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A DEFAULTING GUARANTOR OF A CORPORATE DEBTOR IS NOT ELIGIBLE TO SUBMIT A RESOLUTION PLAN: SUPREME COURT

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INTRODUCTION

The Supreme Court (SC) interpreted the scope and applicablity of Section 29A(h) of the Insolvency and Bankruptcy Code 2016 (the Code) by way of its judgement dated 18 January 2022 in *Bank of Baroda and Anr. v. MBL Infrastructures Limited and Ors.*, 2022 SCC OnLine SC 48 providing clarity as to whether a guarantor whose guarantee is invoked by a creditor is eligible to submit a resolution plan under Section 29A(h) of the Code. In the peculiar facts of the case, the Guarantor's submission of a resolution plan took place alongside and in the backdrop of the 2018 amendments to Section 29A(h).

BRIEF BACKGROUND OF THE APPEAL:

The original promoter / founder of MBL Infrastructures Limited (MBL) extended personal guarantees for credit facilities availed by MBL (Guarantor). On account of defaults by MBL in its repayment obligations, some of the personal guarantees furnished by the Guarantor were invoked by lenders.

Corporate insolvency resolution proceedings (CIRP) was instituted against MBL under Section 7 of the Code before the National Company Law Tribunal, Kolkata (NCLT) in 2017. Two resolution plans were received by the resolution professional (RP), one of which was submitted by the Guarantor.

Section 29A was introduced by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 on 23.11.2017, which came into effect on 18.01.2018. On 18.12.2017, NCLT held that the Guarantor was eligible to submit a resolution plan under Section 29A(h) of the Code. Section 29A(h), as it then stood, provided that a person who "*has executed an enforceable guarantee in favour of a creditor, in respect of a corporate debtor under insolvency resolution process or liquidation under this code*" is not eligible to submit a resolution plan. Two appeals were filed before the National Company Law Appellate Tribunal (NCLAT) against NCLT's judgment, which were subsequently withdrawn. In the meantime, the Guarantor's resolution plan received 68.50% vote share of the Committee of Creditors (COC) and thereafter, pursuant to certain modifications and negotiations, the resolution plan was approved by 78.50% of the COC. NCLT approved the Guarantor's Resolution Plan in April 2018 and lenders challenged NCLT's order dated 18.4.18 approving the Guarantor's Resolution Plan before NCLAT.

While the appeal was pending before NCLAT, in June 2018, Section 29A(h) of the Code was further amended to state that a person who has "*executed an enforceable guarantee in favour of a creditor, in respect of a corporate debtor against which an*

application for insolvency resolution made by such creditor has been admitted under this code and such guarantee has been invoked by the creditor and remains unpaid in full or part" is a person who is not eligible to submit a resolution plan. In August 2019, NCLAT upheld NCLT's order approving the Guarantor's resolution plan (*IDBI Bank Ltd & Ors. v MBL Infra Ltd & Ors*, 2019 SCC OnLine NCLAT 453). Thereafter, on account of the Guarantor's resolution plan having come into effect, the shareholders of MBL approved a fund raising of INR 300 crores in MBL's Annual General Meeting.

Bank of Baroda challenged NCLAT's order dated 16.8.19 before the Supreme Court. While the Supreme Court, considering the peculiar facts of this case upheld the Guarantor's resolution plan, the Supreme Court examined the scope of ineligibility of a guarantor to submit a resolution plan under Section 29A(h) of the Code subsequent to the 2018 amendments to Section 29A(h).

WHAT THE SUPREME COURT HELD REGARDING THE SCOPE OF SECTION 29A(h) OF THE CODE:

- If a guarantor has extended a guarantee in favour of a corporate debtor against whom an application for insolvency resolution by a creditor has been admitted, and if such guarantee is invoked by a creditor, then the guarantor is ineligible to submit a resolution plan under Section 29A(h) of the Code.

- What the provision requires is a guarantee in favour of 'a creditor' : *"Once an application for insolvency resolution is admitted on behalf of 'a creditor' ……then all creditors of the same class would have their respective rights at par with each other."*

- The criteria for disqualification under the said provision is the invocation of a personal guarantee by a single creditor, even though the application for initiation of insovency is filed by another creditor.

- Ineligibility under Section 29A of the Code is with respect to the participation of a prospective resolution applicant in the resolution process of a corporate debtor. There cannot be "ineligibility qua one creditor as against others" under Section 29A(h) of the Code.

- The manner of invocation of such personal guarantee by any creditor is not of relevance for the purpose of determining eligibility.

OTHER KEY OBSERVATIONS OF THE SUPREME COURT:

- A qualified resolution applicant may be disqualified by virtue of a subsequent amendment in law . If a resolution applicant is eligible to submit a resolution plan at the time of the submission of the plan, and thereafter, by the operation of the law, he becomes ineligible, *"then the subsequent amended provision would govern the question of eligibility of the resolution applicant to submit a resolution plan".*

- The resolution plan submitted by Guarantor in the present case "*ought not to have been entertained*" given that the Guarantor is ineligible under Section 29A(h) of the Code.

CONCLUSION

The Court noted that the Guarantor's resolution plan received the requisite vote share of the COC and "*the plan was put into operation since 18.4.18 and MBL is an on-going concern*". The Court also noted that the Guarantor infused over INR 63 Crores since the resolution plan was put into operation and INR 300 Crores were sought to be raised for the revival of MBL. Therefore, the Court did not interfere with the Guarantor's resolution plan in the peculiar facts and circumstances of the case.

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