retrospective operation and that, therefore, in any case, the impugned judgment would have to be set aside.

7. Learned counsel appearing on behalf of the Respondents first took shelter under Section 60(2) of the Code, as according to the learned counsel, the said Section precludes the bank from proceeding against the personal guarantor under SARFAESI or any other Act outside the Code. He relied upon the reasoning of the Tribunal and took shelter under Section 31, as did the Tribunal. He also relied upon a judgment of the Allahabad High Court in **Sanjeev Shriya v. State Bank of India and Ors.**,[2] which stated that as a proceeding relatable to the corporate debtor is pending adjudication in two forums, it is not permissible to

[2] (2018) 2 All LJ 769 (decided on 06.09.2017).

proceed against the personal guarantor. A financial creditor cannot operate in a manner that imperils the value of the property of the personal debtor. He also relied strongly upon the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which came into effect on 23.11.2017, by which, clause (e) of Section 2 was substituted so as to include within the sweep of the Code, personal guarantors to corporate debtors. He then relied upon the Statement of Objects of the Amendment Act, 2018, which was, *inter alia*, to extend the provisions of the Code to personal guarantors of corporate debtors, to further strengthen the corporate insolvency resolution process. He then relied upon certain statutory forms which are contained in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and in particular, to Annexure VI(e) to Form 6. Regulation 36(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 also provides, as did Annexure VI(e), that information as to personal guarantees have to be given in relation to the debts of the corporate debtor when an insolvency process is initiated against the corporate debtor. All this would show that since the personal guarantor is very much part of the overall process, the moratorium contained in Section 14 of the Code should apply to the personal guarantor as well.

8. We appointed Shri K.V. Viswanathan, learned Senior Advocate, to assist us as *Amicus Curiae* in this matter. We thank him for the valuable assistance that he has rendered. He has pointed out that the whole idea of the Insolvency Code was that the history of debt recovery had shown that the earlier statutes were loaded heavily in favour of corporate debtors and that, as a result, huge outstanding debts to banks and financial institutions had not been repaid. In particular, he pointed out Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, and stated that as a result of the said Section applying to guarantors as well, creditors could not proceed against guarantors as well after the company had been declared sick under the said Act, without permission from the Board for Industrial and Financial Reconstruction. Now that the said Act has been repealed, and the fact that several later enactments, including the Companies Act, 2013 had omitted a provision akin to Section 22, would show that the enactment of Section 14 of the Code was deliberate, and that the idea was that there should be no stay of proceedings against the guarantor while the corporate debtor is undergoing an insolvency proceeding. For this, he cited various judgments. He also relied upon the Amendment Act, 2018 and stated

A that since the Act was to get over the appellate judgment in particular, and since it was clarificatory, the position in law would be that it would be retrospective, and would thus govern the case at hand.

9. Before dealing with the arguments of learned counsel on both sides, it is important at this stage to set out some of the provisions of the
B Code. One difficulty that we faced when hearing the matter was that different provisions of the Code were brought into force on different dates, as Section 1(3) indicates. Also, certain important provisions of the Code have not yet been brought into force. This we will advert to a little later in our judgment.

C 10. Section 2(e) of the Code, as originally enacted, reads as under:

"**2. Application**.— The provisions of this Code shall apply to—

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(e) partnership firms and individuals;

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By the Amendment Act, 2018, this Section was substituted as follows:

"**2. Application**.— The provisions of this Code shall apply to—

xxx xxx xxx

E (e) personal guarantors to corporate debtors;

xxx xxx xxx"

Though the original Section 2(e) did not come into force at all, the substituted Section 2(e) has come into force w.e.f. 23.11.2017.

F 11. Section 3(7), (8) and (11) of the Code read as under:

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

(7) "corporate person" means a company as defined in clause (20) of Section 2 of the Companies Act, 2013 (18 of 2013), a
G limited liability partnership, as defined in clause (*n*) of sub-section (1) of Section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;

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(8) "corporate debtor" means a corporate person who owes a debt to any person;"

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"(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;"

12. Section 5(8)(i) of the Code reads as follows:

"**5. Definitions**.— In this Part, unless the context otherwise requires,—

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(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

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

xxx xxx xxx"

13. Section 5(22) of the Code read as follows:

"**5. Definitions**.— In this Part, unless the context otherwise requires,—

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(22) "personal guarantor" means an individual who is the surety in a contract of guarantee to a corporate debtor;"

14. Sections 14, 31, 60, 95, 101, 238, 243, and 249 of the Code read as under:

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

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution

A of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

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

B (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

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

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

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

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

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

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G "**31. Approval of resolution plan**.— (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

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on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),—

(a) the moratorium order passed by the Adjudicating Authority under Section 14 shall cease to have effect; and

(b) 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 recorded on its database."

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"**60. Adjudicating Authority for corporate persons**.— (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or bankruptcy proceeding of a personal guarantor of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debts Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

A (5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) any application or proceeding by or against the corporate debtor or corporate person;

B (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

C (6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded."

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E "**96. Interim-moratorium.—** (1) When an application is filed under Section 94 or Section 95—

(a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and

F (b) during the interim-moratorium period—

(i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and

(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

G (2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator."

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"**101. Moratorium**.— (1) When the application is admitted under Section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under Section 114, whichever is earlier.

(2) During the moratorium period—

(a) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;

(b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt; and

(c) the debtor shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein;

(3) Where an order admitting the application under Section 96 has been made in relation to a firm, the moratorium under sub-section (1) shall operate against all the partners of the firm.

(4) The provisions of this section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator."

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"**238. Provisions of this Code to override other laws**.— The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

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"**243. Repeal of certain enactments and savings**.— (1) The Presidency-Towns Insolvency Act, 1909 (3 of 1909) and the Provincial Insolvency Act, 1920 (5 of 1920) are hereby repealed.

(2) Notwithstanding the repeal under sub-sections (1),—

(i) all proceedings pending under and relating to the Presidency-Towns Insolvency Act, 1909, and the Provincial Insolvency

A Act, 1920 immediately before the commencement of this Code shall continue to be governed under the aforementioned Acts and be heard and disposed of by the concerned courts or tribunals, as if the aforementioned Acts have not been repealed;

B (ii) any order, rule, notification, regulation, appointment, conveyance, mortgage, deed, document or agreement made, fee directed, resolution passed, direction given, proceeding taken, instrument executed or issued, or thing done under or in pursuance of any repealed enactment shall, if in force at the commencement of this Code, continue to be in force, and shall have effect as if the aforementioned Acts have not been repealed;

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(iii) anything done or any action taken or purported to have been done or taken, including any rule, notification, inspection, order or notice made or issued or any appointment or declaration made or any operation undertaken or any direction given or any proceeding taken or any penalty, punishment, forfeiture or fine imposed under the repealed enactments shall be deemed valid;

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(iv) any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure or existing usage, custom, privilege, restriction or exemption shall not be affected, notwithstanding that the same respectively may have been in any manner affirmed or recognised or derived by, in, or from, the repealed enactments;

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(v) any prosecution instituted under the repealed enactments and pending immediately before the commencement of this Code before any court or tribunal shall, subject to the provisions of this Code, continue to be heard and disposed of by the concerned court or tribunal;

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(vi) any person appointed to any office under or by virtue of any repealed enactment shall continue to hold such office until such time as may be prescribed; and

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(vii) any jurisdiction, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not in existence or in force shall not be revised or restored.

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(3) The mention of particular matters in sub-section (2) shall not be held to prejudice the general application of Section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal of the repealed enactments or provisions of the enactments mentioned in the Schedule."

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"**249. Amendments of Act, 51 of 1993**.— The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 shall be amended in the manner specified in the Fifth Schedule."

15. The first important thing that needs to be noticed is that, as has been stated earlier in this judgment, Part III of the Code has not yet been brought into force. This part is entitled "Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms". The repealing provision, namely Section 243, which repeals the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920, has also not been brought into force. Section 249, which amends the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, so that the Debt Recovery Tribunals under that Act can exercise the jurisdiction of the Adjudicating Authority conferred by the Code, has also not been brought into force.

16. Under Part II of the Code, which deals with "Insolvency Resolution and Liquidation for Corporate Persons", a financial creditor or a corporate debtor may make an application to initiate this process. Once initiated, the Adjudicating Authority, after admission of such an application, shall by order, declare a moratorium for the purposes referred to in Section 14 (*See* Section 13 of the Code).

17. Section 14 refers to four matters that may be prohibited once the moratorium comes into effect. In each of the matters referred to, be it institution or continuation of proceedings, the transferring, encumbering or alienating of assets, action to recover security interest, or recovery of property by an owner which is in possession of the corporate debtor, what is conspicuous by its absence is any mention of the personal guarantor. Indeed, the corporate debtor and the corporate debtor alone is referred to in the said Section. A plain reading of the said Section, therefore, leads to the conclusion that the moratorium referred to in Section 14 can have no manner of application to personal guarantors of a corporate debtor.

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

B 19. We are afraid that such arguments have to be turned down on a careful reading of the Sections relied upon. Section 60 of the Code, in sub-section (1) thereof, refers to insolvency resolution and liquidation for both corporate debtors and personal guarantors, the Adjudicating Authority for which shall be the National Company Law Tribunal, having territorial jurisdiction over the place where the registered office of the C corporate person is located. This sub-section is only important in that it locates the Tribunal which has territorial jurisdiction in insolvency resolution processes against corporate debtors. So far as personal guarantors are concerned, we have seen that Part III has not been brought into force, and neither has Section 243, which repeals the Presidency-D Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. The net result of this is that so far as individual personal guarantors are concerned, they will continue to be proceeded against under the aforesaid two Insolvency Acts and not under the Code. Indeed, by a Press Release dated 28.08.2017, the Government of India, through the Ministry of Finance, cautioned that Section 243 of the Code, which provides for the E repeal of said enactments, has not been notified till date, and further, that the provisions relating to insolvency resolution and bankruptcy for individuals and partnerships as contained in Part III of the Code are yet to be notified. Hence, it was advised that stakeholders who intend to pursue their insolvency cases may approach the appropriate authority/ F court under the existing enactments, instead of approaching the Debt Recovery Tribunals.

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 G 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

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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 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 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.

A 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
B 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.

C 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
D 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
E 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
F 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
G 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
H 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 assent, overriding within the State's territory, an earlier parliamentary enactment in the concurrent sphere, *before it is brought into force*. Parliament can repeal, amend, or vary such State law no sooner it is assented to by the President and that it need not wait till such assented-to State law is brought into force. This view finds support in the judgment of this Court in *Tulloch* [AIR 1964 SC 1284 : (1964) 4 SCR 461] .

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

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

A 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 (Central) Chit Funds Act, 1982 occupied the entire field as envisaged in Article 254(1) of the Constitution."

B 24. Thus, for the purpose of interpretation, it is certainly open for us to contrast Section 14 with Sections 96 and 101, as Sections 96 and 101 are laws made by the Legislature, even though they have not yet been brought into force.

25. As argued by Shri Viswanathan, the historical background of C the Code now needs to be looked at. Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 reads as follows:

"**22. Suspension of legal proceedings, contracts, etc**.—(1) Where in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under Section D 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect E under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof [and no suit for the recovery of money or for the enforcement of any security against F the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

(2) Where the management of the sick industrial company is G taken over or changed [in pursuance of any scheme sanctioned under Section 18] notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law—

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(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

(3) [Where an inquiry under Section 16 is pending or any scheme referred to in Section 17 is under preparation or during the period] of consideration of any scheme under Section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board:

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.

(4) Any declaration made under sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a court, tribunal, officer or other authority or of any submission, settlement or standing order and accordingly,—

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before

A any court, tribunal, officer or other authority shall remain stayed or be continued subject to such declaration; and

(b) on the declaration ceasing to have effect—

(i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and B enforceable as if the declaration had never been made; and

(ii) any proceeding so remaining stayed shall be proceeded with subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed. C

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded.

D It will be clear from a reading of sub-section (1) thereof that suits for the enforcement of any guarantee in respect of loans or advances granted to the industrial company, shall not lie or be proceeded with further, except with the consent of the Board or Appellate Authority. It may be noted that the Sick Industrial Companies (Special Provisions) Act, 1985 was repealed on 01.12.2016. By a notification dated 30.11.2016, Section E 14 of the Code was brought into force w.e.f. 01.12.2016. In **Madras Petrochem Ltd. and Anr. v. Board for Industrial and Financial Reconstruction and Ors.**, (2016) 4 SCC 1, this Court found:

"**40.** An interesting pointer to the direction Parliament has taken after enactment of the Securitisation and Reconstruction of F Financial Assets and Enforcement of Security Interest Act, 2002 is also of some relevance in this context. The Eradi Committee Report relating to insolvency and winding up of companies dated 31-7-2000, observed that out of 3068 cases referred to BIFR from 1987 to 2000 all but 1062 cases have been disposed of. Out of the cases disposed of, 264 cases were revived, 375 cases G were under negotiation for revival process, 741 cases were recommended for winding up, and 626 cases were dismissed as not maintainable. These facts and figures speak for themselves and place a big question mark on the utility of the Sick Industrial Companies (Special Provisions) Act, 1985. The Committee further H pointed out that effectiveness of the Sick Industrial Companies

(Special Provisions) Act, 1985 as has been pointed out earlier, has been severely undermined by reason of the enormous delays involved in the disposal of cases by BIFR. (*See* Paras 5.8, 5.9 and 5.15 of the Report.) Consequently, the Committee recommended that the Sick Industrial Companies (Special Provisions) Act, 1985 be repealed and the provisions thereunder for revival and rehabilitation should be telescoped into the structure of the Companies Act, 1956 itself.

41. Pursuant to the Eradi Committee Report, the Companies Act was amended in 2002 by providing for the constitution of a National Company Law Tribunal as a substitute for the Company Law Board, the High Court, BIFR and AAIFR. The Eradi Committee Report was further given effect to by inserting Sections 424-A to 424-H into the Companies Act, 1956 which, with a few changes, mirrored the provisions of Sections 15 to 21 of the Sick Industrial Companies (Special Provisions) Act, 1985. Interestingly, the Companies Amendment Act, 2002 omitted a provision similar to Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. Consequently, creditors were given liberty to file suits or initiate other proceedings for recovery of dues despite pendency of proceedings for the revival or rehabilitation of sick companies before the National Company Law Tribunal.

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43. Close on the heels of the amendment made to the Companies Act came the Sick Industrial Companies (Special Provisions) Repeal Act, 2003. This particular Act was meant to repeal the Sick Industrial Companies (Special Provisions) Act, 1985 consequent to some of its provisions being telescoped into the Companies Act. Thus, the Companies Amendment Act, 2002 and the SICA Repeal Act formed part of one legislative scheme, and neither has yet been brought into force. In fact, even the Companies Act, 2013, which repeals the Companies Act, 1956, contains Chapter 19 consisting of Sections 253 to 269 dealing with revival and rehabilitation of sick companies along the lines of Sections 424-A to 424-H of the amended Companies Act, 1956. Conspicuous by its absence is a provision akin to Section 22(1) of the Sick Industrial Companies (Special Provisions) Act,

1985 in the 2013 Act. However, this Chapter is also yet to be brought into force. These statutory provisions, though not yet brought into force, are also an important pointer to the fact that Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 has been statutorily sought to be excluded, Parliament veering around from wanting to protect sick industrial companies and rehabilitate them to giving credence to the public interest contained in the recovery of public monies owing to banks and financial institutions. These provisions also show that the aforesaid construction of the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 vis-à-vis the Sick Industrial Companies (Special Provisions) Act, 1985, leans in favour of creditors being able to realise their debts outside the court process over sick industrial companies being revived or rehabilitated. In fact, another interesting document is the Report on Trend and Progress of Banking in India 2011-2012 for the year ended 30-6-2012 submitted by Reserve Bank of India to the Central Government in terms of Section 36(2) of the Banking Regulation Act, 1949. In Table IV.14 the Report provides statistics regarding trends in non-performing assets bank-wise, group-wise. As per the said Table, the opening balance of non-performing assets in public sector banks for the year 2011-2012 was Rs 746 billion but the closing balance for 2011-2012 was Rs 1172 billion only. The total amount recovered through the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 during 2011-2012 registered a decline compared to the previous year, but, even then, the amounts recovered under the said Act constituted 70% of the total amount recovered. The amounts recovered under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 constituted only 28%. All this would go to show that the amounts that public sector banks and financial institutions have to recover are in staggering figures and at long last at least one statutory measure has proved to be of some efficacy. This Court would be loathe to give such an interpretation as would thwart the recovery process under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which Act alone seems to have worked to some extent at least.

> **44.** It will, thus, be seen that notwithstanding the non obstante clauses in Sections 22(1) and (4), read with Section 32, Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 will have to give way to the measures taken under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, more particularly referred to in Section 13 of the said Act, and that this being the case, the sale notices issued both in 2003 and 2013 could continue without in any manner being thwarted by Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985."
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> (emphasis supplied)

It is thus clear that for this reason also, it is obvious that Parliament, when it enacted Section 14, had this history in mind and specifically did not provide for any moratorium along the lines of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 in Section 14 of the Code.

26. The reasoning of the Bombay High Court in the judgment of **M/s. Sicom Investments and Finance Ltd.** (supra) commends itself to us. The reasoning of the Allahabad High Court, on the other hand, does not.

27. We now come to the argument that the amendment of 2018, which makes it clear that Section 14(3), is now substituted to read that the provisions of sub-section (1) of Section 14 shall not apply to a surety in a contract of guarantee for corporate debtor. The amended Section reads as follows:

> **"14. Moratorium.—**
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>
> (3) The provisions of sub-section (1) shall not apply to—
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> (a) such transactions as may be notified by the Central Government in consultation with any financial sector regulator;
>
> (b) a surety in a contract of guarantee to a corporate debtor."

28. The Insolvency Law Committee, appointed by the Ministry of Corporate Affairs, by its Report dated 26.03.2018, made certain key recommendations, one of which was:

A "(iv) to clear the confusion regarding treatment of assets of guarantors of the corporate debtor vis-à-vis the moratorium on the assets of the corporate debtor, it has been recommended to clarify by way of an explanation that all assets of such guarantors to the corporate debtor shall be outside scope of moratorium imposed under the Code;"

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The Committee insofar as the moratorium under Section 14 is concerned, went on to find:

"**5.5** Section 14 provides for a moratorium or a stay on institution or continuation of proceeding, suits, etc. against the corporate C debtor and its assets. There have been contradicting views on the scope of moratorium regarding its application to third parties affected by the debt of the corporate debtor, like guarantors or sureties. While some courts have taken the view that Section 14 may be interpreted literally to mean that it only restricts actions against the assets of the corporate debtor, a few others have D taken an interpretation that the stay applies on enforcement of guarantee as well, if a CIRP is going on against the corporate debtor."

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E "**5.7** The Allahabad High Court subsequently took a differing view in *Sanjeev Shriya* v. *State Bank of India*, 2017 (9) ADJ 723, by applying moratorium to enforcement of guarantee against personal guarantor to the debt. The rationale being that if a CRIP is going on against the corporate debtor, then the debt owed by the corporate debtor is not final till the resolution plan is approved, F and thus the liability of the surety would also be unclear. The Court took the view that until debt of the corporate debtor is crystallised, the guarantor's liability may not be triggered. The Committee deliberated and noted that this would meant that surety's liabilities are put on hold if a CIRP is going on against G the corporate debtor, and such an interpretation may lead to the contracts of guarantee being infructuous, and not serving the purpose for which they have been entered into.

5.8 In *State Bank of India* v. *V. Ramakrishnan and Veeson Energy Systems*, NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 213/2017 [Date of decision – 28 February, 2018], H

the NCLAT took a broad interpretation of Section 14 and held that it would bar proceedings or actions against sureties. While doing so, it did not refer to any of the above judgments but instead held that proceedings against guarantors would affect the CIRP and may thus be barred by moratorium. The Committee felt that such a broad interpretation of the moratorium may curtail significant rights of the creditor which are intrinsic to a contract of guarantee."

5.9 A contract of guarantee is between the creditor, the principal debtor and the surety, where under the creditor has a remedy in relation to his debt against both the principal debtor and the surety [*National Project Construction Corporation Limited* v. *Sandhu and Co.*, AIR 1990 P&H 300]. The surety here may be a corporate or a natural person and the liability of such person goes as far the liability of the principal debtor. As per section 128 of the Indian Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor and the creditor may go against either the principal debtor, or the surety, or both, in no particular sequence [*Chokalinga Chettiar* v. *Dandayunthapani Chattiar*, AIR 1928 Mad 1262]. Though this may be limited by the terms of the contract of guarantee, the general principle of such contracts is that the liability of the principal debtor and the surety is co-extensive and is joint and several [*Bank of Bihar* v. *Damodar Prasad*, AIR 1969 SC 297]. The Committee noted that this characteristic of such contracts i.e. of having remedy against both the surety and the corporate debtor, without the obligation to exhaust the remedy against one of the parties before proceeding against the other, is of utmost important for the creditor and is the hallmark of a guarantee contract, and the availability of such remedy is in most cases the basis on which the loan may have been extended.

5.10 The Committee further noted that a literal interpretation of Section 14 is prudent, and a broader interpretation may not be necessary in the above context. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on

A the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety. Thus, contractual principles of guarantee require being respected even during a moratorium and an alternate interpretation may not have been the intention of the Code, as is clear from a plain reading of Section 14.

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5.11 Further, since many guarantees for loans of corporates are given by its promoters in the form of personal guarantees, if there is a stay on actions against their assets during a CIRP, such promoters (who are also corporate applicants) may file frivolous applications to merely take advantage of the stay and guard their assets. In the judgments analysed in this relation, many have been filed by the corporate applicant under Section 10 of the Code and this may corroborate the above apprehension of abuse of the moratorium provision. The Committee concluded that Section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in Section 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only."

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29. The Report of the said Committee makes it clear that the object of the amendment was to clarify and set at rest what the Committee thought was an overbroad interpretation of Section 14. That such clarificatory amendment is retrospective in nature, would be clear from the following judgments:

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(i) CIT v. Shelly Products, (2003) 5 SCC 461:

F "**38.** It was submitted that after 1-4-1989, in case the assessment is annulled the assessee is entitled to refund only of the amount, if any, of the tax paid in excess of the tax chargeable on the total income returned by the assessee. But before the amendment came into effect the position in law was quite different and that is why the legislature thought it proper to amend the section and insert the proviso. On the other hand learned counsel for the Revenue submitted that the proviso is merely declaratory and does not change the legal position as it existed before the amendment. It was submitted that this Court in *CIT* v. *Chittor Electric Supply Corpn* [(1995) 2 SCC 430 : (1995) 212 ITR 404] has held that proviso (*a*) to Section 240 is declaratory and,

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therefore, proviso (*b*) should also be held to be declaratory. In our view that is not the correct position in law. Where the proviso consists of two parts, one part may be declaratory but the other part may not be so. Therefore, merely because one part of the proviso has been held to be declaratory it does not follow that the second part of the proviso is also declaratory. However, the view that we have taken supports the stand of the Revenue that proviso (b) to Section 240 is also declaratory. We have held that even under the unamended Section 240 of the Act, the assessee was only entitled to the refund of tax paid in excess of the tax chargeable on the total income returned by the assessee. We have held so without taking the aid of the amended provision. It, therefore, follows that proviso (*b*) to Section 240 is also declaratory. It seeks to clarify the law so as to remove doubts leading to the courts giving conflicting decisions, and in several cases directing the Revenue to refund the entire amount of income tax paid by the assessee where the Revenue was not in a position to frame a fresh assessment. Being clarificatory in nature it must be held to be retrospective, in the facts and circumstances of the case. It is well settled that the legislature may pass a declaratory Act to set aside what the legislature deems to have been a judicial error in the interpretation of statute. It only seeks to clear the meaning of a provision of the principal Act and make explicit that which was already implicit."

(ii) CIT v. Vatika Township, (2015) 1 SCC 1:

"**32.** Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labelled as "declaratory statutes". The circumstances under which provisions can be termed as "declaratory statutes" are explained by Justice G.P. Singh [*Principles of Statutory Interpretation*, (13th Edn., Lexis Nexis Butterworths Wadhwa, Nagpur, 2012)] in the following manner:

"*Declaratory statutes*

The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES [W.F. Craies, *Craies on Statute Law* (7th Edn., Sweet and Maxwell Ltd., 1971)] and approved by the Supreme Court [in *Central Bank of India* v.

A *Workmen*, AIR 1960 SC 12, para 29]: 'For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the B statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word "declared" as well as the word "enacted".' But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduced C new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply D an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In E the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory F amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law."

The above summing up is factually based on the judgments of this Court as well as English decisions."

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30. For all these reasons, we are of the view that the impugned judgment of the Tribunal has to be set aside. The appeals are accordingly allowed.

Devika Gujral Appeals allowed.