

Simultaneously initiation of CIRPs against Principal Borrower and Corporate Guarantor and Filing of Claim and Appointment of Resolution Professional in the both CIRPs

-By Editorial Team

NCLAT in a recent judgment comments on the earlier two members' bench judgment in Piramal Case that *"in the matter of Piramal, the Bench of this Appellate Tribunal "interpreted" the law. Ordinarily, we would respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner it was interpreted in the matter of Piramal"*. Also, the NCLAT in the recent judgment didn't consider the three members' bench judgment of Shabad Khan Vs. M/s. Nisus Finance and Investment Manager & Ors.

I. Comparison of the both decisions as under

Case Name	Dr. Vishnu Kumar Agarwal Vs. M/s. Piramal Enterprises Ltd.	State Bank of India Vs. Athena Energy Ventures Private Limited
In Short	Piramal Case	Athena Energy Ventures Case
Case Citation	(2019) ibclaw.in 16 NCLAT	(2020) ibclaw.in 344 NCLAT
Bench	One Chairperson & One Judicial Member	One Judicial Member & One Technical Member
Case Referred	<ol style="list-style-type: none"> 1. Bank of Bihar v. Damodar Prasad and Anr. [2017] ibclaw.in 21 SC 2. Ram Bahadur Thakur vs. Sabu Jain Limited – [1981 (51) Comp Cas 301] 3. Kesoram Mills Case – [(1966) 59 ITR 767] 4. State Bank of India v. Indexport Registered and Ors. [2017] ibclaw.in 25 SC 5. Innoventive Industries Ltd. v. ICICI Bank and Ors. [2017] ibclaw.in 02 SC 	<ol style="list-style-type: none"> 1. Vishnu Kumar Agarwal vs. Piramal Enterprise Ltd. (2019) ibclaw.in 16 NCLAT 2. State Bank of India versus V. Ramakrishnan & Anr. [2018] ibclaw.in 29 SC 3. Innoventive Industries Ltd. vs. ICICI Bank [2017] ibclaw.in 02 SC 4. Edelweiss Asset Reconstruction Company Ltd. Sachet Infrastructure Ltd. and Ors. (2019) ibclaw.in 466 NCLAT

**Relevant case
not considered**

1. Shabad Khan Vs. M/s. Nisus Finance and Investment Manager & Ors. [\[2020\] ibclaw.in 118 NCLAT.](#)
2. IFCI Ltd. Vs. M/s ACCIL Hospitality Ltd. [\[2020\] ibclaw.in 210 NCLAT](#)

Notices were issued individually to the respective Corporate Guarantors, Sunrise Naturopathy and Resorts Pvt. The Appellant-State Bank of India filed Ltd.- (Corporate Guarantor No.1) and the Application against Respondent-Sunsystem Institute of Information Athena Energy Ventures Private Limited-Technology Pvt. Ltd.- (Corporate Corporate Debtor who was Corporate Guarantor No.2) showing similar Guarantor for “Athena Chattisgarh Power outstanding amount of Rs.Ltd.” (The Principal Borrower 40,28,76,461/- and demand notices “Borrower”). The application was filed as were issued simultaneously on the Borrower committed default in same date i.e. on 24th October, 2017 repayment of the financial assistance and 26th October, 2017. provided to the Borrower.

The Financial Creditor- (M/s. Piramal Appellant claims that the Appellant also Enterprises Ltd.) thereafter, filed an filed present Application under Section 7 application under Section 7 of the of IBC having number Code for initiation of the CIRP against CP(IB)No.466/07/HDB/2019 to seek Sunrise Naturopathy and Resorts Pvt. initiation of CIRP against Respondent-Ltd.- (Corporate Guarantor No.1) and Corporate Guarantor. The Application another application under Section 7 of was filed before the Adjudicating the Code for initiation of the CIRP Authority at Hyderabad in view of against Sunsystem Institute of provisions of Section 60(2) of IBC Information Technology Pvt. Ltd.- although registered office of Respondent (Corporate Guarantor No.2). is at New Delhi.

Issue

The Adjudicating Authority (NCLT), Relying on the paragraph 32 in the Principal Bench, New Delhi, by matter of Piramal, the Adjudicating impugned order dated 24th May, 2018 Authority declined to admit the admitted the application and initiated Application as it was on same set of CIRP against Sunsystem Institute of facts, claim and default for which CIRP Information Technology Pvt. Ltd.- was already initiated and was in (Corporate Guarantor No.2). progress and where according to the By another order dated 31st May, Adjudicating Authority, the claim of 2018, the Adjudicating Authority Applicant had already been admitted. (NCLT), Principal Bench, New Delhi, Thus, the Application of the Appellant admitted the application and initiated against the Respondent came to be CIRP against Sunrise Naturopathy and rejected. Resorts Pvt. Ltd.- (Corporate Guarantor No.1).

Question

Whether the CIRP can be initiated against two Corporate Guarantors simultaneously for the same set of debt and default? The question can be looked from another angle. Whether the Financial Creditor can claim same amount from the Resolution Professional appointed pursuant to CIRP initiated against the Corporate Guarantor No.1, as also from the claims and default? Resolution Professional appointed pursuant to CIRP initiated against Corporate Guarantor No.2?

Held

Though there is a provision to file joint application under Section 7 by the Financial Creditor, no application can be filed by the Financial Creditor against two or more Corporate Debtors on the ground of joint liability (Principal Borrower and one Corporate Guarantor, or Principal Borrower or two Corporate Guarantors or one Corporate Guarantor and other Corporate Guarantor), till it is shown that the Corporate Debtors combinedly are joint venture company.

NCLAT referring “State Bank of India versus V. Ramakrishnan & Anr. [2018] ibclaw.in 29 SC” judgment and “Edelweiss Asset Reconstruction Company Ltd. Sachet Infrastructure Ltd. and Ors. (2019) ibclaw.in 466 NCLAT” held that if two Applications can be filed, for the same amount against Principal Borrower and Guarantor keeping in view the Sec. 60(2) & (3) of IBC, the Applications can also be maintained.

NCLAT also held that in the matter of Piramal, the Bench of this Appellate Tribunal “interpreted” the law. Ordinarily, we would respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner it was interpreted in the matter of Piramal. For such reasons, we are unable to uphold the Judgement as passed by the Adjudicating Authority.

We need to draw the timeline of the various cases involved in these matter:

Amendment in Sec. 60(2) of IBC

Notification date 17.08.2020. Retrospective effective w.e.f. 06.06.2018

R. Krishana Case	14.08.2018
Piramal Case	08.01.2019
Athena Energy Ventures Case	24.11.2020

II. Finding of the Appellate Tribunal in the Piramal Case

Two Members' bench of the NCLAT in the Piramal case held that:

- **It is not necessary to initiate CIRP against the Principal Borrower before initiating CIRP against the Corporate Guarantors. Without initiating any CIRP against the Principal Borrower, it is always open to the Financial Creditor to initiate CIRP under Section 7 against the Corporate Guarantors, as the creditor is also the Financial Creditor qua Corporate Guarantor. The first question is thus answered against the Appellant.**
- In the present case, the Adjudicating Authority has accepted that there is a debt payable in law by Sunsystem Institute of Information Technology Pvt. Ltd.- ("Corporate Guarantor No.2") and admitted the application on 24th May, 2018. The moment it is admitted, it is open to the other Corporate Guarantor No.1 namely– Sunrise Naturopathy and Resorts Pvt. Ltd. to say that the debt in question is not due as it is not payable in law, having shown the same debt payable by the 'Corporate Guarantor No.2' in its Form-1, and CIRP having already been initiated against the 'Corporate Guarantor No. 2'.
- The matter can be looked from another angle. The question arises whether the Financial Creditor- (M/s. Piramal Enterprises Ltd.) can claim same amount of Rs. 40,28,76,461/- from the Resolution Professional appointed pursuant to the CIRP against the Corporate Guarantor No.1 ('Sunrise Naturopathy and Resorts Pvt. Ltd.'), as also from the Resolution Professional appointed pursuant to CIRP initiated against Sunsystem Institute of Information Technology Pvt. Ltd.- ("Corporate Guarantor No.2")? Admittedly, for same set of debt, claim cannot be filed by same Financial Creditor in two separate CIRP. If same claim cannot be claimed from Resolution Professionals of separate CIRP, for same claim amount and default, two applications under Section 7 cannot be admitted simultaneously. Once for same claim the CIRP is initiated against one of the Corporate Debtor after such initiation, the Financial Creditor cannot trigger CIRP against the other Corporate Debtor(s), for the same claim amount (debt).
- **There is no bar in the Code for filing simultaneously two applications under Section 7 against the Principal Borrower as well as the Corporate Guarantor(s) or against both the Guarantors. However, once for same set of claim application under Section 7 filed by the Financial Creditor is admitted against one of the Corporate Debtor (Principal Borrower or Corporate Guarantor(s)), second application by the same Financial Creditor for same set of claim and default cannot be admitted against the other Corporate Debtor (the Corporate Guarantor(s) or the Principal Borrower). Further, though there is a provision to file joint application under**

Section 7 by the Financial Creditors, no application can be filed by the Financial Creditor against two or more Corporate Debtors on the ground of joint liability (Principal Borrower and one Corporate Guarantor, or Principal Borrower or two Corporate Guarantors or one Corporate Guarantor and other Corporate Guarantor), till it is shown that the Corporate Debtors combinedly are joint venture company. [para 32]

III. Current status of the Piramal Case

Appeals pending before Hon'ble Supreme Court against Judgement in the matter of Piramal and other Judgements of this Tribunal which have followed Judgement of Piramal and the Hon'ble Supreme Court has in the matter of Piramal in the Interim Order directed maintaining of status quo and in other matters, stayed the Judgements of this Tribunal.

IV. Finding in Athena Energy Ventures Case

Two Members' bench of the NCLAT in the Athena Energy Ventures case held that:

A. Comments on Piramal Case

In Piramal, although Financial Creditor took pains to secure same amount by ensuring that two Corporate Guarantors are there (which is not prohibited by law) the Corporate Guarantor No. 1 simply walked away only because, CIRP had already been initiated against Corporate Guarantor No. 2. Thus Guarantor No. 1 escaped payment (which has not been found to be the object of IBC-See Para 25 of Judgment in the matter of **V. Ramakrishna**).

Considering the issues which were before the NCLAT when matter of Piramal was decided, it is clear that the Issue No.2 was relating to question whether CIRP can be initiated against two Corporate Guarantors simultaneously for same set of debt and default. The issue was not whether Application can be filed against the Principal Borrower as well as the Corporate Guarantor. The observations made in para-32 of the Judgement that second application for same set of claim and default cannot be admitted against the Corporate Guarantor or Principal Borrower was not an issue in the matter of Piramal.

Apart from this, the observations in the Judgement in the matter of Piramal do not appear to have noticed Sub-Sections 2 and 3 of Section 60 of IBC.

In Sub-Section 2, the earlier words were "*bankruptcy of a personal guarantor of such corporate debtor*". These words were later on substituted by the words "*liquidation or bankruptcy of a corporate guarantor or personal guarantor as the case may be, of such Corporate Debtor*". These words were substituted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 Act 26 of 2018. This amendment was published in Government Gazette on 17th August, 2018 and this amendment was inserted with retrospective effect from 6th June, 2018.

NCLAT referred to these details as Hon'ble Supreme Court of India in Judgement in the matter of "**State Bank of India versus V. Ramakrishnan & Anr. [2018] ibclaw.in 29 SC**" (which was pronounced on 14th August, 2018 three days before the above Notification) discussed Section 60(2) and (3) as they stood before this amendment was enforced. At present, NCLAT referred to the above provision which had come on the statute book when Act 26 of 2018 was enforced and the Judgement in the matter of Piramal which was passed on 8th January, 2019 did not notice the above amendment. If the above provisions of Section 60(2) and (3) are kept in view, it can be said that IBC has no aversion to simultaneously proceeding against the Corporate Debtor and Corporate Guarantor.

In the matter of Piramal, the Bench of this Appellate Tribunal "interpreted" the law. Ordinarily, we would respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner it was interpreted in the matter of Piramal.

B. Decision on simultaneously CIRPs

If two Applications can be filed, for the same amount against Principal Borrower and Guarantor keeping in view the above provisions, the Applications can also be maintained. It is for such reason that Sub-Section (3) of Section 60 provides that if insolvency resolution process or liquidation or bankruptcy proceedings of a Corporate Guarantor or Personal Guarantor as the case may be of the Corporate Debtor is pending in any Court or Tribunal, it shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such Corporate Debtor. Apparently and for obvious reasons, the law requires that both the proceedings should be before same Adjudicating Authority.

The learned Counsel for the Appellant is relying on the observations made by the Insolvency Law Committee in its Report of February, 2020 to argue that the Creditor cannot be restrained from initiating CIRP against both the Principal Borrower as well as the surety and also maintaining the same. The learned Counsel submitted that when remedy is available against both, Application can be maintained against both and only at the stage of disbursement, adjustment may have to be made.

NCLAT found substance in the arguments being made by the learned Counsel for Appellant which are in tune with the Report of ILC. The ILC in para – 7.5 rightly referred to subsequent Judgement of "**Edelweiss Asset Reconstruction Company Ltd. Sachet Infrastructure Ltd. and Ors. (2019) ibclaw.in 466 NCLAT**" (See review later) dated 20th September, 2019 which permitted simultaneously initiation of CIRPs against Principal Borrower and its Corporate Guarantors. In that matter Judgment in the matter of Pirmal was relied on but the larger Bench mooted the idea of group CIRP in para-34 of the Judgement. The ILC thus rightly observed that provisions are there in the form of Section 60(2) and (3) and no amendment or legal changes were required at the moment.

The Hon'ble Supreme Court in the matter of **V. Ramakrishnan** dealt with Section 60(2) and (3) of IBC in Paragraphs – 24 and 25 of the Judgement, Hon'ble Supreme Court observed as under:-

"24. The scheme of Sections 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.

25. Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him."

NCLAT already mentioned that when Hon'ble Supreme Court was dealing with Section 60(2), it was in the context of bankruptcy of Personal Guarantor and the Act 26 of 2018 was yet not published. The above para – 24 of the Judgement in the matter of Ramakrishnan can be conveniently read keeping in view the substituted provisions as per Act 26 of 2018. In place of Personal Guarantor, one can read "Corporate Guarantor" and with suitable changes, scheme of Section 60(2) and (3) can be appreciated from that angle also. The issue involved in the matter of "Ramakrishnan" was whether Section 14 of IBC will provide for a moratorium for the limited period mentioned in the Code, on admission of an insolvency petition would the same apply to Personal Guarantor of a Corporate Debtor. The issue was answered in negative by the Hon'ble Supreme Court. The Hon'ble Supreme Court in such context made observations as above in Paragraphs – 24 and 25 of the Judgement.

It is clear that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as Guarantor. The law as laid down by the Hon'ble High Courts for the respective jurisdictions, and law as laid down by the Hon'ble Supreme Court for the whole country is binding.

C. Creditor's Claim filing and Appointment of Resolution Professional in both CIRPs

NCLAT view that simultaneously remedy is central to a contract of guarantee and where Principal Borrower and surety are undergoing CIRP, the Creditor should be able to file claims in CIRP of both of them. The IBC does not prevent this. NCLAT is unable to agree with the arguments of Learned Counsel for Respondent that when for same debt claim is made in CIRP against Borrower, in the CIRP against Guarantor the amount must be said to be not due or not payable in law. Under the Contract of Guarantee, it is only when the Creditor would receive amount, the question of no more due or adjustment would arise. **It would be a matter of adjustment when the Creditor receives debt due from the Borrower/Guarantor in the respective CIRP that the same should be taken note of and adjusted in the other CIRP. This can be conveniently done, more so when IRP/RP in both the CIRP is same. IBBI may have to lay down regulations to guide IRP/RPs in this regard.**

In this appeal, NCLAT directed to the Adjudicating Authority to appoint the same IRP/RP as has been appointed in CP(IB)616/7/HDB/2018 in the CIRP proceeding against M/s. Athena Chattisgarh Power Ltd. (Principal Borrower). The IRP/RP will act in accordance with law keeping observations in this Judgment in view.

V. Review of the judgment considered in Athena Energy Ventures Private Limited Case

NCLAT in *Edelweiss Asset Reconstruction Company Ltd. Sachet Infrastructure Ltd. and Ors. (2019)* [ibclaw.in 466](https://www.ibclaw.in) NCLAT held that ECL Finance Limited, the original Financial Creditor subsequently by Assignment Agreement dated 23rd March, 2017 assigned the total debt in favour of the Appellant-Edelweiss Asset Reconstruction Company Limited (Assignee) under Section 3 of the SARFAESI Act, 2002. The Corporate Debtors are Corporate Guarantor, and also shown as Co-Borrowers. The statement showing details of the loan and security documents have been mentioned which includes guarantee agreements given by the aforesaid Corporate Debtors.

As the project will be developed on the land of five Corporate Debtors, as referred to above as per the township plan, they have rightly taken plea that simultaneous CIRP should continue against them under the guidance of same Resolution Professional. NCLAT found that it is a case of joint consortium of different Corporate Debtors and thereby a group insolvency is required to develop the township on the land. For the said reasons, we hold that group CIRP proceeding is required to be initiated against five Corporate Debtors.

VI. Other Judgments in favour of Piramal's Case which were not considered in Athena Energy Ventures Case

a. **Shabad Khan Vs. M/s. Nisus Finance and Investment Manager & Ors. [2020] ibclaw.in 118 NCLAT**

In the matter of **Shabad Khan Vs. M/s. Nisus Finance and Investment Manager & Ors. [2020] ibclaw.in 118 NCLAT**, three members' bench held that it is not in dispute that the aforesaid judgment in Dr. Vishnu Kumar Agarwal's case rendered by this Appellate Tribunal has neither been stayed nor set aside by the Hon'ble Apex Court and it holds the field till date. The proposition of law is unmistakably, unambiguously and lucidly clear that where a Financial Creditor, whether singly or jointly with other Financial Creditors seeks initiation of CIRP against the principal borrower or one or the other corporate guarantors in respect of a claim, it cannot file second application for the same set of claim against the other Corporate Debtor, be it the principal borrower or one or other Corporate Guarantor. The proposition of law occupying the field in terms of the aforesaid judgment further extends to a situation where the Financial Creditor seeks initiation of CIRP against the principal borrower and the corporate guarantor(s) jointly which is not permissible unless the Corporate Debtor combinedly constitute a joint venture company. It is manifestly clear that triggering of CIRP by a Financial Creditor simultaneously against the principal borrower and the corporate guarantors for same set of claim is impermissible. **[para 9]**

Further in para 14 of the **Shabad Khan** judgment, it was held that the proposition of law laid down in Dr. Vishnu Kumar Agarwal's case occupying the field and not having been disturbed in appeal till date, has to be followed by the Adjudicating Authority scrupulously. The dictum of law in para 32 of the judgment is loud and clear and the course available thereunder has to be followed depending on the outcome of application under Section 65. Disposal of appeal in any manner at this juncture when application under Section 65 of the 'I&B Code' is sub-judice in terms of the order of Hon'ble Apex Court, would amount to circumventing the order of Hon'ble Apex Court referred hereinabove and adversely impacting the outcome of the sub-judice application.

b. **IFCI Ltd. Vs. M/s ACCIL Hospitality Ltd. [2020] ibclaw.in 210 NCLAT**

NCLAT in the matter IFCI Ltd. Vs. M/s ACCIL Hospitality Ltd. [2020] ibclaw.in 210 NCLAT held that once the Financial Creditor's claim has been collated and admitted by the IRP in its entirety in CIRP against Principal Borrower, invoking of jurisdiction of the Adjudicating Authority at its instance for triggering a fresh CIRP against the Corporate Guarantor would amount to duplicity of claims being pressed. The fact that the Resolution Plan is yet to be approved by the Adjudicating Authority and the Financial Creditor may be faced with the prospect of taking a haircut is no ground to trigger a fresh resolution process against the Corporate Guarantor. Assuming but not holding that the Corporate Guarantors liability is coextensive with that of the Principal Borrower in the instant case with no proof of record that there is no contract to the contrary within the meaning of Section 128 of the Indian Contract Act and there has been no subsequent variance in terms of contract between the Financial Creditor and the Principal Borrower, apprehension of Financial Creditor that in the resolution process initiated against the Principal Borrower, which is still underway, its total claim

will not be satisfied has to be termed as speculative and a figment of imagination. This being a second application for same set of claim and arising out of the same default cannot be admitted against the Corporate Guarantor while CIRP initiated against the 'Principal Borrower' is still subsisting.