

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 538 of 2019

[Arising out of Order dated 8th April, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai in CP/1314/IB/2018]

IN THE MATTER OF:

K. Paramasivam
Promoter/ Suspended Director of
M/s. Maharaja Theme Parks and Resorts Pvt. Ltd.
128, Bhavani Main Road,
Erode 638 004.

.... Appellant

Versus

1. The Karur Vysya Bank Ltd.,
Asset Recovery Branch,
Represented by Assistant General Manager,
Padmavathiyar Road,
Off Peters Road, Gopalapuram,
Chennai 600 014.

2. Mrs. Aneetha Subramaniam,
Interim Resolution Professional,
A-2, Saradha Apartments,
17/6, Sringeri Mutt Road,
R.A. Puram, Mandaveli,
Chennai 600 028.

.... Respondents

Present:

**For Appellant: Mr. Sudhir K. Makkar, Senior Advocate with
 Mr. P.J. Shri Ganesh, Ms. Shruti Shrivastava,
 Ms. Saumya Gupta, Mr. Ankit Chaturvedi,
 Advocates.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

M/s. The Karur Vysya Bank Limited ('Financial Creditor') filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the '**I&B Code**') against M/s. Maharaja Theme

Parks and Resorts Private Limited ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai by impugned order dated 8th April, 2019 admitted the application, giving rise to this Appeal. The Appellant is Promoter/ Suspended Director of M/s. Maharaja Theme Parks and Resorts Private Limited ('Corporate Debtor'). According to the Appellant, the application under Section 7 of the I&B Code was not maintainable against the 'Principal Borrower' not being a 'Corporate Debtor'.

2. The case of the Appellant is that the M/s. The Karur Vysya Bank Limited (hereinafter referred to as the '**Bank**') advanced credit facility to three entities, namely: -

- (a) Sri Maharaja Refineries, a Partnership Firm.
 - (b) Sri Maharaja Industries, a proprietary concern of K. Paramasivam.
 - (c) Sri Maharaja Enterprises, a proprietary concern of P. Sathiyamoorthy.
- [Collectively referred to as the 'Borrowers']

3. M/s. Maharaja Theme Parks and Resorts Private Limited ('Corporate Debtor') extended corporate guarantees for the loans availed by all three Borrowers. The three Borrowers failed to repay the debts payable to the Respondent Bank. Under the circumstances, the proceedings were not initiated against the Borrowers, but against the 'Corporate Guarantor', i.e., M/s. Maharaja Theme Parks and Resorts Private Limited.

4. Learned Counsel for the Appellant submitted that the application under Section 7 was not maintainable against M/s. Maharaja Theme Parks and Resorts Private Limited. It was submitted that the petition can be filed

under Section 7 only against a “Corporate Debtor” as defined in Section 3(8) of the I&B Code.

5. Reliance has also been placed on the definition of “Corporate Person” as defined under Section 3(7) of the I&B Code for the purpose of conjoint reading of the same with definition of “Corporate Guarantor” as defined under Section 5(5A) of the I&B Code.

6. According to the Appellant, the application under Section 7 was not maintainable against a ‘partnership firm’ or a ‘proprietary concern’ (Borrowers herein) and the same was not maintainable against the ‘Corporate Guarantor’.

7. Section 5(5A), which defines “Corporate Guarantor”, reads as follows:-

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

xxx

xxx

xxx

(5A) “corporate guarantor” means a corporate person who is the surety in a contract of guarantee to a corporate debtor;”

8. From the above definition, it is clear that a ‘Corporate Person’, who is the surety in a contract of guarantee to a ‘Corporate Debtor’ comes within the meaning of ‘Corporate Guarantor’.

9. The Appellant M/s. Maharaja Theme Parks and Resorts Private Limited is a ‘Corporate Person’ being a Company under the Companies Act, 2013. It has given a surety, but not in relation to a ‘contract’ or ‘guarantee’ to a ‘Corporate Debtor’. It has granted surety with regard to ‘contract’ with a ‘Debtor Firm’ or ‘proprietary concern’. Therefore, the Appellant -

M/s. Maharaja Theme Parks and Resorts Private Limited does not come within the meaning of 'Corporate Guarantor' as defined under Section 5(5A).

10. Section 5(22) defines "Personal Guarantor", reads as follows: -

"5(22) "personal guarantor" means an individual who is the surety in a contract of guarantee to a corporate debtor."

11. It is submitted that the Appellant having not given any 'surety' in its individual capacity in a 'contract of guarantee' to a 'corporate debtor' (Borrowers being Partnership Firms or Proprietorship concern), the Appellant comes within the meaning of 'personal guarantor'.

12. Section 3(7) defines "Corporate Person", reads as follows: -

"3(7) "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a 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;"

13. Section 3(8) defines "Corporate Debtor", reads as follows: -

"3(8) "corporate debtor" means a corporate person who owes a debt to any person;"

14. From the conjoint reading of Sections 3(7) and (8), it is clear that a Company as defined in clause (2) of Section 2 of the Companies Act, 2013 or

a limited liability partnership, as defined in clause (n) of sub-section (1) of Section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated therein (except any financial service provider), comes within the meaning of “Corporate Debtor”.

15. It is not in dispute that M/s. Maharaja Theme Parks and Resorts Private Limited is a ‘Company’ under the Companies Act, 2013. Therefore, M/s. Maharaja Theme Parks and Resorts Private Limited comes within the meaning of “Corporate Debtor”.

16. Section 5(7) defines “Financial Creditor”, means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

17. Section 5(8) defines “Financial Debt”, means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes the amount of any liability in respect of any of the guarantees or indemnity for any of the items referred to in sub-clauses (a) to (h) of the clause. Relevant provisions of Section 5(8) reads follows: -

“5(8) “financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-

- (a) money borrowed against the payment of interest;*
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialized equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*

- (d) *the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- (e) *receivable sold or discounted other than any receivable sold on non-recourse basis;*
- (f) *any amount raised under any other transaction, including, any forward sale or purchase agreement, having the commercial effect of borrowing;*

Explanation.—For the purpose of this sub-clause,--

- (i) *any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*
- (ii) *the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);*
- (g) *any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*
- (h) *any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*
- (i) *the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”*

18. Admittedly, the ‘Borrowers’ have borrowed the money against payment of interest from the Bank and M/s. Maharaja Theme Parks and Resorts Company Appeal (AT) (Insolvency) No. 538 of 2019

Private Limited has taken the 'guarantee' in respect of the item referred to in clause (a) of Section 5(8). In this background, we hold that the Bank comes within the meaning of 'Financial Creditor' of M/s. Maharaja Theme Parks & Resorts Private Limited ('Corporate Debtor'). For the said reason, the application under Section 7 is maintainable.

19. We find no merit in this Appeal. It is accordingly dismissed. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

(Justice A.I.S. Cheema)
Member (Judicial)

(Kanthi Narahari)
Member (Technical)

NEW DELHI

18th November, 2019

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