



# INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI

(Company formed by ICAI under Section 8 of the Companies Act 2013)

## IBC Case Law Capsule

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***K.V. Jayaprakash Vs. State Bank of India & Anr.***  
**Company Appeal (AT) (Insolvency) No. 362 of 2022**  
**Date of NCLAT's Judgement: September 30, 2022.**

### Facts of the Case: -

This appeal under Section 61(1) of IBC was filed by K.V.Jayaprakash, hereinafter referred as “Appellant”, who is a personal guarantor of Corporate Debtor (Coastal Projects Limited), against the order passed by the Adjudicating. The appellant had filed an Interlocutory Application (IA) before the AA with a request to direct State Bank of India, (Respondent-1), which is Financial Creditor, to abstain the public auction of his properties in view of the liquidation order dated December 06, 2018, passed by the NCLT admitting the Corporate Debtor into liquidation.

During pendency of the liquidation process, the Financial Creditor filed an application before Chief Metropolitan Magistrate, Bangalore under Section 14 of SARFAESI Act against the Corporate Debtor and its guarantors, including the appellant herein, for taking possession of the Property. In this application, the Financial Creditor had not revealed the ongoing liquidation process and the moratorium in force under Section 33(5) of the IBC. Accordingly, the application was admitted, and Financial Creditor was allowed to take possession of the property. However, the appellant challenged this order in Debt Recovery Tribunal which was finally dismissed. Meanwhile, the Financial Creditor started the process of possession and sale of the said property. The order was challenged before NCLT Cuttack through an IA which was dismissed by the AA.

### NCLAT's Observations: -

After listening the arguments of both the sides, the Appellate Tribunal formulated five legal questions for adjudication – (1.) Whether Section 60 (5) of the IBC permits 3<sup>rd</sup> party (Personal Guarantor to Corporate Debtor) to file an application and redress the grievances in the present appeal? (2.) Whether moratorium declared under IBC provides protection to the Personal Guarantor (3.) Whether Liquidator should include the Personal Guarantor as Secured Creditor (4.) The way out in case of conflict between IBC provisions and Section 140 of the Contract Act.



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Relying on the Supreme Court judgements in the cases of “*Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta*” and *Arcelor Mittal (India) (P) Ltd. Vs. Satish Kumar Gupta*, the NCLAT held that the proceedings under SARFAESI Act are independent and purely for recovery of the loan amount. “The Personal Guarantor though related to debt, but not related to the insolvency of the Corporate Debtor when no insolvency process is initiated. Therefore, the petition filed by the petitioner claiming various reliefs is unrelated to the insolvency of corporate debtor,” said the Court and due to ‘no jurisdiction’ denied entertaining the application. Further in light of the Supreme Court Judgement in the case of *State Bank of India Vs. V. Ramakrishnan* (2018) and Delhi High Court Order in case of *Kiran Gupta Vs. State Bank of India* (2020) and some other cases, the Appellate Tribunal concluded that there is no bar to proceed against Personal Guarantor during moratorium.

Furthermore, the Court held that the Appellant is entitled to claim as Creditor of Corporate Debtor in view of Section 140 of Indian Contract Act, but not as Secured Creditor as no security interest is created in his favour, subject to limitation provided in Chapter III of IBC. The court also upheld the superseding powers of the IBC, 2016 on Indian Contract Act.

**Order:** - the Appeal fails as it is devoid of any merit.

**Case Review:** - Appeal dismissed.