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Principle of Double Dip: A Contentious Issue before the Supreme Court

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ABSTRACT

This case comment looks to analyse a contentious issue before the Supreme Court. The Insolvency Law Principle of "Double-Dip' is a globally accepted norm which allows a financial creditor to move against multiple estates for the same claim. The principle was further upheld by the Supreme Court in the United States and has come up before the Indian Supreme Court. As the legislature declined to interfere in this matter as stated in their insolvency law commission report, all eyes are on the Supreme Court to settle this issue once and for all.

I. INTRODUCTION

The Hon'ble NCLT in ***Piramal Enterprises Ltd v Vishnu Kumar Aggarwal*** held that a financial creditor may pursue its claim simultaneously against a co-guarantor as the liability of the surety is joint and several. It went on to hold that delaying the enforcement of claims against a one creditor due to the pendency of proceedings against another would strike at the raison d'etre of a contract of guarantee. Thus, allowing multiple claims for the same debt against different estates and recognising the 'Principle of Double-Dip' in India for the first time.

However, this welcome change was short lived as he NCLAT[2] did not concur with the view taken by the NCLT, it held that the liability of a co-guarantor is joint and several and that it co-extensive with that of the corporate debtor however simultaneous claims cannot be entertained as it may grant an unfair advantage to the creditor. In addition to this it was held that simultaneous proceedings were barred under the Code.

II. CRITIQUE

The rule of 'double dip' has its origin in equity which has managed to survive the brunt of age. In 2011, the Supreme Court of the United Kingdom, while shedding light on these principles ***'In the matter of Kaupthing Singer and Friedlander Limited[3]'***, noted that procuring double

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[2] Dr Vishnu Kumar Aggarwal v. M/s Piramal Enterprises Limited [CA (AT) (Ins) No. 346 and 347 of 2018]
[3] 2011 UKSC 48

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dividend on substantially the same debt against the same estate was barred ('rule against double proof'), however, the same was allowed against two separate estates ('double dip').[4]

The same principle was first recognised by the United States Supreme Court in its decision *in* ***Ivanhoe Building & Loan Ass'n of Newark, N.J. v. Orr[5],*** wherein it held that a creditor was permitted to assert the full amount of its claim against a debtor even though it had already foreclosed upon the third-party collateral securing the debt. The Court concluded that the Creditor could pursue its full claim against the debtor, with the caveat that the creditor could not receive more than 100% of its claim from all involved parties. Applying the principle laid down in *Ivanhoe*, the Fourth Circuit ***In re National Energy & Gas Transmission, Inc.[6]*** concluded that GTN's (Guarantor 1) partial guarantee payment did not reduce the total amount of debt owed to Liberty (Financial Creditor) by ET (Guarantor 2). Thus, recognising that a creditor may enforce claims against co-guarantors. However, the sum recovered from both guarantors may not be more than the total debt owed.

Disregarding the age-old insolvency law principle of double dip, the NCALT failed to appreciate that upon the admission of CIR Process the claim of the financial creditor may get acknowledged and is likely to be admitted by the resolution professional. However, this process must not be confused with the extinguishment of the debt. The debt remains alive until a resolution plan is approved that caters to the said debt. A partial payment of the debt will continue to vest in the financial creditor the right to realise the balance. This view has been endorsed by The Hon'ble Andhra Pradesh High Court when determining the validity of multiple suits against different estates for the same debt under the CPC in ***Benthina Venkanna v Sait Chunnilal Moolchand[7]***

"There is many a slip between the filling and the closing of an execution petition and a decree-holder has ordinarily to face the chance of an execution petition not being successful in full. He has to take a practical view in the matter, realise the undeniable fact that he may meet a stiff contest in that petition and that the amount of effort, ingenuity and tactics which are put forward by the judgement-debtor that the petition can be of large magnitude and can deprive him of realisation of the decree in full or in part."

Furthermore, the Code since its inception envisaged that parallel proceedings relating to the same debt and default are to be undertaken by the same tribunal[8]. This view has been endorsed

[4] Barlow & Ors vs Polly Peck International Finance Ltd 1996 B.C.C. 486
[5] 295 U.S. 243 (1935)
[6] 492 F.3d 297 (4th Cir. 2007)
[7] 1960 SCC Online AP 46
[8] Section 60(2) & Section 60(3), IBC 2016

by the ***IBBI Handbook***[9] that underscores the legislative intent behind enacting Section 60(2), IBC 2016. Furthermore, the ***Insolvency Law Commission Report March, 2018***[10] recommended that Section 60(a) may be suitably amended to provide the same NCLT the authority to deal with the insolvency proceedings of the corporate guarantor as that of the corporate debtor. Making it clear that simultaneous proceedings were very much a part of the intent behind the Code.

Following this decision of the Appellate Authority an appeal was preferred before the Supreme Court.

III. CONCLUSION

The law regarding the 'principle of double-dip' must be settled in light of the conflicting judgements that have been passed by the NCLAT. The Hon'ble Supreme Court has been granted the opportunity to settle the law as the Insolvency Law Comission while taking cognizance of the situation commented that no further amendments are recommend at this stage as the Courts have been interpreting the question of law and felt best to leave the decision up to judicial discretion.[11] The decision of the Hon'ble Apex Court in ***Piramal Enterprises Ltd v Vishnu Kumar Aggarwal*** is eagerly awaited and would settle a contentious issue arising out of the Insolvency Code.

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[9] Page 31, IBBI Handbook: *"Section 60(2) deals with a situation where the insolvency resolution, liquidation, or bankruptcy of a corporate guarantor or personal guarantor of a corporate debtor is taken up when a CIRP or liquidation proceeding of such a CD is already pending before the NCLT. The purpose of subsection (2) is to group together (A) the CIRP or liquidation proceeding of a CD and (B) the insolvency resolution, liquidation, or bankruptcy of a corporate guarantor or personal guarantor of the very same CD so that a single forum may deal with both. This is to ensure that the CIRP of a CD and the insolvency resolution of the individual guarantors of the same CD do not proceed on different tracks, before different forums, leading to a conflict of interests, situations,*
or decisions."

[10] Insolvency Law Commission Report, March 2018 – Para@23.1: *"Section 60 of the Code requires that the Adjudicating Authority for the corporate debtor and personal guarantors should be the NCLT which has territorial jurisdiction over the place where the registered office of the corporate debtor is located. This creates a link between the insolvency resolution or bankruptcy processes of the corporate debtor and the personal guarantor such that the matters relating to the same debt are dealt in the same tribunal. However, no such link is present between the insolvency resolution or liquidation processes of the corporate debtor and the corporate guarantor.* ***It was decided that section 60 may be suitably amended to provide for the same NCLT to deal with the insolvency resolution or liquidation processes of the corporate debtor and its corporate guarantor. For this purpose, the term "corporate guarantor" will also be defined.****"*

[11] Insolvency Law Commission Report, February 2020 – *"As the right to simultaneous remedy is central to a contract of guarantee, the Committee suggested that in cases where both the principal borrower and the surety are undergoing CIRP, the creditor should be permitted to file claims in the CIRP of both of them.* ***Since, as the Code does not prevent this, the Committee recommended that no amendments were necessary in this regard.****"*