

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 346 of 2018**

(Arising out of Order dated 24<sup>th</sup> May, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, in C.P. No.(IB)-65(PB)/2018)

**IN THE MATTER OF:**

**Dr. Vishnu Kumar Agarwal** **...Appellant**

**Vs**

**M/s. Piramal Enterprises Ltd.** **....Respondent**

**Company Appeal (AT) (Insolvency) No. 347 of 2018**

(Arising out of Order dated 31<sup>st</sup> May, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, in C.P. No.(IB)-66(PB)/2018)

**IN THE MATTER OF:**

**Dr. Vishnu Kumar Agarwal** **...Appellant**

**Vs**

**M/s. Piramal Enterprises Ltd.** **....Respondent**

**Present:**

**For Appellant:** **Mr. Anup Kumar, Dr. Amit George, Mr. Bhaskar Aditya, Mr. Swaroop George and Mr. K. Dileep, Advocates.**

**For Respondent:** **Ms. Misha, Ms. Charu, Mr. Vaijyant Paliwal, Mr. Shantanu Chaturvedi, Ms. Srishti Khare and Ms. Jasveen Kaur, Advocates.  
Mr. Sabyasanchi Chatterjee and Mr. Uddyam Mukherjee, Advocates.**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

Dr. Vishnu Kumar Agarwal, Shareholder, has preferred these appeals against the two different orders of initiation of ‘Corporate Insolvency Resolution Process’ against the two ‘Corporate Guarantors’. As common questions of law are involved and are based on same set of facts, they were heard together and disposed of by this common judgment.

2. A ‘Deed of Agreement’ was entered into by ‘All India Society for Advance Education and Research’ (hereinafter referred to as **“Principal Borrower”**) with ‘M/s. Piramal Enterprises Ltd.’ (hereinafter referred to as **“Financial Creditor”**) for grant of Rs. 38,00,00,000/- (Rupees Thirty-Eight Crores Only) which was guaranteed by two ‘Corporate Guarantors’ namely— ‘Sunrise Naturopathy and Resorts Pvt. Ltd.’- (**“Corporate Guarantor No.1”** for short) and ‘Sunsystem Institute of Information Technology Pvt. Ltd.’- (**“Corporate Guarantor No.2”** for short). The loan amount was disbursed in two tranches by the ‘Financial Creditor’ to the ‘Principal Borrower’ which is as follows:

<b>DATE</b>	<b>AMOUNT (IN RS.)</b>
28 <sup>th</sup> October, 2013	31,17,00,000
1 <sup>st</sup> November, 2013	6,83,00,000
<b>Total</b>	<b>38,00,00,000</b>

3. Between the years January, 2014 to July, 2017, the 'Principal Borrower' has repaid more than Rs. 22 Crores of the loan.

4. The 'Financial Creditor' had filed a Civil Suit bearing No. 46/40/2017 before the Court of Additional District Judge-I, Alwar, Rajasthan against the 'Principal Borrower' and both the 'Corporate Guarantors' on 15<sup>th</sup> September, 2017, which is pending adjudication.

5. During the pendency of this suit, the 'Financial Creditor' issued separate demand notice to both the 'Corporate Guarantors' on 24<sup>th</sup> October, 2017 and 26<sup>th</sup> October, 2017 calling upon each of the 'Corporate Guarantors' to make payment of the outstanding amount of Rs. 40,28,76,461/- (Rupees Forty Crores Twenty-Eight Lakhs Seventy-Six Thousand Four Hundred and Sixty-One Only) from the 'Principal Borrower' within 15 days of receipt of such notice, failing which, the 'Financial Creditor' may take all remedial measures including the initiation of the 'Corporate Insolvency Resolution Process' in terms of the 'Insolvency and Bankruptcy Code, 2016' ("**I&B Code**" for short).

6. Notices were issued individually to the respective 'Corporate Guarantors' 'Sunrise Naturopathy and Resorts Pvt. Ltd.'- ("Corporate Guarantor No.1") and 'Sunsystem Institute of Information Technology Pvt. Ltd.'- ("Corporate Guarantor No.2") showing similar outstanding amount of Rs. 40,28,76,461/- (Rupees Forty Crores Twenty-Eight Lakhs Seventy-Six

Thousand Four Hundred and Sixty-One Only) and demand notices were issued simultaneously on the same date i.e. on 24<sup>th</sup> October, 2017 and 26<sup>th</sup> October, 2017.

7. The 'Financial Creditor'- (M/s. Piramal Enterprises Ltd.) thereafter, filed an application under Section 7 of the 'I&B Code' for initiation of the 'Corporate Insolvency Resolution Process' against 'Sunrise Naturopathy and Resorts Pvt. Ltd.'- ("Corporate Guarantor No.1") and another application under Section 7 of the 'I&B Code' for initiation of the 'Corporate Insolvency Resolution Process' against 'Sunsystem Institute of Information Technology Pvt. Ltd.'- ("Corporate Guarantor No.2").

8. The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, by impugned order dated 24<sup>th</sup> May, 2018 admitted the application and initiated 'Corporate Insolvency Resolution Process' against 'Sunsystem Institute of Information Technology Pvt. Ltd.'- ("Corporate Guarantor No.2").

9. By another order dated 31<sup>st</sup> May, 2018, the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, admitted the application and initiated 'Corporate Insolvency Resolution Process' against 'Sunrise Naturopathy and Resorts Pvt. Ltd.'- ("Corporate Guarantor No.1").

10. On perusal of records, including the Form-1 filed by the 'Financial Creditor'- (M/s. Piramal Enterprises Ltd.) against both the 'Corporate

Guarantors No. 1 & 2' (shown as 'Corporate Debtors') it is clear that same claim amount has been shown in both the Form-1, and reliance has been placed on same agreement. Debt amount and the amount of default, date of default etc. are also same which is in terms of the agreement dated 18<sup>th</sup> October, 2013. The Adjudicating Authority noticed the similarity in two separate impugned orders and used same language and reasoning though passed orders one on 24<sup>th</sup> May, 2018 and the other on 31<sup>st</sup> May, 2018.

11. In the aforesaid background, learned counsel for the Appellant raised question of maintainability of two 'Corporate Insolvency Resolution Processes' against two 'Corporate Guarantors' based on same sets of claim; debt, default and record.

12. Learned counsel for the Appellant submitted that no 'Corporate Insolvency Resolution Process' can be initiated against the 'Corporate Guarantors', without initiating 'Corporate Insolvency Resolution Process' against the 'Principal Borrower'. Further, according to him, the 'Principal Borrower' not being a Company, no application under Sections 7 or 9 can be filed against it. If no application under Sections 7 or 9 can be filed against the 'Principal Borrower', the application under Section 7 for same claim and debt cannot be filed against the 'Corporate Guarantors'.

13. It was also submitted that for same set of claim amount and debt, two 'Corporate Insolvency Resolution Processes' cannot be initiated against two different 'Corporate Guarantors'.

14. The aforesaid argument has been controverted by learned counsel appearing on behalf of the 'Financial Creditor'- (Respondent). According to him, both the 'Corporate Guarantors' being separate entity and both 'Corporate Guarantors' having guaranteed for the same set of amount, even in absence of initiation of 'Corporate Insolvency Resolution Process' against the 'Principal Borrower', two separate applications under Section 7 can be filed against respective 'Corporate Guarantors'.

15. The questions arise for consideration in these appeals are:

- i. Whether the 'Corporate Insolvency Resolution Process' can be initiated against a 'Corporate Guarantor', if the 'Principal Borrower' is not a 'Corporate Debtor' or 'Corporate Person'? and;
- ii. Whether the 'Corporate Insolvency Resolution Process' can be initiated against two 'Corporate Guarantors' simultaneously for the same set of debt and default?

16. For deciding the aforesaid issues, it is desirable to notice the claim of the 'Financial Creditor'- ('M/s. Piramal Enterprises Ltd. '), the record of default etc. as shown in two separate sets of Form-1, one against 'Sunrise Naturopathy and Resorts Pvt. Ltd.'- ("Corporate Guarantor No.1") and another against 'Sunsystem Institute of Information Technology Pvt. Ltd.'- ("Corporate Guarantor No.2"), as quoted below:

**“Sunrise Naturopathy and Resorts Pvt. Ltd.” (“Corporate Guarantor No.1”)**

**Relevant Extract of Form-1**

**PART - II  
PARTICULARS OF THE CORPORATE DEBTOR**

1.	NAME OF THE CORPORATE DEBTOR	Sun Rise Naturopathy and Health Resorts Private Limited
2.	IDENTIFICATION NUMBER OF THE CORPORATE DEBTOR	CIN: U85110RJ1999PTC015643
3.	DATE OF INCORPORATION OF THE CORPORATE DEBTOR	25 May 1999
4.	NOMINAL SHARE CAPITAL AND THE PAID-UP SHARE CAPITAL OF THE CORPORATE DEBTOR AND/OR DETAIL OF GUARANTEE CLAUSE AS PER MEMORANDUM OF ASSOCIATION (AS APPLICABLE) AUTHORISED SHARE CAPITAL OF THE CORPORATE DEBTOR.	<p>Authorised Share Capital: Rs. 2,10,00,000 (Rupees Two Crores Ten Lakhs)</p> <p>Paid Up Share Capital: Rs. 2,09,04,000 (Rupees Two Crores Nine Lakhs Four Thousand)</p> <p>Copies of the Memorandum of Association, the Articles of Association of the Corporate Debtor along with the extract of the master data for the Corporate Debtor as available on the website of the Ministry of Corporate Affairs</p>
5.	ADDRESS OF THE REGISTERED OFFICE OF THE CORPORATE DEBTOR	P.O. Kalighati (SIR) Panchayat, Bilochi, Tehsil – Amer, Jaipur

**PART - III  
PARTICULARS OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL**

1. NAME, ADDRESS, EMAIL ADDRESS AND REGISTRATION NUMBER OF	<p><u>Name:</u> Mr. Sethurathnam Ravi</p> <p><u>Registration No:</u> IBBI/IPA-001/IP-P00372/2017-18/10629</p>
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<p>THE PROPOSED INTERIM RESOLUTION PROFESSIONAL</p>	<p><u>Address:</u> 505-A, 5th Floor, Rectangle 1, District Centre, Saket ,New Delhi, Delhi, 110017</p> <p><u>Email Address:</u> sravi.fca@gmail.com</p> <p>Form 2 along with registration certificate issued by IBBI in favour of the proposed Interim Resolution Professional is annexed herewith as <u>Annexure A-3 (Colly.)</u></p>
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**PART:- IV**

**PARTICULARS OF FINANCIAL DEBT**

<p>1. TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT</p>	<p>Rs. 38,00,00,000 (Rupees Thirty Eight Crores) granted to All India Society for Advance Education and Research ("Borrower") by the Financial Creditor the repayment of which was guaranteed by the Corporate Debtor under the Deed of Guarantee dated 18 October 2013</p> <p>The loan amount was disbursed in two tranches by the Financial Creditor to the Borrower. The details of disbursement are as follows:</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 50%;">DATE</th> <th style="width: 50%;">AMOUNT (IN RS.)</th> </tr> </thead> <tbody> <tr> <td>28<sup>th</sup> October 2013</td> <td>31,17,00,000</td> </tr> <tr> <td>1<sup>st</sup> November 2013</td> <td>6,83,00,000</td> </tr> <tr> <td><b>Total</b></td> <td><b>38,00,00,000</b></td> </tr> </tbody> </table>	DATE	AMOUNT (IN RS.)	28 <sup>th</sup> October 2013	31,17,00,000	1 <sup>st</sup> November 2013	6,83,00,000	<b>Total</b>	<b>38,00,00,000</b>
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1 <sup>st</sup> November 2013	6,83,00,000								
<b>Total</b>	<b>38,00,00,000</b>								
<p>2. AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT</p>	<p>The total amount outstanding in respect of the Term Loan Agreement (together with the principal amounts, accrued interest and penal interest, as applicable) as on 30<sup>th</sup> September 2017 is Rs. 40,28,76,461 (Rupees Forty Crores Twenty Lakhs Seventy Six Thousand Four Hundred and Sixty One).</p> <p>The default occurred on 11 November 2017 where despite receipt of notice prescribed under the Deed Guarantee dated 18 October 2013 calling upon the Corporate Debtor</p>								



IN TABULAR FORM)	to make payments as outstanding on 30 September 2017, the Corporate Debtor failed to pay the due amount.										
	The breakup of the outstanding amount as on 30 September 2017 is as follows:										
	<table border="1"> <thead> <tr> <th>Particulars</th> <th>Amount (in Rs.)</th> </tr> </thead> <tbody> <tr> <td>Interest Payable</td> <td>5,80,01,098</td> </tr> <tr> <td>Principal Outstanding</td> <td>28,53,44,965</td> </tr> <tr> <td>Penal Interest payable</td> <td>5,95,30,399</td> </tr> <tr> <td><b>Total Outstanding</b></td> <td><b>40,28,76,461</b></td> </tr> </tbody> </table>	Particulars	Amount (in Rs.)	Interest Payable	5,80,01,098	Principal Outstanding	28,53,44,965	Penal Interest payable	5,95,30,399	<b>Total Outstanding</b>	<b>40,28,76,461</b>
Particulars	Amount (in Rs.)										
Interest Payable	5,80,01,098										
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<b>Total Outstanding</b>	<b>40,28,76,461</b>										
	The Applicant reserves its rights to file an updated claim before the RP inclusive of the applicable interest post 31 September 2017.										
	<ul style="list-style-type: none"> <li>The Borrower originally defaulted in repayment of its obligations to the Financial Creditor on 30 April 2014 and since then has persistently defaulted on its repayment obligations. The Financial Creditor has already commenced Civil Suit No. 46/40/2017 before the court of Additional District Judge-I, Alwar against the Borrower and the guarantors, including the Corporate Debtor herein on 15 September 2017.</li> <li>The Financial Creditor issued a notice of demand to the Corporate Debtor on 24 October 2017 and 26 October 2017 calling upon the Corporate Debtor to make payment of the amount outstanding from the Borrower within 15 days of receipt.</li> </ul>										
	Details of dates on which the installments became due and were not honored by the Borrower is annexed hereto as <u>Annexure A-4</u>										

## PART - V

## PARTICULARS OF FINANCIAL DEBT (DOCUMENTS, RECORD AND EVIDENCE OF DEFAULT)

1. PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS	N/A
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<p>ESTIMATED VALUE AS PER THE CREDITOR.</p> <p>[ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF CORPORATE DEBTOR IS A COMPANY)]</p>	
<p>2. PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY.</p>	<p>As stated above, a civil suit is pending adjudication and the matter has been referred for mediation. Since no progress is made in the mediation, the Financial Creditor intends to withdraw from the mediation.</p>
<p>3. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY.</p>	<p>N/A</p>
<p>4. DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925).</p>	<p>N/A</p>
<p>5. THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE.</p>	<p>i. Deed of Guarantee dated 18 October 2013 executed by the Corporate Debtor in favor of the Financial Creditor</p> <p>ii. Term Loan Agreement dated 18<sup>th</sup> October 2013 between the Financial Creditor and the Borrower.</p> <p>The above financial contracts are annexed herewith as <u>Annexure A-5 (COLLY)</u></p>

6. A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY	N/A
7. COPIES OF ENTRIES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891)	The Financial Creditor is not required to maintain a books of account in accordance with the Bankers Books Evidence Act, 1891. Furthermore, the Corporate Debtor is the guarantor for the Borrower and the Corporate Debtor was obliged to ensure repayment of loan amount to the Financial Creditor.
8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL DEBT, THE AMOUNT AND THE DATE OF DEFAULT.	<ul style="list-style-type: none"> <li>(i) Balance Confirmation Letter dated 6 January 2015 as duly acknowledged by the Borrower;</li> <li>(ii) Legal notice dated 17 November 2015 issued to the Borrower and <i>inter alia</i> the Corporate Debtor, on behalf of the Financial Creditor</li> <li>(iii) Letter dated 26 November 2015 issued by the Borrower</li> <li>(iv) Letter dated 9 December 2015 issued by the Borrower</li> <li>(v) Balance confirmation dated 18 January 2016 signed by Mr. V. K. Agarwal on behalf of the Borrower</li> <li>(vi) Audit Report of the Borrower for the year 1 April 2015 to 31 March 2016 issued by Ravindra Shah &amp; Co., Chartered Accountants</li> <li>(vii) Letter dated 12 July 2016 issued by the Financial Creditor to <i>inter alia</i> the Corporate Debtor</li> <li>(viii) Notice of Demand/Invocation dated 24 October 2017 issued by the Financial Creditor to the Corporate Debtor</li> </ul>


	<p>(ix) Legal Notice dated 24 October 2017 issued by the counsel on behalf of the Financial Creditor, KNM &amp; Partners, to the Corporate Debtor</p> <p>(x) Letter dated 26 October 2017 issued on behalf of the Financial Creditor to the Corporate Debtor</p> <p>Copies of the above documents are annexed herewith as <u>Annexure A-6 (COLLY)</u></p>
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The Financial Creditor hereby certifies that to the best of its knowledge, Mr. Sethurathnam Ravi, is fully qualified and permitted to act as an insolvency professional in accordance with the Insolvency and Bankruptcy Code, 2016, and the associated rules and regulations.

The Financial Creditor has paid the requisite fee of Rs. 25,000 for this application through a demand draft bearing no. 506410 dated 11 January 2018 drawn on Deutsche Bank, 28, Kasturba Gandhi Marg, ECE House, Main Building, New Delhi payable at New Delhi

The Financial Creditor submits that this Hon'ble Tribunal may be pleased to admit the present Application in terms of Section 7 of the Insolvency and Bankruptcy Code, 2016.

Yours sincerely,

Signature of person authorised to act on behalf of the financial creditor	
Name	Shikha Varun Ginodia
Position with or in relation to the financial creditor	Manager, Legal
Address of person signing	Piramal Enterprises Limited, Piramal Tower, Peninsula Corporate Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai - 400 013

**True Copy of The Original**

**“Sunssystem Institute of Information Technology Pvt. Ltd.”  
 (“Corporate Guarantor No.2”)**

**Relevant Extract of Form-1**

PART - II PARTICULARS OF THE CORPORATE DEBTOR		
1.	NAME OF THE CORPORATE DEBTOR	Sunssystem Institute of Information Technology Private Limited
2.	IDENTIFICATION NUMBER OF THE CORPORATE DEBTOR	CIN: U16911RJ2001PTC016911
3.	DATE OF INCORPORATION OF THE CORPORATE DEBTOR	8 March 2001
4.	NOMINAL SHARE CAPITAL AND THE PAID-UP SHARE CAPITAL OF THE CORPORATE DEBTOR AND/OR DETAIL OF GUARANTEE CLAUSE AS PER MEMORANDUM OF ASSOCIATION (AS APPLICABLE) AUTHORIZED SHARE CAPITAL OF THE CORPORATE DEBTOR.	<p>Authorized Share Capital: Rs. 1,55,00,000 (Rupees One Crore Fifty Five Lakhs)</p> <p>Paid Up Share Capital: Rs. 1,50,00,000 (Rupees One Crore Fifty Lakhs)</p> <p>Copies of the Memorandum of Association, the Articles of Association of the Corporate Debtor along with the extract of the master data for the Corporate Debtor as available on the website of the Ministry of Corporate Affairs are annexed herewith as <u>Annexure A-2 (Colly.)</u>.</p>
5.	ADDRESS OF THE REGISTERED OFFICE OF THE CORPORATE DEBTOR	P.O. Kalighati (SIR) Panchayat, Bilochi, Tehsil - Amer, Jaipur, Rajasthan

**PART - III**  
**PARTICULARS OF THE PROPOSED INTERIM RESOLUTION**  
**PROFESSIONAL**

<p>1. NAME, ADDRESS, EMAIL ADDRESS AND REGISTRATION NUMBER OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL</p>	<p><b>Name:</b> Mr. Sethurathnam Ravi</p> <p><b>Registration No:</b> IBBI/IPA-001/IP-P00372/2017-18/10629</p> <p><b>Address:</b> 505-A, 5th Floor, Rectangle 1, District Centre, Saket, New Delhi - 110017</p> <p><b>Email Address:</b> sravi.fca@gmail.com</p> <p>Form 2 along with registration certificate issued by IBBI in favour of the proposed Interim Resolution Professional is annexed herewith as <b>Annexure A-3 (Colly.)</b></p>
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**PART - IV**  
**PARTICULARS OF FINANCIAL DEBT**

<p>1. TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT</p>	<p>Rs. 38,00,00,000 (Rupees Thirty Eight Crores) granted to All India Society for Advance Education and Research ("Borrower") by the Financial Creditor the repayment of which was guaranteed by the Corporate Debtor under the <u>Deed of Guarantee dated 18 October 2013</u></p> <p>The loan amount was disbursed in two tranches by the Financial Creditor to the Borrower. The details of disbursement are as follows:</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 50%;">DATE</th> <th style="width: 50%;">AMOUNT (IN RS.)</th> </tr> </thead> <tbody> <tr> <td>28<sup>th</sup> October 2013</td> <td>31,17,00,000</td> </tr> <tr> <td>1<sup>st</sup> November 2013</td> <td>6,83,00,000</td> </tr> <tr> <td><b>Total</b></td> <td><b>38,00,00,000</b></td> </tr> </tbody> </table>	DATE	AMOUNT (IN RS.)	28 <sup>th</sup> October 2013	31,17,00,000	1 <sup>st</sup> November 2013	6,83,00,000	<b>Total</b>	<b>38,00,00,000</b>
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<p>2. AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT</p>	<p>The total amount outstanding in respect of the Term Loan Agreement (together with the principal amounts, accrued interest and penal interest, as applicable) as on 30<sup>th</sup> September 2017 is Rs. 40,28,76,461 (Rupees Forty Crores Twenty Lakhs Seventy Six Thousand Four Hundred and Sixty One).</p> <p>The default occurred on 11 November 2017 where despite receipt of notice prescribed under the Deed Guarantee</p>								

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## PART - V

## PARTICULARS OF FINANCIAL DEBT (DOCUMENTS, RECORD AND EVIDENCE OF DEFAULT)

1. PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR.	N/A
	 Copy of The Original

[ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF CORPORATE DEBTOR IS A COMPANY)]	
2. PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY.	As stated above, a civil suit is pending adjudication and the matter has been referred for mediation. Since no progress is made in the mediation, the Financial Creditor intends to withdraw from the mediation.
3. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY.	N/A
4. DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925).	N/A
5. THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE.	<p>i. Deed of Guarantee dated 18 October 2013 executed by the Corporate Debtor in favor of the Financial Creditor</p> <p>ii. Term Loan Agreement dated 18 October 2013 between the Financial Creditor and the Borrower.</p> <p>The above financial contracts are annexed herewith as <u>Annexure A-5 (Colly)</u></p>
6. A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY	N/A
7. COPIES OF ENTRIES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891)	The Financial Creditor is not required to maintain a books of account in accordance with the Bankers Books Evidence Act, 1891. Furthermore, the Corporate Debtor is the guarantor for the Borrower and the Corporate




	Debtor was obliged to ensure the repayment of loan amount to the Financial Creditor.
<p>8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL DEBT, THE AMOUNT AND THE DATE OF DEFAULT.</p>	<p>(i) Balance Confirmation Letter dated 6 January 2015 as duly acknowledged by the Borrower;</p> <p>(ii) Legal notice dated 17 November 2015 issued to the Borrower and <i>inter alia</i> the Corporate Debtor, on behalf of the Financial Creditor</p> <p>(iii) Letter dated 26 November 2015 issued by the Borrower</p> <p>(iv) Letter dated 9 December 2015 issued by the Borrower</p> <p>(v) Balance confirmation dated 18 January 2016 signed by Mr. V. K. Agarwal on behalf of the Borrower</p> <p>(vi) Audit Report of the Borrower for the year 1 April 2015 to 31 March 2016 issued by Ravindra Shah &amp; Co., Chartered Accountants</p> <p>(vii) Letter dated 12 July 2016 issued by the Financial Creditor to <i>inter alia</i> the Corporate Debtor</p> <p>(viii) Notice of Demand/Invocation dated 24 October 2017 issued by the Financial Creditor to the Corporate Debtor</p> <p>(ix) Legal Notice dated 24 October 2017 issued by the counsel on behalf of the Financial Creditor, KNM &amp; Partners, to the Corporate Debtor</p> <p>(x) Letter dated 26 October 2017 issued on behalf of the Financial Creditor to the Corporate Debtor</p> <p>Copies of the above documents are annexed herewith as <u>Annexure A-6 (COLLY)</u></p>

The Financial Creditor hereby certifies that to the best of its knowledge, Mr. Sethurathnam Ravi, is fully qualified and permitted to act as an insolvency professional in accordance with the Insolvency and Bankruptcy Code, 2016, and the associated rules and regulations.

The Financial Creditor has paid the requisite fee of Rs. 25,000 for this application through a demand draft bearing no. 506409 dated 11 January 2018 drawn on Deutsche Bank, 28, Kasturba Gandhi Marg, ECE House, Main Building, New Delhi payable at New Delhi

The Financial Creditor submits that this Hon'ble Tribunal may be pleased to admit the present Application in terms of Section 7 of the Insolvency and Bankruptcy Code, 2016.

Yours sincerely,

Signature of person authorised to act on behalf of the financial creditor	
Name	Shikha Varun Ginodia
Position with or in relation to the financial creditor	Manager, Legal
Address of person signing	Piramal Enterprises Limited, Piramal Tower, Peninsula Corporate Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai – 400 013

17. If relevant portions of both Form-1 aforesaid are compared, it will be evident that the total amount of debt granted date(s) of disbursement (28<sup>th</sup> October, 2013 and 1<sup>st</sup> November, 2013); the amount claimed to be in default (Rs. 40,28,76,461/-) and the date of default occurred shown as on 11<sup>th</sup> November, 2017 and other details including the demand notice etc. are same.

18. We have heard the learned counsel for the parties and perused the record. The position of law is manifested in the 'I&B Code' including the

definitions which require harmonious and purposeful reading and reasoning.

19. Section 3 of the 'I&B Code' defines various terms as follows:

*“Sec. 3(6) “claim” means—*

*(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*

*(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;*

*xxx*

*xxx*

*xxx*

*Sec. 3(10) “creditor” means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;*

*Sec. 3(11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;*

*Sec. 3(12) “default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and*

*is not repaid by the debtor or the corporate debtor,  
as the case may be.”*

20. Certain definitions contained in Section 5 of the 'I&B Code', relevant of which are Section 5(7) & (8) and reads as follows:-

**“Sec. 5. Definitions.—** (7) *“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;*

*Sec. 5(8) “financial debt” means a debt along with 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 dematerialised 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) receivables sold or discounted other than any receivables sold on nonrecourse basis;*

*(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; (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”*

21. From clause (h) of Section 5 (8) of the 'I&B Code', it is clear that counter-indemnity obligation in respect of a guarantee comes within the meaning of 'financial debt' and, therefore, there is no dispute that 'M/s. Piramal Enterprises Ltd.' is a 'Financial Creditor' of both 'Sunrise Naturopathy and Resorts Pvt. Ltd.'- ("Corporate Guarantor No.1") and 'Sunsystem Institute of Information Technology Pvt. Ltd.'- ("Corporate Guarantor No.2").

22. In "**Bank of Bihar v. Damodar Prasad and Anr.- (1969) 1 SCR 620**" the Hon'ble Supreme Court held:

*"3. The demand for payment of the liability of the principal debtor was the only condition for the enforcement of the bond. That condition was fulfilled. Neither the principal debtor nor the surety discharged the admitted liability of the principal debtor in spite of demands. Under Section 128 of the Indian Contract Act, save as provided in the contract, the liability of the surety is coextensive with that of the principal debtor. The surety became thus liable to pay the entire amount. His liability was immediate. It was not deferred until the creditor exhausted his remedies against the principal debtor.*

4. *Before payment the surety has no right to dictate terms to the creditor and ask him to pursue his remedies against the principal in the first instance. As Lord Eldon observed in Wright v. Simpson "But the surety is a guarantee; and it is his business to see whether the principal pays, and not that of the creditor". In the absence of some special equity the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against the principal in some other proceedings.*

5. *Likewise where the creditor has obtained a decree against the surety and the principal, the surety has no right to restrain execution against him until the creditor has exhausted his remedies against the principal. In Lachhman Joharimal v. Bapu Khandu and Surety Tukaram Khandoji the Judge of the Court of Small Causes, Ahmednagar, solicited the opinion of the Bombay High Court on the subject of the liability of sureties. The creditors having obtained decrees in two suits in the Court of Small Causes against the principals and sureties presented applications for the*

*imprisonment of the sureties before levying execution against the principals. The Judge stated that the practice of his court had been to restrain a judgment-creditor from recovering from a surety until he had exhausted his remedy against the principal but in his view the surety should be liable to imprisonment while the principal was at large. Couch, C.J., and Melvill, J. agreed with this opinion and observed-*

*“This court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt.”*

23. In **‘Ram Bahadur Thakur vs. Sabu Jain Limited – [1981 (51) Comp Cas 301]’**, the Hon’ble High Court of Delhi relying on the decision of Hon’ble Supreme Court in **‘Kesoram Mills Case – [(1966) 59 ITR 767]’**, held that under the ‘deed of guarantee’ the liability of the company to pay debt arose when the borrower defaulted in making payments and the creditor sent a demand/notice invoking the guarantee.



24. In “**State Bank of India v. Indexport Registered and Ors.– (1992) 3 SCC 159**”, the Hon’ble Supreme Court held that the decree holder bank can execute the decree first against the guarantor without proceeding against the ‘Principal Borrower’. Guarantor’s liability is co-extensive with that of the principal debtor under the ‘Contract Act, 1872’ (Section 128), relevant of which is quoted hereunder:

“10. .... *The decree does not put any fetter on the right of the decree-holder to execute it against any party, whether as a money decree or as a mortgage decree. The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree-holder. The question arises whether a decree which is framed as a composite decree, as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of decretal amount covering mortgage decree can be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the property.*”

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“13 *In the present case before us the decree does not postpone the execution. The decree is simultaneous and it is jointly and severally against all the defendants including the guarantor. It is the right*

*of the decree-holder to proceed with it in a way he likes. Section 128 of the Indian Contract Act itself provides that “the liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract”.*

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22. *The decree for money is a simple decree against the judgment-debtors including the guarantor and in no way subject to the execution of the mortgage decree against judgment-debtor 2. If on principle a guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgaged decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor. It appears the above-quoted observations in Manku Narayana case [(1987) 2 SCC 335 : AIR 1987 SC 1078] are not based on any established principle of law and/or reasons, and in fact, are contrary to law. It, of course depends on the facts of each case how the composite decree is drawn up. But if the composite decree is a decree which is both a personal decree as well as a mortgage decree, without any limitation on its execution, the decree-holder, in principle, cannot be forced to first exhaust the remedy by way of execution of the*

*mortgage decree alone and told that only if the amount recovered is insufficient, he can be permitted to take recourse to the execution of the personal decree.”*

25. In view of the aforesaid decision of the Hon’ble Supreme Court, we hold that it is not necessary to initiate ‘Corporate Insolvency Resolution Process’ against the ‘Principal Borrower’ before initiating ‘Corporate Insolvency Resolution Process’ against the ‘Corporate Guarantors’. Without initiating any ‘Corporate Insolvency Resolution Process’ against the ‘Principal Borrower’, it is always open to the ‘Financial Creditor’ to initiate ‘Corporate Insolvency Resolution Process’ 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.

26. We have noticed that with regard to the claim amount of debt and date of default etc. two separate applications under Section 7 has been preferred by same ‘Financial Creditor’ against two ‘Corporate Guarantors’ namely— ‘Sunrise Naturopathy and Resorts Pvt. Ltd.’- (“Corporate Guarantor No.1”) and ‘Sunsystem Institute of Information Technology Pvt. Ltd.’- (“Corporate Guarantor No.2”). Both the applications under Section 7 are same in verbatim, as noticed and referred in the preceding paragraphs.

27. In **“Innoventive Industries Ltd. v. ICICI Bank and Ors.— (2018) 1 SCC 407”**, the Hon’ble Supreme Court observed and held as follows:  
**Company Appeal (AT) (Insolvency) Nos. 346 & 347 of 2018**

*“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is*

*disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.*

*28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor- it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part*

*V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7*

*days of admission or rejection of such application,  
as the case may be.”*

28. A ‘Financial Creditor’ has been defined under sub-section (7) of Section 5 means any person to whom a financial debt is owed and ‘financial debt’ is defined in sub-section (8) of Section 5 as a debt which is disbursed against the consideration for the time value of money.

29. In the present case, the ‘Financial Creditor’- (‘M/s. Piramal Enterprises Ltd.’) has claimed that it was owed financial debt of Rs. 40,28,76,461/- from ‘Sunsystem Institute of Information Technology Pvt. Ltd.’- (“Corporate Guarantor No.2”), which means that the ‘Financial Creditor’ was owed debt which is disbursed against the time value of money. Once such claim is made by the same very ‘Financial Creditor’- (‘M/s. Piramal Enterprises Ltd.’) against one of the ‘Corporate Debtor’ (‘Corporate Guarantor No.2’) in respect of same financial debt for triggering ‘Corporate Insolvency Resolution Process’ and such application is admitted (on 24<sup>th</sup> May, 2018), the question arises as to whether for same very claim and for same very default, the application under Section 7 against the other ‘Corporate Debtor’- (‘Corporate Guarantor No.1’)— ‘Sunrise Naturopathy and Resorts Pvt. Ltd.’ can be initiated?

30. 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 24<sup>th</sup> 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 'Corporate Insolvency Resolution Process' having already been initiated against the 'Corporate Guarantor No. 2'.

31. 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 'Corporate Insolvency Resolution Process' against the 'Corporate Guarantor No.1' ('Sunrise Naturopathy and Resorts Pvt. Ltd.'), as also from the 'Resolution Professional' appointed pursuant to 'Corporate Insolvency Resolution Process' 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 'Corporate Insolvency Resolution Processes'. If same claim cannot be claimed from 'Resolution Professionals' of separate 'Corporate Insolvency Resolution Processes', for same claim amount and default, two applications under Section 7 cannot be admitted simultaneously. Once for same claim the 'Corporate Insolvency Resolution Process' is initiated against one of the 'Corporate Debtor' after such initiation, the 'Financial Creditor' cannot trigger 'Corporate Insolvency



Resolution Process' against the other 'Corporate Debtor(s)', for the same claim amount (debt).

32. There is no bar in the 'I&B 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.

33. For the reasons aforesaid, while we uphold the initiation of the 'Corporate Insolvency Resolution Process' initiated under Section 7 of the 'I&B Code' against 'Sunsystem Institute of Information Technology Pvt. Ltd.'- ('Corporate Guarantor No.2') by impugned order dated 24<sup>th</sup> May, 2018, we hold that the impugned order dated 31<sup>st</sup> May, 2018 initiating 'Corporate Insolvency Resolution Process' under Section 7 against the 'Sunrise Naturopathy and Resorts Pvt. Ltd.'- ('Corporate Guarantor No.1')

for same very claim/debt is not permissible and the application under Section 7 was not maintainable.

34. In effect, order (s), passed by the Adjudicating Authority appointing any 'Interim Resolution Professional', declaring moratorium, freezing of account, and all other order(s) passed by the Adjudicating Authority pursuant to impugned order dated 31<sup>st</sup> May, 2018 and action, if any, taken by the 'Interim Resolution Professional' of 'Sunrise Naturopathy and Resorts Pvt. Ltd.' ('Corporate Guarantor No.1'), including the advertisement published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 7 against 'Sunrise Naturopathy and Resorts Pvt. Ltd.' ('Corporate Guarantor No.1') is dismissed. Learned Adjudicating Authority will now close the proceeding of the said case C.P. No(IB)-66(PB)/2018. The 'Corporate Debtor' namely— 'Sunrise Naturopathy and Resorts Pvt. Ltd.' is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

35. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional' of 'Sunrise Naturopathy and Resorts Pvt. Ltd.' and the said 'Corporate Debtor' will pay the fees of the 'Interim Resolution Professional', for the period he has functioned.

36. The Company Appeal (AT) (Insolvency) No. 346 of 2018 is dismissed. The Company Appeal (AT) (Insolvency) No. 347 of 2018 is allowed with aforesaid observations. However, in the facts and circumstances of the case, there shall be no order as to cost.

[Justice S.J. Mukhopadhaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

NEW DELHI

8<sup>th</sup> January, 2019

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