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## REVISITING CRITICAL JUDGEMENTS



A R E P U B L I C D A Y S P E C I A L I S S U E

# Position of Co-Borrowers in IBC Regime

## An Analysis of Maitreya Doshi V. Anand Rathi Global Finance Ltd. & Anr1.

Analysis on the recent judgment passed by the Supreme Court of India wherein it has been held that in a case where there are two or more borrowers, proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 can be initiated against both/ all borrowers; however, if some dues are realized from one borrower, only the balance dues can be realized from the other borrower(s)

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### BRIEF FACTS

The Financial Creditor, viz., Anand Rathi Global Finance Ltd (“FC”) had disbursed certain loans to the Borrower, viz, Premier Limited (“Borrower”) in the years 2015-16 by way of three separate Loan-cum-Pledge Agreements. Appellant in the case in hand, viz, Doshi Holdings Private Limited (“Co-borrower”/ “Pledgor”) pledged certain shares held by it in the Borrower in favour of the FC.

The Borrower defaulted in meeting its payment obligations and in the years 2019-20, the FC called upon the Borrower and the Co-borrower to clear the outstanding dues. The Borrower admitted its liability towards the FC but cited certain difficulties in meeting the payment obligations.

The aforementioned admitted default led to the filing of a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“IBC”) by the FC against the Borrower before the concerned National Company Law Tribunal (“NCLT”). The FC also filed a separate petition under Section 7 of the IBC against the Co-borrower before the NCLT, on the same date.

By way of two separate orders, the NCLT admitted both petitions filed by the FC against the Borrower and Co-Borrower. Aggrieved by the order passed by the NCLT, the Co-borrower (through its erstwhile management) approached the National Company Law Appellate Tribunal (“NCLAT”) by way of an Appeal under the provisions of IBC. The NCLAT upheld the order of the NCLT and dismissed the Appeal filed by the Co-Borrower.



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In view of the said situation, the Co-borrower filed an Appeal before the Supreme Court of India (“Supreme Court”). The case of the Co-borrower before the Supreme Court was that the loans were disbursed by the FC to the Borrower and not to the Co-borrower/ Pledgor. No part of the loans was utilized by the Co-borrower/ Pledgor. In fact, the Co-borrower contended that it was not a co-borrower, but was only a pledgor. It was also contended by the Co-borrower that no part of the loans availed by the Borrower can be deemed to be a Financial Debt<sup>2</sup>. The Co-borrower also asserted that a contract of pledge has to be treated differently as compared to a contract of guarantee and thus, no liability can be fastened on the Pledgor.

Governed by the facts of the case, the FC contended that the Pledgor had executed the loan documents in dual capacity, as that of a Co-borrower and a Pledgor. It was also asserted by the FC that in a situation such as this, where there are more than one borrower of a

credit facility, the actual disbursement of the loan amount to all borrowers cannot be taken to be the consideration for time value of money. The FC also contended that if the disbursal to a borrower along with a co-borrower is taken to be the criteria, in that event, no contract for guarantee can be ever executed.

It is to be noted that the NCLAT order records in detail that the Co-borrower had not only executed a loan-cum-pledge agreement, but had also executed a demand promissory note, along with the Borrower, undertaking to unconditionally repay the FC, on demand, towards the disbursed amount. Therefore, it is clear that the Co-borrower had executed documents along with the Borrower and had undertaken to repay the FC the entire ‘amount received’ by the Borrower from the FC.

### **OBSERVATIONS BY THE SUPREME COURT**

The Supreme Court first analyzed the fact that the finding of the NCLAT,

wherein the Co-borrower had in fact executed the loan documents in a dual capacity, of that of a Co-Borrower as well as Pledgor, cannot be found fault with.

The Supreme Court also assessed the contention of the Co-borrower that the monies were only disbursed to the Borrower. The Supreme Court also examined the contention that a contract of pledge, a contract of indemnity and a contract of guarantee cannot be dealt with in the same manner, as the scope and ambit thereof is different, thereby stating that a pledgor per se may not be a financial debtor. However, the Supreme Court held that the observation of the NCLAT that the Pledgor is a Co-borrower is correct.

Relying on the judgment of the Supreme Court in *Lalit Kumar Jain & Ors v. Union of India & Ors*<sup>3</sup>, the Supreme Court held that it is a settled law that initiation of proceedings against one borrower under the provisions of the IBC does not discharge the co-borrowers.



The Supreme Court held that there is no embargo in law that proceedings under the IBC cannot be initiated against a borrower and a co-borrower, simultaneously or severally. However, the Supreme Court did clarify the fact that if certain amounts are realized from one of the borrowers, the other borrower(s) can only be held liable to pay the balance amounts and there can be no question of recovery of the claim amount, twice over.

## CONCLUSION

The judgment passed by the Supreme Court reaffirms the well-established principles of law in so far as the liability of a borrower and a co-borrower/

guarantor is concerned. The judgment does reiterate the law laid down in the Lalit Kumar Jain (Supra) judgment to state that mere discharge of a borrower by way of passing of a resolution plan qua the borrower, does not discharge the co-borrower/ guarantor.

While we feel that the judgment clarifies certain aspects, vis-à-vis the facts at hand are concerned, one aspect that needs to be addressed by the Supreme Court in later judgments would be regarding situations where a party is only a pledgor and not a co-borrower or guarantor. [W](#)



With more than 14 years of professional experience, **Rahul Tyagi** is a Partner with Dhir & Dhir Associates and is an expert in handling complex commercial litigation matters. He has wide experience and expertise in handling banking and finance matters, matters pertaining to the insolvency and restructuring litigation (including but not limited to securitisation related and debts recovery related matters), arbitrations, constitutional and criminal matters.



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<sup>1</sup>2022 SCC OnLine SC 1276, decided on September 22, 2022.

<sup>2</sup>Section 5(8) of the IBC

<sup>3</sup>(2021)9SCC321