NATIONAL COMPANY LAW TRIBUNAL
COURT-V, MUMBAI BENCH

2. RCP(IB)/6(MB)2023

IN THE MATTER OF

Jammu And Kashmir Bank Limited
Vs
Essel Infraprojects Limited
U/s 7 of the Insolvency and Bankruptcy Code, 2016

Order Delivered on 24.08.2026

CORAM:

SH. VINAY GOEL
MEMBER (J)

SH. CHARANJEET SINGH GULATI
MEMBER (T)

Appearance through VC/Physical/Hybrid Mode:

For the IRP: -	Adv. Devarajan Raman (VC)
For the Respondent: -	Adv Rohit Gupta a/w Adv Shakib Dhorajiwala a/w Adv Aditi Biswas a/w Adv Nateshwari Kadagad i/b Vidhii Partners, Advocates for Corporate Debtor (VC)

ORDER

RCP(IB)/6(MB)2023: - The above **RCP(IB)/6(MB)2023** is listed for pronouncement of orders. The same is pronounced in open court vide a separate order

Sd/-
VINAY GOEL
Member (Judicial)

Sd/-
CHARANJEET SINGH GULATI
Member (Technical)

//Anmol//

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH COURT V

R.C.P. (IB)/ 6 (MB) 2023

Under Section 7 of the Insolvency and Bankruptcy Code, 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Jammu And Kashmir Bank Limited
Having its registered office at:
Corporate Headquarters, M.A. Road, Srinagar and amongst other having its branch office at Suyog Sadan Building, Mahakali Caves Road, Andheri (East), Mumbai - 400 093.

... Financial Creditor/Petitioner

Versus

Essel Infraprojects Limited
Having its registered office at:
513/A, 5th Floor, Kohinoor City, Kirol Road, L.B.S. Marg, Kurla (W), Mumbai - 400 070.

... Corporate Debtor/Respondent

Order Pronounced on: 24.08.2026

Coram:

Sh. Vinay Goel
Member (Judicial)

Sh. Charanjeet Singh Gulati
Member (Technical)

Appearances:

For Petitioner:	Adv. Vinodini Srinivasan a/w Adv. Arpita Tiwari (VC)
For IRP:	Adv. Neha Hajare (VC)
For Respondent:	Adv. Rohit Gupta a/w Adv. Shakib Dhorjiwala, Adv. Aditi Biswa, Adv. Nateshwari Kadagad i/b Vidhi Partners (PH)

ORDER

1. The Present Company Petition has been filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**Code**") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Jammu And Kashmir Bank Limited ("**the Financial Creditor/Petitioner**") for initiating Corporate Insolvency Resolution Process ("**CIRP**") against Essel Infraprojects Limited ("**the Corporate Debtor/Respondent**") for a default amount of **Rs. 87,43,17,925.37/-** ((Rupees Eighty-Seven Crores Forty-Three Lacs Seventeen Thousand Nine Hundred and Twenty-Five and paise Thirty-Seven Only) inclusive of interest and legal charges, the date of default being 29.10.2019.

2. This Tribunal, vide order dated 28.08.2024, admitted the Respondent into CIRP. Aggrieved by the said order, Pooja Ramesh Singh, a suspended director of the Corporate Debtor, filed *Company Appeal (AT) Insolvency No. 1808 of 2024* before the Hon'ble NCLAT, which was dismissed by order dated 11.09.2025. The suspended director thereafter carried the matter to the Hon'ble Supreme Court by way of *Civil Appeal No. 11950 of 2025*. The Hon'ble Supreme Court, by order dated 02.07.2026, set aside both the NCLT order dated 28.08.2024 and the NCLAT order dated 11.09.2025, and remanded the matter to this Tribunal for fresh consideration.

Brief Facts as per the Petition:

3. It is submitted that, by sanction letter dated 17.12.2013 (loan agreement 27.12.2013, petition page 256), the Petitioner provided Line of Credit Facility (SOD) of Rs. 200,00,00,000/- (Rupees Two Hundred Crores Only) to Pan India Utilities Distribution Company Limited ("**PIUDCL**"). Of this, Rs. 125,00,00,000/- was disbursed on 28.12.2013 and the balance amount of Rs. 75,00,00,000/- was disbursed on 30.12.2013. As per the sanction letter, the facility was secured, inter alia, by (i) a Corporate Guarantee from the Corporate Debtor and (ii) an extension of charge over land admeasuring 196.16 acres at Survey No. 268, Village Gorai, Borivali (West), Mumbai – 400091, then standing in the Corporate Debtor's name ("Gorai Land").

4. Pursuant to this arrangement, the Respondent executed a Corporate Guarantee dated 27.12.2013 in the Petitioner's favour on which the present Petition is founded. The Respondent also executed a Deed of Mortgage over the Gorai Land in the Petitioner's favour. The facility was subsequently renewed by a Renewal-cum-Reduction Letter dated 18.11.2017.

5. As recorded in Part IV of Form 1, the amount claimed to be in default and the date of default are as follows:

Principal	Amount (in Rs.)
Principal Amount outstanding as on 01.03.2019	69,96,71,800.37
Interest at the rate of Applicant Bank's 1-year MCLR Plus 2.55% per annum with Monthly rests Plus 2% penal interest (effective 12.20% p.a.) as on 30.06.2020.	17,36,47,021.00
Legal charges/other charges	9,99,104.00
Total amount	**Rs. 87,43,17,925.37**

6. The Petitioner has placed on record various documents in support of this claim.

7. By Demand Notice dated 31.01.2019, read with a notice dated 02.03.2019, the Petitioner called upon PIUDCL to pay Rs. 69,96,71,800.37/-, due under the renewed sanction letter dated 18.11.2017. PIUDCL, by reply dated 05.03.2019, admitted the debt and default and sought further time on account of liquidity issues. This Tribunal subsequently admitted PIUDCL into CIRP by order dated 20.09.2019. The Petitioner submits that, under Clause 10 of the Corporate Guarantee, this admission of default by the principal borrower is binding on the Respondent as guarantor.

8. On 29.10.2019, the Petitioner issued a demand notice to the Respondent, as Corporate Guarantor, calling for payment of Rs. 78,18,55,689.57/- within fifteen days.

9. Upon the Respondent's failure to pay, the Petitioner filed the present Petition under Section 7 of the Code on 13.11.2023, seeking initiation of CIRP against the Respondent.

Reply of the Respondent:

10. The Respondent admits having executed a Deed of Mortgage dated 27.12.2013 (Annexure O) over the property at Survey No. 268, Village Gorai, Taluka Borivali, Mumbai, and a Deed of Guarantee of the same date (Annexure P), both in the Petitioner's favour, to secure the facility granted to PIUDCL.

11. The Respondent submits that it filed ***Company Scheme Petition No. 798 of 2013*** before the Hon'ble Bombay High Court, proposing to demerge its undertaking into Essel Urban Infrastructures Private Limited, the resulting company, and transfer its assets, including the Gorai Land, to that company. The Scheme was sanctioned on 04.04.2014 (Exhibit B), pursuant to which the Respondent ceased to own the Gorai Land.

12. Thereafter, Essel Urban Infrastructures Private Limited filed ***Company Scheme Petition No. 109 of 2014*** for its merger with Pan India Infraprojects Private Limited ("**PIIPL**"). The Scheme was sanctioned on 20.06.2014 (Exhibit C), pursuant to which all assets of Essel Urban, including the Gorai Land, were transferred to PIIPL.

13. The Respondent contends that the Petitioner was aware of these transactions, as evidenced by its Renewal-cum-Reduction Letter dated 18.11.2017 (Annexure R). The letter required the existing mortgage to be re-executed by PIIPL, in whose name the Gorai Land then stood, and also required a fresh guarantee from PIIPL. According to the Respondent, this demonstrates that the Petitioner itself treated PIIPL, and not the Respondent, as the party from whom continuing security and guarantee were to be obtained.

14. In pursuance of the aforesaid requirement, Deeds of Declaration dated 03.12.2018 were executed by PIIPL and the Respondent in favour of the Petitioner, placing on record the transactions and the subsequent transfer of the property Exhibit D (Colly.). On this basis, the Respondent contends that

it is neither the mortgagor nor the guarantor for the facility availed by PIUDCL, and that the present Petition is not maintainable against it.

15. It is further submitted that the Petitioner has already proceeded against the Principal Borrower, PIUDCL, which is presently undergoing liquidation pursuant to the order passed by this Tribunal on 11.08.2020. The Financial Creditor has also proceeded against PIIPL, the entity recognized as the guarantor and mortgagor in respect of the said facilities, which is presently undergoing CIRP pursuant to the order dated 15.04.2019. Having proceeded against both the principal borrower and PIIPL, the Petitioner cannot now also proceed against the Respondent.

16. The Respondent also contends that the claim does not properly correlate with the sanction letter and underlying transaction documents, and that the Petition fails to clearly disclose the date of default as required under Section 7(3) of the Code.

17. It is further submitted that the Petition has been filed on the instructions of Mr. Fayaz Ahmad Wani, purportedly the Petitioner's authorised officer under a Power of Attorney dated 21.10.2015, which does not specifically authorise him to initiate CIRP proceedings against a company or its guarantor.

18. On these grounds, the Respondent submits that the present petition deserves to be dismissed.

Written submissions by the Petitioner

19. The Petitioner submits that, under Clauses 1.1.4 and 2 of the first Scheme of Demerger, only the "Demerged Undertaking", and not the entire business of the Respondent, was transferred to Essel Urban. The Demerged Undertaking comprised only of one project of the Corporate Debtor, namely, the development of the Gorai Land. Accordingly, only the liabilities pertaining to or relatable to the Demerged Undertaking were transferred under the Scheme. The Corporate Guarantee, however, was not a liability pertaining to or relatable to the Gorai Land and, therefore, was not transferred from the Corporate Debtor under the Scheme. The Corporate Guarantee is not linked to any specific asset of the Corporate Debtor and may be enforced against any or all of its assets. Further, the Deed of Mortgage and the Deed of

Guarantee are separate and independent instruments, hence, the transfer of the mortgaged asset under the Scheme did not result in the transfer of the liability under the Deed of Guarantee. Clauses 4 and 9 of the Corporate Guarantee expressly provide that the guarantee is independent of, and in addition to, any security furnished to the Bank, including the mortgaged asset. In this regard, reliance is placed on the judgment of the Hon'ble Supreme Court in ***Himachal Pradesh Financial Corporation v. Pawna Corporation, (2015) 5 SCC 6/7***. It is further submitted that Clauses 2 and 8 of the Corporate Guarantee themselves preclude the Respondent from contending that its liability could be transferred or extinguished by entering into a Scheme of Arrangement.

20. It is submitted that, under Clause 2.1 of the Second Scheme of Amalgamation between Essel Urban and PIIPL, the entire undertaking of Essel Urban, including all liabilities, was transferred to PIIPL. However, since the liability under the Corporate Guarantee was never transferred from the Corporate Debtor to Essel Urban under the First Scheme of Demerger, such liability could not have subsequently been transferred from Essel Urban to PIIPL under the Second Scheme of Amalgamation.

21. It is submitted that the renewed sanction letter dated 18.11.2017 did not amend or alter the existing terms and conditions between the parties. Therefore, the Respondent's contention that the omission of any reference to the Corporate Guarantee in the said letter resulted in its transfer, relinquishment, or extinguishment is untenable. The Corporate Guarantee formed part of the existing terms and conditions between the parties, and the Loan Agreement was never amended or modified. Accordingly, the Corporate Guarantee continues to remain valid and binding.

22. The Petitioner further relies on this Tribunal's order dated 12.01.2026 in ***Appeal (IBC) 32/2024 and I.A. (IBC) 55(MB)/2025 in C.P. (IB) 2815(MB)/2019***, wherein, at paragraphs 20 and 21, it was held that the guarantee could not be said to have been transferred to PIIPL by virtue of the Scheme approved on 04.04.2014.

23. The Petitioner contends that the Respondent's allegation that the commercial understanding contemplated only one guarantee is untenable. The Petitioner submits that the Scheme did not result in any additional guarantee and that the additional guarantee from PIIPL was sought only under the Renewed Sanction Letter dated 18.11.2017, three years after the Scheme. The additional security was sought for a valid commercial reason, as the Gorai Land, valued at approximately Rs. 796 crores and forming part of the Respondent's asset base at the time of sanction, had subsequently been transferred to PIIPL, thereby reducing the assets available for enforcement against the Respondent. However, PIIPL never furnished the proposed guarantee and only executed a Declaration dated 03.12.2018 acknowledging the transfer of the Gorai Land.

Written submissions of the Respondent

24. The Respondent submitted that the sanction letter dated 18.11.2017 materially altered and substituted the security arrangement contained in the sanction letter dated 17.12.2013, thereby constituting novation under Section 62 of the Indian Contract Act, 1872. It was contended that the 2017 sanction introduced a new mortgagor/guarantor, namely PIIPL, in place of the Corporate Debtor and, being a material variation made without the Corporate Debtor's consent, discharged the Corporate Debtor from its guarantee under Section 133 of the Contract Act. Reliance was placed on ***Lata Construction v. Rameshchandra Ramniklal Shah, (2000) 1 SCC 586***, ***Chrisomar Corpn. v. MJR Steels (P) Ltd., (2018) 16 SCC 117*** and ***Bhagyalaxmi Co-operative Bank v. Babaldas Amtharam Patel, 2026 SCC OnLine SC 326***.

25. The Respondent further submitted that the Schemes of Demerger dated 04.04.2014 and Merger dated 20.06.2014, sanctioned by the Bombay High Court under Sections 391–394 of the Companies Act, 1956, had attained finality and were binding on all creditors. According to the Respondent, under the Schemes, PIIPL assumed the rights, obligations and liabilities of the Corporate Debtor under the Deed of Mortgage and Deed of Corporate Guarantee dated 27.12.2013.

26. The Respondent also relied upon the Petitioner's conduct in the proceedings concerning PIIPL. PIIPL was admitted to CIRP on 16.07.2020 and ordered into liquidation on 04.10.2023. The Financial Creditor filed its claim in those proceedings on 06.08.2020 and thereafter, by Form-D dated 02.12.2023, claimed to be a secured financial creditor. When its claim was classified as unsecured by email dated 04.12.2023, the Financial Creditor challenged the classification and contended before the Tribunal that, by virtue of the Schemes, PIIPL had stepped into the shoes of the Corporate Debtor under the Deed of Mortgage and Deed of Corporate Guarantee dated 27.12.2013. The Respondent submitted that the Financial Creditor's present stand is contrary to the stand taken in those proceedings and amounts to approbation and reprobation.

27. The Respondent also contended that the present Petition does not specify any date of default and that the Financial Creditor has relied only upon a Demand Notice dated 29.10.2019, without producing proof of its service upon the Corporate Debtor. It was contended that, in the absence of proof of valid service and invocation of the alleged guarantee, no default can be said to have been established against the Corporate Debtor.

Analysis & Findings

28. Heard Ld. Counsel for the parties, and perused the record. We have given our thoughtful consideration to the arguments advanced and material placed on record.

29. The Petitioner's case is that the Corporate Guarantee executed by the Respondent is independent of the Deed of Mortgage, and only the assets and liabilities forming part of the "Demerged Undertaking" under the first Scheme were transferred to Essel Urban and thereafter to PIIPL. Since the Corporate Guarantee was not specific to the Gorai Land and did not form part of the Demerged Undertaking, it continued to bind the Respondent despite the transfer of the mortgaged property. The Petitioner further submits that the request for a fresh guarantee from PIIPL under the Renewal-cum-Reduction Letter dated 18.11.2017 was only additional security required due to the reduction in the Respondent's asset base and did not mean that the

Respondent's guarantee had ceased to be binding. The Petitioner also relies on this Tribunal's earlier order dated 12.01.2026, which, according to it, had already decided this issue in its favour.

30. Per contra, the Respondent contends that the Gorai Land and the undertaking to which it belonged were first transferred to Essel Urban under the Scheme sanctioned on 04.04.2014 and thereafter to PIIPL under the Scheme sanctioned on 20.06.2014. It contended that the Petitioner's subsequent conduct of requiring the mortgage to be re-executed by PIIPL and seeking a fresh guarantee from PIIPL, followed by the Deeds of Declaration dated 03.12.2018, shows that the Petitioner itself treated PIIPL as liable in place of the Respondent. Accordingly, the Respondent denies that it remains the mortgagor or guarantor in respect of the facility granted to PIUDCL and contends that the Petition, being based on the Corporate Guarantee, is not maintainable against it.

31. The existence of the underlying debt owed by PIUDCL to the Petitioner, and PIUDCL's default in repayment thereof, is not in dispute. The sanction letter dated 17.12.2013, the loan agreement dated 27.12.2013, and the record of disbursement of Rs. 125,00,00,000/- on 28.12.2013 and Rs. 75,00,00,000/- on 30.12.2013 establish that a Line of Credit Facility of Rs. 200,00,00,000/- was in fact extended to PIUDCL. The Respondent does not dispute the disbursement of this facility to PIUDCL, nor does it dispute execution of the Deed of Guarantee dated 27.12.2013 (Annexure P) in the Petitioner's favour. As far as the default is concerned, the Petitioner issued a Demand Notice dated 31.01.2019, followed by a further notice dated 02.03.2019, calling upon PIUDCL to clear the outstanding amount under the renewed sanction letter dated 18.11.2017. PIUDCL, by its reply dated 05.03.2019, did not deny the debt but admitted it, seeking further time on account of liquidity difficulties. Subsequently, on account of default in repayment of the dues, this Tribunal, by order dated 20.09.2019, admitted PIUDCL into CIRP.

32. Therefore, the sole issue that arises for determination before this Tribunal is:

"Whether in the facts and circumstances of the case, the Respondent has liability in terms of the deed of Guarantee executed on 27.12.2013?"

33. To determine the aforesaid issue, it is imperative to take note of the relevant extract of the **<u>Corporate Guarantee dated 27.12.2013</u>**, which is as under:

"NOW, THEREFORE, THIS DEED OF CORPORATE GUARANTEE WITNESSETH AS UNDER:

1. In consideration of the said Line of Credit facility (SOD) facility detailed above sanctioned by the BANK in favour of the above named Borrower Company. the Guarantor Company hereby Irrevocably and unconditionally guarantees to repay ***on demand*** *the sum of Rs. 200.00 Crores (Rupees Two Hundred Crores Only) together with interest and other charges accruing thereon as per terms and conditions agreed between the BANK and the Borrower Company or part thereof as may be availed or may remain outstanding against the Borrower Company.*

2. ***That the Guarantor Company shall not do any act or acts relieving it of the guarantee hereunder given and this guarantee shall succeed and shall be duly and validly performed till such time repayment of the said Line of Credit facility (SOD) facility with interest and other charges thereon or any other amount due to the BANK remains unpaid or are in arrears****.*

4. That the BANK may initiate recovery proceedings against the Guarantor Company notwithstanding that any securities given or to be given to the BANK may be void, defective or that the Borrower/Guarantor Companies has exceeded its powers or that the arrangements of the Borrower Company with the BANK are ultra vires and without being bound to enforce its claim, the BANK shall not be bound to enquire into the powers of the Borrower/Guarantor Companies and all moneys due and liabilities incurred shall be deemed to form part of the present guarantee.

5. That the BANK shall be free to invoke this guarantee and the

Guarantor Company undertakes to pay the loan amounts together with interest and other charges to the BANK secured under this guarantee immediately from the date of receipt of demand in writing from the BANK.

6. That a demand in writing shall be deemed to have been duly made to the Guarantor Company if sent by post under registered cover and shall be deemed to have been received by the Guarantor Company six days after posting thereof and in proving such service it shall be sufficient to provide that the letter containing the demand was properly addressed and sent under registered cover. Alternatively such service could be effected by hand delivery.

8. That this Guarantee shall not be determined and not in any way prejudiced by any absorption or by any amalgamation of the Guarantor Company with any other Company, but shall inure and be available to the BANK till such time the loan account/s of the Borrower Company is/are adjusted in the books of accounts of the BANK.

9. This guarantee shall be in ***addition to any other security offered by us in connection with the credit facility, which the Bank may now or at any time hold, sanctioned in favor of the Borrower Company****.*

10. That the Borrower Company's accounts settled or started between the BANK and the Borrower Company shall be accepted by the Guarantor Company as conclusive evidence. A certificate in writing signed by any Officer of the BANK stating that the balance on any particular date payable under this guarantee shall be conclusive evidence against the Guarantor Company.

11. That notwithstanding any meaning or import or otherwise in any clause/s heretofore, this guarantee shall be full, complete, perfect and continuing one and ***shall remain in force and bind the Guarantor Company till the Loan/s secured under this guarantee is/are fully liquidated/adjusted along-with interest and other charges thereupon incurred by the BANK****.*

12. That in case default is made in the payment by the Borrower

Company to the BANK of the lawful claim or demand held or made by the BANK against the Company, the Guarantor Company hereby covenants, promises and agrees to pay the same to the BANK, its successors in interest and assigns demand.”

*[**Emphasis Supplied**]*

34. Section 128 of the Indian Contract Act, 1872 provides that the liability of a surety is co-extensive with that of the principal debtor, unless otherwise provided by the contract. In the present case, the terms of the Corporate Guarantee expressly provide for a continuing liability of the Respondent until the loan is fully liquidated or adjusted. Clauses 2, 8, 9 and 11, read together, make it clear that the guarantee was an independent and continuing obligation. In particular, Clause 8 expressly provides that the guarantee shall not be determined or prejudiced by any absorption or amalgamation of the Guarantor Company, while Clause 9 stipulates that the guarantee shall be in addition to any other security furnished to the Petitioner. Thus, the continuance of the Corporate Guarantee was not dependent upon the subsistence of the mortgage over the Gorai Land.

35. The Respondent relied on Section 62 and 133 of the Indian Contract Act, 1872, to contend that it stood discharged from the guarantee. For the ready reference, the said sections are reproduced hereinbelow:

> *“**Section 62: Effect of novation, rescission, and alteration of contract**.*
>
> *If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed.*
>
> ***Section 133: Discharge of surety by variance in terms of contract**.*
>
> *Any variance, made without the surety’s consent, in the terms of the contract between the principal 1 [debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.”*

36. The Respondent has contended that the sanction letter dated 18.11.2017 altered and substituted the security arrangement contained in the sanction letter dated 17.12.2013, thereby constituting novation under Section 62 of the Contract Act. However, the Respondent has failed to establish that the sanction letter dated 18.11.2017 was intended to substitute or extinguish the Corporate Guarantee dated 27.12.2013. The mere introduction of PIIPL as a mortgagor/guarantor under the subsequent security arrangement cannot, in the absence of any express agreement to that effect, constitute novation of the Respondent's existing contractual obligation.

37. The Respondent's reliance on ***Lata Construction v. Rameshchandra Ramniklal Shah*** and ***Chrisomar Corpn. v. MJR Steels (P) Ltd***. does not further its case. In *Lata Construction*, it was held that novation under Section 62 requires complete substitution of a new contract for the old, such that the two contracts are inconsistent and cannot stand together. In *Chrisomar Corpn.*, the Hon'ble Supreme Court clarified that an "alteration" within the meaning of Section 62 must go to the very root of the original contract and change its essential character, such that the modified contract has no independent meaning or content apart from the original; where the modified contract can be read together with the original, the original terms continue to apply except to the extent of actual inconsistency. In the present case, the sanction letter dated 18.11.2017 and the Corporate Guarantee dated 27.12.2013 are not mutually inconsistent. The 2017 letter sought a fresh, additional guarantee and re-executed mortgage from PIIPL, an arrangement expressly contemplated and permitted by Clause 9 of the Corporate Guarantee, which stipulates that the guarantee "shall be in addition to any other security" held by the Bank. There is no inconsistency between the Respondent continuing to be bound as guarantor and PIIPL being asked to furnish additional security.

38. As regards Section 133 of the Contract Act, the Respondent has failed to establish any subsequent transaction which discharges the guarantor. More importantly, no document has been placed on record evidencing any release or discharge of existing liabilities of the Respondent by the Petitioner. The stipulation of a guarantee by PIIPL under the sanction letter dated

18.11.2017, therefore, cannot by itself operate as a discharge of the Respondent, particularly when Clause 8 of the Corporate Guarantee executed by the Respondent expressly provides that the guarantee shall continue notwithstanding any absorption or amalgamation of the Guarantor Company. Accordingly, the Corporate Guarantee dated 27.12.2013 would continue to bind the Respondent until the underlying loan liability is fully discharged.

39. The Respondent has also placed reliance on the judgment of ***Bhagyalaxmi Co-operative Bank v. Babaldas Amtharam Patel***, wherein it was observed that a surety is discharged under Section 133 only where there is a *material* variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor. It further clarifies that an immaterial alteration does not discharge the surety. In the present case, the sanction dated 18.11.2017 did not alter the repayment obligations of PIUDCL that the Respondent had guaranteed, the Respondent has placed no material on record to establish any such change. Only an additional security from the PIIPL, which does not discharge Respondent's own obligation under the Corporate Guarantee at all. Furthermore, the Respondent in the present case had, at the time of executing the guarantee itself, expressly agreed under Clause 8 that the guarantee would survive any absorption or amalgamation of the Guarantor Company. Therefore, the reliance placed by the Respondent is misplaced.

40. It is also relevant to take note of the relevant clauses of the **<u>Scheme of demerger sanctioned on 04.04.2014</u>**, which are as under:

> *"9. In response to the aforesaid observation in paragraph 6 (a) (i) of the Affidavit of Regional Director, the Petitioner Companies through their Counsel state that the assets/ liabilities of the Demerged Company shall be transferred to Resulting Company on book value basis. Further, it is clarified that the Resulting Company and the Demerged Company are part of the same group and the Resulting Company is a Wholly Owned subsidiary of the Demerged Company. The Scheme does not involve any movement of assets or liabilities to any company outside the group and hence,* ***the assets***

of the Demerged Company relating to the Demerged Undertaking are proposed to be taken over by the Resulting Company at nil value*...*

10. In response to the aforesaid observation in paragraph 6 (a) (ii) of the Affidavit of Regional Director, the Petitioner Companies through their Counsel states that as per Clause 3.2.1 of the Scheme, ***book value of liabilities pertaining to the Demerged Undertaking taken over would be apportioned over the assets taken over in the books Of the Resulting Company****, the question of excess of assets over liabilities or vise-versa does not arise therefore the Accounting treatment provided in Clause 3.2.1 of the Scheme be confirmed.*

11. In response to the aforesaid observation in paragraph 6 (a) (iii) of the Affidavit of Regional Director, the Petitioner Companies through their Counsel state that no fair valuation of Assets and Liabilities of remaining undertaking of the Demerged company is anticipated in the books of the Demerged Company and hence the Petitioner Companies undertake that no amount shall be transferred to capital reserve account on account of fair valuation of assets and liabilities of remaining undertaking the Demerged company."

41. On a conjoint reading of the aforesaid clauses, it is evident that the Scheme contemplated the transfer of the assets and liabilities pertaining to the Demerged Undertaking to the Resulting Company. However, the Scheme does not specifically identify or provide for the transfer, extinguishment or substitution of the Respondent's independent liability under the Corporate Guarantee dated 27.12.2013. Mere reference to the transfer of liabilities pertaining to the Demerged Undertaking cannot, by itself, establish that the Respondent's existing contractual liability under the Corporate Guarantee stood transferred to the Resulting Company, particularly when the guarantee was a continuing and independent obligation of the Respondent.

42. Further, the Scheme was sanctioned on 04.04.2014, whereas Clause 8 of the Corporate Guarantee expressly provided that the guarantee would not be determined or prejudiced by any absorption or amalgamation of the Guarantor Company. Thus, in the absence of any specific provision in the Scheme or any subsequent document evidencing the release of the Respondent by the Petitioner, the Respondent's liability under the Corporate Guarantee cannot be said to have ceased merely by virtue of the Scheme of Demerger.

43. The Respondent has contended that the Petitioner is guilty of approbation and reprobation, as the Petitioner had stated in the PIIPL proceedings that PIIPL had stepped into the shoes of the Corporate Debtor under the Deed of Guarantee, whereas in the present proceedings it has taken a contrary stand. This contention cannot be accepted. The Petitioner's case in the PIIPL proceedings was that PIIPL had assumed liability as an additional/subsequent guarantor and mortgagor pursuant to the Renewal-cum-Reduction Letter dated 18.11.2017 and the Deed of Declaration dated 03.12.2018. This does not mean that the Respondent was released from its own liability under Clause 9 of the Corporate Guarantee, which expressly permits additional security. Therefore, the Petitioner can proceed against PIIPL as an additional guarantor while also asserting the Respondent's liability as the original guarantor. The two positions are not inconsistent, and hence the doctrine of approbation and reprobation does not apply.

44. The objection that the Petitioner, having initiated proceedings against PIUDCL and PIIPL, cannot maintain the present Petition against the Respondent is misconceived. It is well settled that a creditor may proceed simultaneously against the principal borrower and multiple guarantors, and recovery from one does not extinguish the liability of the others except to the extent of actual realization. Furthermore, there is no actual recovery of the claimed amount from either PIUDCL or PIIPL that would extinguish the debt claimed herein.

45. To sum up, a borrower, guarantor and mortgagor may be part of the same loan transaction, but each has a separate role and liability. A borrower takes the loan and may mortgage its property as security. A guarantor gives a

guarantee for repayment of the loan and may or may not also mortgage its property. Similarly, the liability of a guarantor or mortgagor may be limited depending upon the terms of the respective agreements. In the present case, the Corporate Debtor had given a guarantee and had also mortgaged its property for the loan taken by PIUDCL. Subsequently, due to merger/demerger, the mortgaged property was transferred to another entity. Therefore, when an additional sanction was issued, the Bank obtained a fresh mortgage from the entity in which the property had vested. Importantly, the subsequent sanction letter specifically provided that the other terms and conditions would remain unchanged. This shows that the subsequent sanction was in continuation of the earlier loan arrangement and not a fresh or substituted transaction. Merely because the Bank obtained a mortgage from the new owner of the property would not discharge the Corporate Debtor from its separate liability under the guarantee. There is no document showing that the Bank ever released or discharged the Corporate Debtor from its guarantee. Rather, the guarantee agreement itself provides that the liability of the guarantor would continue even if the Bank accepts additional or substituted security. Therefore, continuation of the mortgage with the new owner of the property cannot, by itself, amount to discharge of the Corporate Debtor from its liability as guarantor.

46. The objection regarding the authority of Mr. Fayaz Ahmad Wani to file and prosecute the present Petition is rejected. Clauses 2(a) and 2(d) of the Power of Attorney dated 21.10.2015 expressly authorise him to institute legal proceedings for recovery of dues owed to the Petitioner Bank, which is sufficiently wide to include initiation of proceedings under Section 7 of the Code against the Corporate Guarantor.

47. The Respondent has contended that the Petitioner has not set out the date of default as required under Section 7(3) of the Code. Further, in the written submission, Respondent submits that the Petitioner only makes a reference to a demand notice dated 29.10.2019, for which it has not placed on record any document to evidence that the same was served on the Corporate Debtor. The said contention/submission of the Respondent are not tenable for the following reasons:

i. As regards the submission of the Respondent regarding proof of service of demand notice not being placed on record, it is noted that the Respondent expressly in its Reply or otherwise has not denied receipt of the Demand Notice dated 29.10.2019. Merely a mention in the written submission that a proof of service of the said demand notice has not been placed on record by the Petitioner does not ipso facto either invalidates the Petition or takes the Respondent's cause any further.

ii. As regards the contention regarding not setting out the date of default it is mentioned that under the Corporate Guarantee dated 27.12.2013, the Respondent was liable to repay the sanctioned amount together with interest and other incidentals upon demand by the Petitioner. The Petitioner has placed on record the demand notice dated 29.10.2019 as "Annexure CC" to the Petition and has treated the said date as the date of default, the liability being payable on demand. Even assuming that the date of default was not stated in the prescribed format, the same would not invalidate the Petition unless the Respondent establishes that the claim is barred by limitation when considered from the date of default. No such case has been made out.

48. We are of the considered view that the Financial Creditor have proved existence of debt and default. Further the debt is in excess of Rs. 1 Crore and thus above the threshold limit mandated in Section 4(1) of the Code. Also, the Petition filed is within limitation. Accordingly, this company petition is **admitted** in terms of following order:

ORDER

a. The above **Restored Company Petition (IB) 6 (MB) 2023 is allowed**, and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Essel Infraprojects Limited**.

b. Taking into consideration the consent given by the Insolvency Professional, this Bench appoints **Mr. Hemant J Mehta**, having Registration No: **IBBI/IPA-001/IP-P00027/2016-2017/10060**, email: hemant@apmh.in; Address: D-613, Neelkanth Business Park, Opposite Near Railway Station, Vidyavihar(west), Mumbai City, Maharashtra, 400086, as the Interim Resolution Professional to carry out the functions as mentioned under the Insolvency and Bankruptcy Code, 2016.

c. The Financial Creditor shall deposit an amount of **Rs. 5 Lakhs** towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

d. That this Bench hereby directs operation of moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 and prohibits the following:

    a. the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution 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;
    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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
    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.

e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub- section (1) of section 31 or passes an order for liquidation of the corporate debtor under section 33, as the case may be.

h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish all information in their knowledge to the IRP/RP.

49. The Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.

50. The Registry is hereby directed to communicate this order to both the parties and to the IRP immediately. The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.

Sd/-
Vinay Goel
Member (Judicial)

Sd/-
Charanjeet Singh Gulati
Member (Technical)

OmkarD.