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## LEGAL ADVICE

**RECOVERY MATTER- NATIONAL SKILL  
DEVELOPMENT CORPORATION- 24x7 LEARNING**

This matter pertains to recovery of the dues from a corporate debtor against whom corporate insolvency resolution process has been initiated before the National Company Law Tribunal and its Guarantor. The facts of the case in brief are such that the Borrower Company (the “Corporate Debtor”) took a loan from the Lender Company (the Financial Creditor”) and certain securities were executed as collateral to secure the loan. Some of the significant securities executed were an irrevocable Power of Attorney in favour of the Lender company giving it *carte blanche* in respect of rights over all assets of the Borrower company, a personal guarantee executed by the Director and shareholder of the Lender company to repay the loan in full in case of the Borrower company’s default and a non-disposal undertaking by the shareholders of the Borrower company that they will not dispose of their shares in the Borrower company until and unless the debt owed to the Lender is paid in full & that any related party transactions would be conducted on arm’s length basis. In spite of the securities executed as aforementioned, the Borrower Company’s Board of Directors took a decision to sell one division of the Borrower Company without any notice, intimation or information to and permission from the Lender Company. Moreover, despite having signed a non-disposal undertaking, the Director first transferred a portion and then whole of his remaining share in the Borrower Company even while the debt so incurred by the Borrower had not been paid in full. Then the Borrower Company went on and filed an application before the National Company Law Tribunal to initiate insolvency proceedings against itself. Pursuant to the petition filed before the NCLT, the NCLT declared a moratorium on institution and continuation of any suits against the corporate debtor in accordance to Section 14 of the Insolvency and Bankruptcy Code, 2016 and an interim Insolvency Resolution Professional was appointed to oversee the insolvency process and perform duties as enumerated under the Code.

Although insolvency resolution process has been initiated and currently pending against the Borrower company, the contentious issue remains that as a suit cannot be instituted or continued against the corporate debtor due to the moratorium declared by the NCLT, whether the debt owed can be recovered from the guarantor and if yes, then to what extent. Further, what other legal remedy, if any, does the Lender Company has at its disposal against the parties involved is still an unanswered question.

The answer to the aforementioned questions lie in various judgments of the Supreme Court<sup>1</sup> which lay down that the liability of a guarantor is co-extensive with that of the borrower. Hence, the Lender Company still has an option to enforce its right to recover the debt owed to it by the Borrower Company from the Guarantor. This remedy would also be in accordance to the contract law as the moratorium has been declared only against the Borrower Company and not its Guarantor. The Supreme Court has also held as such under the similar provisions of the previous insolvency law, *i.e.*, Sick Industrial Companies (Special Provisions) Act, 1985 that if the creditor enforces the guarantee in respect of the loan granted to the industrial company, all that could happen would be that the guarantor would step into the shoes of the creditor *vis-a-vis* the company to the extent of the liability met<sup>2</sup>. The declaration of moratorium does not bar the creditor from suing the personal guarantor (who had guaranteed the repayment of loan taken by the debtor company) for recovery of the outstanding loan amount along with the interest from such guarantor.

In addition to the remedy against the Guarantor chalked out above, the Lender company has at its disposal the option to initiate criminal proceedings against the relevant directors and shareholders of the Borrower company who delineated a division and their own share respectively to the detriment of the Lender company despite legal safeguards having been put in place to specifically prevent such actions by the Borrower. These criminal proceedings may be instituted under various heads of offences provided under the Indian Penal Code, 1860 such as Cheating, Fraudulent Removal of Property to prevent distribution among creditors, Criminal Breach of Trust, Mischief and Dishonest Misappropriation of Property.

Pursuant to the above, legal notices should be served on all the relevant stakeholders who were involved in such fraudulent transactions and they must be asked to rectify their actions, failing which criminal proceedings may be initiated against such persons in the court of law.

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<sup>1</sup> Ram Kishun v. State of U.P., (2012) 11 SCC 511; Industrial Investment Bank of India Ltd. V. Biswanath Jhunjhunwala, (2009) 9 SCC 478.

<sup>2</sup> Kailash Nath Agarwal and Ors. v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. And Anr., AIR 2003 SC 1886.