BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT -5

IA No. 1628 OF 2020

IA No. 1746 OF 2020

IN

CP No. 3434 OF 2019

In the matter of

Halliburton Offshore Services Inc.

….Petitioner

Vs

Mercator Petroleum Ltd.

…..Corporate Debtor

IA No. 1628 OF 2020

Under Section 60(2) of the Insolvency and Bankruptcy Code, 2016

In the matter of

UTI Structured Debt Opportunities Fund – I

…..Applicant

Vs

Ms. Pinkush Jaiswal, IRP

…..Respondent

IA No. 1746 OF 2020

Under Section 60(2) of the Insolvency and Bankruptcy Code, 2016

In the matter of

Ms. Pinkush Jaiswal, Interim Resolution Professional

...Applicant

Versus

UTI Structured Debt Opportunities Fund & Anr.

...Respondents

Order Pronounced on: 07.01.2021

Coram:
Hon'ble Smt. Suchitra Kanuparthi, Member (J)
Hon'ble Shri. Chandra Bhan Singh, Member (T)

For the Petitioner: Mr. Gaurav Joshi, Sr. Advocate a/w Mr. Ankit Lohia, Mr. Hemant Shah, Mr. Pratik Kothari, Mr. Tejas Agarwal, Ms. Komal Agarwal, Advocates i/b IC Legal.

For the Respondents: Mr. Amit Jaste, Practising Company Secretary i/b Amit Jaste and Associates. Ms. Bhavika, Ms. Ankita i/b Dua Associates.

Per: Chandra Bhan Singh, Member (T)

ORDER

1. The I. A. No. 1628 of 2020 in C. P. 3434 of 2019 is filed Under Section 60(2) of the Insolvency and Bankruptcy Code, 2016 (hereinafter called as "Code") by UTI Structured Debt Opportunities Fund – I (hereinafter called as "Applicant"), who is a financial services provider and a Category II – Alternate Investment Fund registered with the Securities Exchange Board of India (SEBI) and floated by UTI Structured Debt Opportunities Trust having SEBI Registration No. IN/AIF/17-18/0358, as per the applicable laws. The Applicant is represented by its investment

manager that is UTI Capital Limited. The said IA is filed against Ms. Pinkush Jaiswal, the Interim Resolution Professional (IRP) of Mercator Petroleum Ltd. challenging the rejection of UTI's financial claim of Rs. 2,57,84,25,381/- by the Interim Resolution professional ("IRP") and not considering UTI as a financial creditor of the Corporate Debtor and excluding UTI from the Committee of Creditors.

2. Whereas I. A. 1746 of 2020 in C. P. 3434 of 2019 is filed Under Section 60(2) of the Insolvency and Bankruptcy Code, 2016 (hereinafter called as "Code") by Ms. Pinkush Jaiswal, the Interim Resolution Professional (IRP) of Mercator Petroleum Ltd. against the UTI Structured Debt Opportunities Fund and Anr. seeking avoidance of the transaction between UTI and the Corporate Debtor.

Submissions by the Applicant in I. A. 1628 of 2020 and by the Respondent in I. A. 1746 of 2020:

3. The Mercator Limited is a private limited company engaged in the business of shipping and mercantile operations. The Corporate Debtor is a subsidiary of Mercator Limited. Mercator Limited needed funds and intended to issue Debentures for the same. The Corporate Debtor offered to guarantee the debt repayment obligations and give 2nd charge/mortgage over its assets.

4. The Corporate Debtor already had financial loan from Bank of Baroda, who had a 1st charge on the Corporate Debtor's assets. Thus, on 16.03.2018 Corporate Debtor sought an NOC from its existing financial creditor i.e. Bank of Baroda for the 2nd charge of UTI.

5. UTI agreed to subscribe the Debentures that were being issued by Mercator Limited.

6. On 26.03.2018 the Axis Trustee Services Limited was appointed as the Debenture Trustee (Debenture Trustee). A Debenture Trust Deed was entered into by and between Mercator Limited, the Debenture Trustee and the Corporate Debtor. The Debenture Trust Deed, inter alia, providing for a second charge of UTI on the assets of the Corporate Debtor(Charge) to be created. The same was also amended by Deed of Addendum dated 27.06.2018.

7. On 26.03.2018 a Deed of Corporate Guarantee was entered into by the Debenture Trustee and the Corporate Debtor under which the Corporate Debtor guaranteed the repayment of UTI's entitlement under the Debenture Trust Deed. Bank of Baroda on 31.03.2018 granted its conditional NOC for UTI's 2nd charge on the Corporate Debtor.

8. The Corporate Debtor received funding in from Mercator Limited, directly and through another subsidiary of Mercator Limited viz. Mercator Energy Pte. Ltd. ("**MEPL**"), to the extent of Rs.162.12 crores as on 31.03.2018. As of 31.03.2018, Mercator Limited had provided a Corporate Guarantee of Rs. 152.66 Crores for debts of the Corporate Debtor.

9. Mercator Limited also availed a total disbursement of Rs.130 Crores (in multiple tranches) by allotment of 1300 Secured Non-Convertible Debentures having a face value of Rs.10,00,000/- each to UTI. Debenture Certificates were issued accordingly (Rs.100 Crore in March, 2018 and Rs.30 Crores in June, 2018)**.**

10. The UTI issued a letter dated 26.04.2018 to the Bank of Baroda for final confirmation by Bank of Baroda to the aforesaid charge of UTI. Bank of Baroda addressed a letter dated 10.05.2018 granting it's final NOC to UTI and UTI's charge on the Corporate Debtor.

11. The Charge created on 15.05.2018 was registered by the Registrar of Companies, Mumbai (on 11.03.2019). The necessary charges for delayed registration have been paid and necessary compliances carried out.

12. The Debenture Trustee by its Notice dated 01.10.2019 called an event of default (occurring on 04.10.2018) under the Debenture Trust Deed, to Mercator Limited and all the Guarantors of Mercator Limited calling for repayment of the entire sums due under the Debenture Trust Deed and thereby invoking the corporate guarantees given by the Corporate Debtor under the Deed of Corporate Guarantee.

13. Various Reminder / Letters were sent inter alia to the Corporate Debtor and Mercator Limited calling upon them to pay the monies due to UTI. Various Litigations ensued between the parties.

14. Between 31.03.2018 and 31.03.2020, the Corporate Debtor received funding from Mercator Limited, directly or through MEPL, of Rs. 41.08 Crores, which included a sum of approx. Rs.8.53 Crores from an escrow account which was charged to UTI. Thus, as of 31.03.2020, the Corporate Debtor received debt and equity funding from Mercator Limited, either directly or through MEPL, to the extent of Rs.203.61 crores as on 31.03.2020.

15. On 31.08.2020 this Tribunal was pleased to appoint the Respondent as the Interim Resolution Professional (IRP) and admit the CP/ 3434/ 2019 ("Insolvency Commencement Date") U/s 9 of the Insolvency & Bankruptcy Code ('Code').

16. On 24.09.2020, UTI lodged its claims of Rs.2,57,84,25,381/- (Rupees Two Hundred Fifty-Seven Crores Plus) in the prescribed form i.e. Form C as per the Code and rules made there under. Thereafter the Respondent sought some documents and clarifications regarding invocation of the Guarantee, from UTI which were duly shared by UTI.

17. UTI has also shared a copy of Witten Statement filed before Hon'ble Bombay High Court by Mercator Limited and Corporate Debtor jointly in which the debt of UTI is unequivocally admitted.

18. On 02.10.2020, the Respondent addressed an Email to UTI stating that the Respondent was not admitting UTI's claim. Thereafter on 03.10.2020, UTI through its Advocates addressed a letter, inter alia, protesting against the failure to admit UTI's claim and called upon the Respondent to refrain from taking any further steps including not to hold and/or call a meeting of the Committee of Creditors till such time the claim of UTI is not admitted.

19. On same day the Respondent served on UTI a copy of an Interlocutory Application being filed before this Tribunal U/s.43 for declaring UTI's Charge for the reliefs as more particularly set out therein.

20. Further, UTI through its Advocates addressed a letter dated 04.10.2020 calling upon the Respondent to refrain from holding any

meeting of the Committee of Creditors, to UTI's exclusion and once again called upon the IRP to admit the claim of UTI.

21. By a letter dated 05.10.2020, despite no orders being passed by this Tribunal in favour of the Respondent, the Respondent has refused the request of UTI made by letter dated 04.10.2020.

Submissions by the Respondent in I. A. 1628 of 2020 and by the Applicant in I. A. 1746 of 2020:

22. In 2018, Mercator Limited (Holding Company) issued Debentures to the Respondent No. 1 Fund and executed a Debenture Trust Deed(DTD) dated 26.03.2018 ('Deed'). Under the terms of the Deed, the Respondent No. 1 agreed to subscribe up to 1,900 (One Thousand Nine Hundred Only) Secured Non-Convertible Debentures of the face value of Rs. 10,00,000/- (Rupees Ten Lakhs Only) each, aggregating to Rs. 190,00,00,000/- (Rupees One Hundred and Ninety Crores Only) in three tranches of Rs. 100 Crores, Rs. 65 Crores and Rs. 25 Crores respectively. However, this was subsequently amended by way of Deed of First Addendum to the Debenture Trust Deed executed on 27.06.2018, which revised the second tranche amount from Rs. 65 Crores to Rs. 30 Crores. Subsequently, a total of 1,300 Debentures were subscribed by the Holding Company.

23. Corporate Debtor is described as a "security provider" in the said DTD. Under the DTD, pursuant to clause 8.1.9 – 8.1.13, second charge over all the assets movable or immovable including bank accounts, intangibles of the Corporate Debtor was created in favour of the Respondent No. 1 Fund along with the Corporate Guarantee dated 26.03.2018. This was registered on 11.03.2019.

24. To secure the repayment of the amount raised through the Deed, the Corporate Debtor executed an absolute, unconditional and irrevocable continuing Corporate Guarantee dated 26.03.2018 ('Guarantee') in favour of the trustee, i.e. Axis Trustee Services Limited ('Trustee') guaranteeing the repayment of debts by the Holding Company to Respondent No. 1 Fund.

25. Accordingly, the Holding Company allotted 1300 Secured Non-Convertible Debentures having face value of Rs. 10,00,000/- to the Respondent No. 1 Fund and raised approximately Rs. 130 Crores (Rupees One Hundred and Thirty Crores Only). The funds were raised by the Holding Company. It is an admitted fact that no part of the said investment has been received by the Corporate Debtor.

26. The Corporate Debtor vide its letter dated 16.03.2018 requested Bank of Baroda ('BoB') to cede to creation of a second charge in favour of the Respondent No. 1 over all movable and immovable assets of the Corporate Debtor.

27. Subsequently, within two years, one M/s Halliburton Offshore Services Inc (Operational Creditor) applied to initiate the Corporate Insolvency Resolution Process of the Corporate Debtor under Section 8 and 9 of the Code. The Tribunal admitted M/s Halliburton Offshore Services Inc's application by Order dated 31.08.2020 ('Admission Order') and appointed the Resolution Professional. The fact that the Corporate Insolvency Resolution process was initiated by the Operational Creditor. It is also important to note that IRP has been appointed by the Tribunal and is not a nominee of any Creditor.

28. The IRP thereafter took necessary steps as required under the Code, including collating information and inviting claims by calling the creditors to submit their proof of claims through public advertisement dated 09.09.2020. Pursuant to the above, Respondent No. 1 Fund, as Financial Creditor claimed an amount of Rs. 2,57,84,25,381/- (Rupees Two Hundred Fifty-Seven Crores Eighty-Four Lakhs Twenty-Five Thousand Three Hundred and Eighty-One Only). However, on perusal of the Claim form and other supporting documents submitted by Respondent No. 1 Fund, the IRP concluded that by virtue of the Corporate Guarantee both Respondents were put in an advantageous position than they would have been in the event of a distribution of assets being made in accordance with Section 53 of the Code.

29. The IRP submits that once the transaction come under the ambit of Section 43(2) and 43(4), the only tests that remains to be seen is that whether the transaction does not fall within Section 43(3) of the Code. The section briefly provides that if a transfer is made during the 'ordinary course' of business or financial affairs of the Corporate Debtor **and** Transferee and if the transfer creating a security interest secures new value then the transaction would not amount to giving any 'preference'. That being said, the IRP submits that the creation of security interest and

issuance of Corporate Guarantee is not in the ordinary course of business or financial affairs of the Corporate Debtor. The Corporate Guarantee was neither in the interest of the Corporate Debtor nor advantageous to it.

30. The Corporate Debtor had availed a Term Loan from Bank of Baroda of Rs. 95 Crores in 2016 and had created a first charge on all movable and immovable fixed assets of the Oil Exploration Project, all project contracts and current assets. The IRP submits that since 2016, the Corporate Debtor was already highly indebted and the project undertaken by the Corporate Debtor had long gestation cycle and risks associated with Oil Blocks. In such a scenario, as per the IRP no prudent person would provide any security/guarantee for the borrowing of the Holding Company in the ordinary course of business.

31. The IRP in the favour of his contention cites the Hon'ble Supreme Court judgement which in the case of Anuj Jain (supra) while dealing the aspect of ordinary course of business observed:

A. *"129….. It is noticed, the corporate debtor has been promoted as special purpose vehicle by JAIL for construction and operation of Yamuna Expressway and for development of the parcels of land along with the expressway for residential, commercial and other use. It is difficult to even surmise that the business of JIL, of ensuring execution of the works assigned to its holding company and for execution of housing/building projects, in its ordinary course, had inflated itself to the extent of routinely mortgaging its assets and/or inventories to secure the debts of its holding company. It had also not been the ordinary course of financial affairs of JIL that it would create encumbrances over its properties to secure the debts of its holding company. In other words, we are clearly of the view that the ordinary course of business or financial affairs of the corporate debtor JIL cannot be taken to be that of providing mortgages to*

secure the loans and facilities obtained by its holding company; and that too at the cost of its own financial health."

32. The IRP mentions that the Holding Company is in shipping business whereas the Corporate Debtor is in the business of Oil Exploration. They do no overlap. He further says that the Corporate Debtor was already reeling under financial stress and there would no reason to secure the indebtedness of the Holding Company by furnishing a Corporate Guarantee. Moreover, the IRP says, it is very important to note that the Corporate Debtor did not have any substantial business or income at the time of issuance of the Corporate Guarantee. The Corporate Debtor was already under financial burden and was in no position to issue the Corporate Guarantee or give security for debts of Respondent No. 2 (Holding Company). Despite that, the Corporate Debtor has issued Corporate Guarantee guaranteeing the debts of the Holding Company.

33. The IRP to buttress his point again quotes the Hon'ble Supreme Court, in the case of Anuj Jain (supra) while dealing with the issue of 'in the course of ordinary business' where it has observed:

> *"Another feature of vital importance is that the matter is examined with reference to the dealing and conduct of the corporate debtor; and qua the health and prospects of the corporate debtor…"*
>
> *128. Thus, the enquiry now boils down to the question as to whether the impugned transfers were made in the ordinary course of business or financial affairs of the corporate debtor JIL. It remains trite that an activity could be regarded as 'business' if there is a course of dealings, which are either actually continued or contemplated to be continued with a profit motive. As regards the meaning and essence of the expression 'ordinary course of business', reference made by the appellants to the decision of the*

High Court of Australia in Downs Distributing Co (supra), could be usefully recounted as under: -

"As was pointed out in Burns v. Mcflarlane the issues in sub-s. 2(b) of s.95 of the Bankruptcy Act 1924 – 1933 are "(1) good faith; (2) valuable consideration; and (3) ordinary course of business" This last express it was said 'does not require an investigation of the course pursued in any particular trade or vocation and it does not referto what is normal or usual in the business of the debtor or that of the creditor. It is an additional requirement and is cumulative upon good faith and valuable consideration. It is, therefore, not so much a question of fairness and absence of symptoms of bankruptcy as of the everyday usual or normal character of the transaction. The provision does not require that the transaction shall be in the course of any particular trade, vocation or business. It speaks of the course of business in general. But it does suppose that according to the ordinary and common flow of transaction in affairs of business there is a course, an ordinary course. It means that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation."

129. Taking up the transactions in question, we are clearly of the view that even when furnishing a security may be one of normal business practices, it would become a part of 'ordinary course of business' of a particular corporate entity only if it falls in place as part of the 'the undistinguished common flaw of business done'; and is not arising out of 'any special or particular situation' as rightly expressed in Downs Distributing Co (supra). Though we may assume that the transaction in question was entered in the ordinary course of business of bankers and financial institutions like the

present respondents but on the given set of facts, we have not an iota of doubt that the impugned transactions do not fall within the ordinary course of business of the corporate debtor JIL…."

34. The IRP mentions that the Corporate Debtor and the Holding Company's business are entirely different. The Holding Company is in shipping business, whereas the Corporate Debtor is in the business of Oil exploration. Therefore, in view of the IRP, it cannot be said that issuance of Corporate Guarantee is part of the undistinguished common flow of business done by the Corporate Debtor. Therefore, the IRP adds, that the Corporate Guarantee was not issued in the 'ordinary course of business'.

35. I view of the IRP, the Corporate Guarantee issued by the Corporate Debtor has not been invoked till today by Respondent No. 1. The IRP mentions that Respondent No. 1 Fund has merely sent communications to the Holding Company informing about the overdue payment and accrual of penal interest. The IRP contends that the Corporate Guarantee mandates that a Notice of Demand ought to be sent in the form of Schedule annexed to the Deed to invoke the Corporate Guarantee and Invocation Notice is to be addressed to the party. Thus, as per the IRP, the Invocation Notice is inchoate and incomplete. Admittedly, Respondent No. 1 Fund has not made any invocation in accordance with the Deed. The Resolution Professional submits that such uninvoked Corporate Guarantee holder cannot form part of the Creditors of the Company.

36. The IRP mentions that from the letter dated 1st October 2019 it can seen, that the copy of the letter which is purported to be the invocation is in fact not even properly addressed and hence is contrary to all laws.

FINDINGS:

37. I.A. 1628 of 2020 in C.P. 3434 of 2019 has been filed by the UTI (Applicant) for a claim of Rs. 2,57,84,25,381/- pursuant of the Corporate Guarantee and security interests created by the Corporate Debtor i.e. Mercator Petroleum Ltd (MPL). The applicant mentions that on 26.03.2018 a Debenture Trust Deed entered into by and between Mercator Limited, Debenture Trustee (for UTI) and the Corporate Debtor (MPL) in this deed the Corporate Debtor guaranteed the repayment of UTI's entitlement under the Debentures Trust Deed. It is also worthwhile to note that the Bank of Baroda granted its conditional NOC for UTI's 2nd charge on the Corporate Debtor.

38. Before we discuss the issues in detail it would be worthwhile to bring on record certain dates and events which would be relied upon in the subsequent analysis. These dates along with the events are as under;

a. On 26.03.2018, the Corporate Guarantee entered into by the Debenture Trustee between ML (parent company of the Corporate Debtor, the debenture trustee(UTI) and the Corporate Debtor i.e. MPL)
b. On 15.05.2018, the charge so created and was registered by ROC, Mumbai on 11.03.2019
c. On 01.10.2019, the Debenture Trustee by its notice called on the event of default (received on 04.10.2018) under the Debenture Trust Deed to ML and all the Guarantor of ML for repayment of entire sum Guarantor's dues under the Debenture Trust Deed and thereby invoked guarantee given by the Corporate Debtor (MPL) under the Deed of Corporate Guarantee
d. On 31.08.2020, the Corporate Insolvency Resolution Process under section 9 of I and B Code commenced against the Corporate Debtor (MPL) and RP was appointed and the Respondent in I.A.

1628 of 2020 and the Applicant in I.A. 1746 of 2020 was appointed as an RP.

39. In the following paragraphs, I would address and try to arrive at a conclusion after looking at the arguments from both the sides on the following issues

a. Whether the Deed of Guarantee dated 26.03.2018 comes under a Financial Debt as per section 5(8)(h) of the Code. This is important because if it is a Financial Debt under section 5(8) r/w (i) of the Code then the Corporate Debtor is liable to pay an amount being a liability in respect of guarantee.
b. Whether the transaction in question falls within the section 43 of the I and B Code and will try to see whether it is a preferential transaction in terms of section 43(2) and whether this transaction has been made in the ordinary course of business and also whether as per section 43(4) it falls beyond look back period.
c. I would also address the issues raised by the IRP like the Corporate Guarantee not having been invoked by the applicant i.e. UTI.

40. It may be noted that the IRP while dealing with the case relies heavily on the judgment of Hon'ble Supreme Court in the case of Anuj Jain, IRP Vs. Axis Bank. While the Applicant in his defense differentiates the matter raised in the Hon'ble Supreme Court in the case of Anuj Jain, IRP Vs. Axis Bank and also relies on the Hon'ble NCLAT's judgment in the case of Ascot Realty Private Limited vs. Ajay Kumar Agarwal, IRP. Therefore, while dealing with the above issues, I will liberally revert back to the above two judgements in deciding on the issues raised.

41. It may be noted that UTI is a financial service provider engaged in providing financial services. The Deed of Corporate Guarantee qualifies as a Financial Debt as per section 5 (8) (h) of the code.

> "***Section 5(8)***"*financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes*"
>
> "***Section 5 (8) (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."*

42. Therefore, it can be seen from the above that this counter guarantee to qualify as a financial debt has to have an element of consideration for time value of money which no one dispute that it falls under the category and therefore has to be treated as financial debt under section 5 (8) (a) r/w (i) of the code. The Corporate Debtor is liable to pay the amount being a liability in respect of guarantee issued. Even the Hon'ble Supreme Court in Anuj Jain IRP v/s Axis Bank judgement Para 43 mentions the following:

> *"43. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become 'financial debt' for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be 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). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the time value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said subclauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part 153 of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money."

43. The provision contained in section 124, 126, 127 of the Indian Contract Act, 1872, also have a bearing on the issue at hand. This has been quoted in the Hon'ble Supreme case Judgment in Anuj Jain's case. Which reads as under:

"The provisions contained in Sections 124, 126 and 127 of the Indian Contract Act, 187224 shall also have bearing on the issues at hand and hence, the same may also be noted as follows:-

124. "Contract of indemnity" defined.- A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."

126. 'Contract of guarantee', 'surety', 'principal debtor' and 'creditor' – A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

127. Consideration for guarantee.- Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee."

44. Hon'ble NCLAT in the judgment of Ascot Realty Private Limited vs. Ajay Kumar Agarwal, IRP dated 15.10.2020, on this issue at Para 9 of the judgment mention the following:

"9. The Adjudicating Authority in Para – 15 of the Impugned Order raised question whether the entire claim of OBC and the claim of India Bulls was contrary to the proposition laid down in the matter of "Anuj 9 Company Appeal (AT) (Ins) No.658 of 2020 Jain" as alleged. The Adjudicating Authority took note of the rival contentions and claims and record and referred to the Judgement in the matter of "Anuj Jain" and observed in Para – 19 as under:- "19. In the present case the debt due to the OBC appears to me falls under the definition of financial debt and the lender is

therefore a financial creditor. Because the lender/OBC had invoked the corporate guarantee even before the CIRP (i.e. on 26.09.2018). The concepts of financial debt as discussed in the above cited judgment is different from the debt claimed by the OBC in the case in hand. In this regard it appears to me that once a guarantee is invoked against the Guarantor, the Guarantor steps into the shoes of the principal borrower, the debt that originally is a "financial debt" under section 5(8) towards the principal borrower becomes a "financial debt" towards the guarantor and the same could be enforced as if it were being enforced against the principal borrower. The above said view also seems to have strengthened from the very same judgment cited by the applicant. The Hon'ble SC has discussed at length section 127 and 128 of the Contract Act and referred to a judgment of the High Court in State Bank of India vs. Kusum Vallabhdas Thakkar, 1994CivilCC89. It is good to read para 10 of the decision in Smt. Kusum: It read as follows: 10. As regards consideration, it is true that no direct consideration flowed from the plaintiff to the defendant who has made the promise to create a mortgage. But in such tripartite arrangement, anything done for the benefit of the principal debtor is a sufficient consideration to the surety for giving guarantee as expressly provided in Section 127 of the Contract Act. Thus, even though there is no consideration to the third party surety for mortgage, the consideration of having done anything for the benefit of the principal debtor is a sufficient consideration." This position of law appears to me not altered by the Hon'ble Supreme Court in the cited decision of Anuj Jain. In para 43 of Anuj Jain, the Hon'ble SC holds that 'financial debt' may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also

include any derivative transaction or counterindemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be 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). For broadening the above view of the Hon'ble SC, I extract para 43 of the judgment as follows: 43. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become 'financial debt' for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counterindemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be 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). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein…" In view of the foregoing discussion and the proposition of law, I am of the view that inclusion of the entire claim of the financial creditor/Oriental Bank of Commerce, by the RP is not illegal, as their claims fall under the definition of the financial debt 5(8)(i) and not contrary to the proposition laid down by the Hon'ble Supreme Court of India in the case of Anuj Jain."

45. In view of this it becomes abundantly clear that the Corporate Guarantee extended by the Corporate Debtor towards debts of the parent company i.e. ML which is the Principal Debtor qualifies as financial debt and therefore is recoverable from the Corporate Debtor as per the deed of guarantee.

46. It may be noted that the IRP escaped this aspect and had tried to drag the whole issue under section 43 of the IBC and tries to make it as a preferential and related party transaction.

47. The IRP claims that this Corporate Guarantee falls within the purview of section 43. The contention of the IRP that this case is very similar to the case of Anuj Jain vs. Axis Bank regarding preferential transaction, is completely misconceived. Section 43 (2) (a) apply in a case where transfer of property or interest in the property has been created for the benefit of a Creditor or a surety or a Guarantor for on account of Antecedent Debt or Operational Debt or other liabilities owned by the Corporate Debtor. In other words, the provisions of Section 43(2)(a) apply only in a case where a transfer of a property or an interest in such property has been created for the purpose of an existing i.e. antecedent financial or operational debt or an existing liability. The purpose of the provisions of Section 43(2)(a) is to bring into question a transfer which has been made by way of giving preference to an existing creditor. In the present case there is no antecedent debt for which the Corporate Guarantee was given. On the contrary in the present case a new debt has been created on account of the transaction documents in favour of the UTI. In view thereof, the contention of the IRP that the provisions of Section 43(2)(a) would apply to the present case are misconceived. The mere fact that there were some antecedent financial debts or liabilities owed by the Corporate Debtor does not make the

transaction in question to be a transaction covered by Section 43(2)(a) in as much as the guarantee has been granted for and on account of a new financial debt and not an antecedent financial or operational debt. The same has in fact also been clarified by the Hon'ble Supreme Court in the judgement of Anuj Jain, IRP v. Axis Bank and Para 90 thereof is reproduced for ready reference:

> *"90. To put it more explicit, the sum total of sub-sections (2) and (4) is that a corporate debtor shall be deemed to have given a preference at a relevant time if: (i) the transaction is of transfer of property or the interest thereof of the corporate debtor, for the benefit of a creditor or surety or guarantor for or on account of an antecedent financial debt or 16 operational debt or other liability; (ii) such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets in accordance with Section 53; and (iii) preference is given, either during the period of two years preceding the insolvency commencement date when the beneficiary is a related party (other than an employee), or during the period of one year preceding the insolvency commencement date when the beneficiary is an unrelated party."*

48. On the contrary, in the present case, on the new debt by UTI, Corporate Guarantee has been created on account of transaction of documents in favour of the UTI. Therefore, the contention of IRP that provisions of section 43 (2) (a) would apply, is not correct.

49. I observe that the IRP has contended that this corporate guarantee is not made in an ordinary course of business and also in terms of Section 3 (b) (1) has not secured new value to the Corporate Debtor. This contention of the IRP basically emanates from the fact that the IRP does

not make any difference between mortgage and Corporate Guarantee. In fact, the Hon'ble NCLAT in the case of Ascot Realty Pvt. Ltd. Vs. Ajay Kumar Agarwal, IRP has interpreted the judgment of the Hon'ble Supreme Court in the case of Anuj Jain and inter alia held that the judgment in the case of Anuj Jain, IRP v. Axis Bank would not apply to Corporate Guarantees which are in the nature of a Corporate Guarantee as sought to be enforced by UTI in the present case. The judgment of the Hon'ble NCLAT is binding on the IRP. The relevant paras are reproduced herein below for ready reference: -

> *"22. From the above, the distinction between matters which came up for consideration before Hon'ble Supreme Court in the matter of "Anuj Jain" and the present matter became clear. There the attempt to get Mortgage treated as if it is in the nature of guarantee, was not accepted. Even before Supreme Court similar effort was made (See Para – 37.4) but it did not succeed. Banks knew that if it is treated as guarantee, they could sail through. 30. The learned Counsel for the Appellant argued that the Adjudicating Authority wrongly relied on Judgement in the matter of "State Bank of India vs. Kusum Vallabhdas Thakkar." In Para 19 (reproduced supra) of the Impugned Order, the Adjudicating Authority referred to the said Judgement and observed that the position of law is not altered by Hon'ble Supreme Court in the decision of "Anuj Jain". Judgment in the matter of "Smt. Kusum" was referred in the Judgement of Hon'ble Supreme Court in "Anuj Jain" in Para – 51 and after discussing the ratio of the said Judgement, Hon'ble Supreme Court in Para – 51.4 observed that it was difficult to stretch the ratio of the said decision which appears to be applied to the issue at hand concerning definition of financial debt. The issue in that case was in the context of mortgage. In any case, even if we do not refer to the Judgement in the matter of "Smt. Kusum", in the facts of the present matter, we find that the*

Impugned Order has rightly concluded that the claim as made by Respondent No.2 – OBC and Respondent No.3 – India Bulls was correctly admitted by RP treating them as Financial Creditors for the amounts stated."

50. A Contract of Guarantee i.e. the Deed of Corporate Guarantee dated 26th March, 2018 is an independent contract, which creates independent and distinct rights and obligations in favour of the parties, which does not fall within Section 43(2) of the Code. The IRP cannot seek a declaration for avoidance of the Deed of Corporate Guarantee.

51. It has been brought clearly by UTI in its submissions that the Corporate Debtor has received the benefits of the parent company for whose debt that the Corporate Guarantee was given. The UTI mentions that the Corporate Debtor has received funding from the parent company through another subsidiary of ML that is Mercator Energy Pte. Ltd. ("**MEPL**") to the extent of Rs. 161.12 crores as on 31.03.2018. In addition as on 31.03.2018, ML has provided corporate guarantee of Rs. 152.66 crores for the debts of the Corporate Debtor. Therefore, giving the corporate guarantee is standard practice in the banking system in the financial sector and is normal way for extending loans and creating security interest. The mere fact that the debt has been granted in favour of the parent company does not in any manner whatsoever alter the nature of the guarantee and/or make any difference to the enforceability thereof inasmuch as under the provisions of Section 127 of the Contract Act, no separate consideration is necessary for grant of a guarantee.

52. Be it may, UTI has clearly mentioned that in clause 5.1 of the Deed of Corporate Guarantee, it is clearly stated that the Guarantee is given in

addition to and independent of every other security held in favour of UTI. Further, clause 5.8 of the Deed specifically provides that the Guarantee is enforceable against the Corporate Debtor notwithstanding any security or securities comprised in any instrument (s) executed or to be executed in favour of UTI, at the time when any proceedings are taken against the Guarantor - Corporate Debtor on the said Deed of Corporate Guarantee, be unrealized, or outstanding or lost. Thus, the Deed of Corporate Guarantee is independent of any and all other transaction documents and charges/ securities executed in favour of UTI.

53. I am of the view that it is erroneous on the part of the IRP to claim that the UTI is a related party under section 43 of the code. It must be borne in mind that UTI is a financial service provider engaged in providing financial service and is duly registered with SEBI. UTI is fund sponsored by UTI Asset Management Company Limited which has been sponsored by SBI, Bank of Baroda, Punjab National Bank and LIC India.

54. I am of the view that it would be beyond one's imagination even to consider that UTI can be termed as related party and would qualify under related party transaction.

55. It may be noted that the CIRP of the Corporate Debtor commenced on 31.08.2020. Thus, relevant time or look back period under Section 43 (4) of the Code would be one year (non-related party transaction that is from 01.09.2019 and 2 years for related party transaction that is from 01.09.2018). For discussion sake let us assume that it is covered under section 43 of the Code. However, since the deed of corporate guarantee was executed on 26.03.2018 therefore the transaction in question, that is giving the corporate guarantee, is well beyond the look back period. It is to be noted that the creation of the charge relates back to the date on

which the document creating the charge was executed and not the registration of the charge. In fact, there is nothing under the Companies Act or under the provisions of the Code which provide that the charge would become effective with effect from the date of registration. On the contrary Section 77 of the Companies Act, 2013 applies only in case of liquidation. Further the responsibility of registering the charge with the ROC is of the company. Any delay by the company cannot affect the rights of the charge holder. The contention of the IRP that the charge was registered only on 11th March 2019 is of no consequence whatsoever. The IRP while dealing with the issues of the look back period has wrongly taken the date of transaction as 11.03.2019 on which it was registered to ROC whereas it should be 26.03.2018 when trust deed was executed.

56. The IRP has contended that in the present case that Trust Deed has not been invoked in the format, set out in the transaction documents. However the clause 2.1.1 of the Corporate Guarantee entitles Debenture Trustee to invoke the guarantee in such a manner as it deems appropriate. Clause 2.1.1 has reproduced as below:

> "*2.1.1 guarantees to the Debenture Trustee (i) the due and punctual performance of all the obligations to be performed by the Company under or pursuant to the Transaction Documents; and (ii) the due and punctual repayment by the Company of all the Amounts Due and the discharge of the Secured Obligations. The Debenture Trustee shall be entitled to call upon the Guarantor to make payments as stated in the notice ("Notice of Demand") in the form and manner set out in the Schedule - 1 hereto or such other format as it may deem fit. The Guarantor shall, on receipt of the Notice of Demand from the Debenture Trustee, without any demur, protest, contest or delay, pay to the Debenture Trustee within a period of 7 (seven) days from the date of such Notice of Demand, the Amounts Due as if it were the*

principal obligor and E (Application) Vol. I Pg.131 F (Application) Pg.292 3 in addition thereto shall also pay all Interest, Penal Interest, Premium, charges, costs, fees, dues and / or expenses payable by the Company to the Debenture Trustee for the benefit of the Debenture Holders"

57. It clearly shows that as per relevant clause of the Corporate Guarantee it was not necessary on the part of the UTI to invoke guarantee in a prescribed format. In judgement of Hon'ble NCLAT Exim Bank vs. Resolution Professional - JEKPL Pvt. Ltd. where it has been confirmed by Hon'ble Supreme Court that in respect of where such Corporate Guarantee is invoked or un-invoked, matured or un-matured it is a Financial Debt. Para 56 of the judgment of Exim Bank vs. Resolution Professional - JEKPL Pvt. Ltd. are reproduced as for reference:

"56. Therefore, we hold that maturity of claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of claim pursuant to public announcement made under Section 13(1)(b) r/w Section 15(1)(c) or for collating the claim under Section 18(1)(b) or for updating claim under Section 25(2)(e). For the purpose of collating information relating to assets, finances and operations of Corporate Debtor or financial position of the Corporate Debtor, including the liabilities as on the date of initiation of the Resolution Process as per Section 18(1), it is the duty of the Resolution Professional to collate all the claims and to verify the same from the records of assets and liabilities maintained by the Corporate Debtor."

58. In view of the above, I am of the considered view that UTI is a financial creditor and entitled to be in COC viz-a-viz deed of corporate guarantee. I am also of the view that the facts and issues invoked are

completely different from the one invoked in the judgment of Anuj Jain vs. Axis Bank.

59. It has also been demonstrated in the preceding paragraphs that the corporate guarantee transactions does not fall within the purview of Section 43 of the Code and there is no case made out that UTI is a related party or the transaction is in question falls under the category of the preferential transaction.

60. I have no doubt in my mind that the corporate guarantee falls within the ambit of financial debt and coupled with section 124, 126 and 127 of the Indian Contract Act, 1872, guarantees repayment of debt and corporate Debtor have been guaranteed repayment executable against the Corporate Debtor who have guaranteed repayment of debt.

61. In terms of the above, IA 1628 of 2020 is "Allowed" and IRP in CP 3434 of 2019 to admit the claim of the applicant i.e. UTI as a financial creditor and make the Applicant as a member of CoC.

62. The I.A. 1746 of 2020 in C.P. 3434 of 2019, has been filed by IRP against the UTI Structured Debt Opportunities Fund – I, where in the IRP has prayed for declaring the Corporate Guarantee in favour of the UTI as a preferential transaction in terms of section 43 of IBC. I "Disallow" this application for the reason stated in the preceding paragraph of this judgment.

63. Accordingly, IA 1628 of 2020 is "Allowed" and I.A. 1746 of 2020 in C.P. 3434 of 2019 is "Dismissed".

64. Here I would very humbly state that Member, Judicial has arrived at a different conclusion and, therefore, her Order is at variance with mine and forms a separate Order.

Sd/-

Chandra Bhan Singh
Member (T)

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT -5

IA No. 1746 OF 2020
IA No. 1628 OF 2020
IN
CP No. 3434 OF 2019
In the matter of
Halliburton Offshore Services Inc.
....Petitioner
Vs
Mercator Petroleum Ltd.
.....Corporate Debtor

IA No. 1746 OF 2020
Under Section 60(2) of the Insolvency and Bankruptcy Code, 2016
In the matter of
Ms. Pinkush Jaiswal, Interim Resolution Professional
...Applicant

Versus

UTI Structured Debt Opportunities Fund & Anr.

...Respondents

IA No. 1628 OF 2020

Under Section 60(2) of the Insolvency and Bankruptcy Code, 2016

In the matter of

UTI Structured Debt Opportunities Fund – I

…..Applicant

Vs

Ms. Pinkush Jaiswal, IRP

…..Respondent

P*er:* Smt. Suchitra Kanuparthi*, Member (Judicial)*

ORDER

1. I have gone through the order of my learned brother and with great respect I disagree with the dismissal of IA 1746/2020 and with the direction that Applicant in IA 1628/2020 to be considered as financial Creditor by the IRP for the following reasons:

IA 1746/2020 in CP 3434/2019

2. This is an application filed under section 43 r/w section 65 of the I and B Code, 2016 and rule 11 of NCLT rules, 2016 and have claimed certain directions to declare certain transactions as preferential and direct avoidance of the said transactions, direct release and discharge of Corporate Debtor guarantee issued by the Corporate Debtor in favour of

Respondent No. 1 for benefit of Respondent No. 2 being the preferential transactions and other reliefs as stated in the I.A.

3. The admission order of the CIRP of the Corporate Debtor was passed on 31.08.2020. The applicant herein has taken charge as an IRP and has invited claims from the creditors. The applicant received the claim from Respondent No. 1 as financial creditor claiming an amount of Rs. 257,84,25,381/-. The applicant upon perusal of the claimed formed and other supporting documents submitted by the Respondent No. 1 and verification books of the Corporate Debtor, found that there was no direct borrowing by the Corporate Debtor by the Respondent No. 1. The documents filed by the Respondent No. 1, established the facts that Corporate Debtor is a subsidiary of Mercator Ltd. which is the holding company. The holding company issued debentures to the Respondent No. 1 and executed the debenture trust deed dated 26.03.2018 in terms of which Respondent No. 1 was subscribed to the debentures of the holding company to the tune of Rs. 190 crores in three tranches the first tranche of Rs. 100 cores, second tranche of Rs. 65 crores and third tranche of Rs. 25 crores. The first addendum to the debenture trust deed was executed on 27.06.2018, the second tranche amount was revised from Rs. 65 crores to 35 crores. The amounts were accordingly revised to Rs. 100 crores for the first tranche and Rs. 30 crores for the second tranche. The said amount were disbursed to the holding company, the disbursement took place in March 2018 and June, 2018.

4. The Corporate Debtor was required to execute a Corporate guarantee in favour of Axis Trustee Services Ltd., acting as debenture trustee for Respondent No. 1 for guaranteeing the repayment of debt of the holding company to the Respondent No. 1. The Corporate Debtor accordingly executed a Corporate Debtor guarantee on 26.03.2018.

5. The Corporate Debtor were also required to create a second charge on the assets of the company being oil blocks and the exploration at CB9, situated at Bharuch, Gujarat and second charge over all assets, current and future, movable and immovable, tangible and intangible of second charge over all bank accounts of the Corporate Debtor in favour of Axis Trustee Services Ltd. acting as debenture trustee for Respondent No. 1 for repayment of debts of the holding company to Respondent No. 1.The charge was registered on MCA portal on 11.03.2019.

6. **Grounds of the Application**:

a. The applicant finds that the Corporate Debtor has not availed any funding or loan from the Respondent No. 1 and there is no direct lending by the Respondent No. 1 to the Corporate Debtor.
b. The Corporate Debtor has not received any value and benefit from the said claimant either before or after issuance of the Corporate Debtor or creation of security.
c. The Corporate Debtor is in the business of oil exploration and considering nature of business, the Corporate Debtor itself requires huge investments and funding for its own survival and operations.
d. The Corporate Debtor had availed a term loan from Bank of Baroda for Rs. 95 crores in 2016 and had created first charge on all movable and immovable, fixed assets of oil exploration projects, all project contracts and current assets. The charge was created on 29.08.2016 and registered on MCA on 08.09.2016.
e. The Corporate Debtor was highly indebted and looking at the projects long cycle and risk associated with the oil blocks, the Corporate Debtor would not have security/ guarantee for borrowing of the holding company, putting the Corporate Debtor

under further stress for huge amount in favour of Respondent No. 1.

f. The Corporate Debtor was not having substantial business or income at the time of issuance of Corporate Guarantee and / or creation of security for the benefit of Respondent No. 2. The following table shows the Financial Position of the Corporate Debtor during the relevant period;

Rs in Crores

FY/ Particulars	2017-18	2018-19	2019-20
Revenue from Operations	Nil	4.92	2.01
Profit / (Loss) before Tax	(1.11)	(5.23)	(5.64)
Bank Borrowings	93.07	92.54	95.29

The aforesaid financial position indicates that the Corporate Debtor was itself under financial burden and was in no position to issue Guarantee or given security for debts of Respondent NO. 2- Related Party.

g. The applicant further states that the Corporate Guarantee issued by the Corporate Debtor has not been invoked by the Respondent No. 2 but has merely sent communications to principal debtor/holding company with copies to the Corporate Debtor, informing about the over due payment and accrual of the penal interest. There is no specific invocation of Corporate Guarantee till date.

h. Such uninvoked Corporate Guarantee holder cannot form part of the creditors of the company, further such issuance of the Corporate Guarantee by the Corporate Debtor was preferential and onerous.

i. The holding company of the Corporate Debtor and the Corporate Debtor business are completely different. The holding company is

in the shipping business and whereas the Corporate Debtor is in the business of oil exploration.

j. The said creation of security interest and issuance of the Corporate Guarantee is not in the ordinary course of business and financial affairs of the Corporate Debtor.

k. Such creation of security interest or issuance of Corporate Guarantee was neither in the interest of the Corporate Debtor nor advantageous of the Corporate Debtor. The preference under this transaction is given for the benefit of the Respondent No. 2/ holding company and hence the transactions are to be treated as preferential transactions.

l. The preference given by the Corporate Debtor to the Respondent No. 2 i.e., holding company being related party is for the benefit of the related party.

m. The Respondent No. 2 was benefited by the Corporate Guarantee and Respondent No. 1 was benefited by the way of securing additional charge on the valuable assets of the Corporate Debtor. Both the Respondents were put in beneficial position and in the event of distribution of assets under section 53 of IBC.

n. The charge created on the assets of the Corporate Debtor in favour of Respondent No. 1 for benefits of Respondent No. 2 on 11.03.2019 the charge creation is within preceding 2 years of insolvency commencement date.

o. The applicant also relied upon the decision of the Hon'ble Supreme Court in Anuj Jain case reported in MANU/SC/0228/2020 and hence claim that the transaction are liable to the set aside as preferential transactions.

p. The based on the above decision the Applicant has not admitted the claim of Respondent No. 1 and has constituted the Committee of Creditors (COC) excluding the Respondent No. 1.

q. Recognising the Respondent No. 1 as financial creditor of Corporate Debtor would amount to giving an advantageous positions as the part of the COC, which it is otherwise is not entitled not being the creditors of the Corporate Debtor. This would alter the structure of the COC, wherein the original and direct financial creditors would be reduced to minority merely due to the size of debt of Respondent No. 1 and Respondent No. 2, without any value or benefits to the Corporate Debtor.

7. **Reply of Respondent No. 1**

a. The Respondent No. 2 claimed that the application is filed on complete misreading and erroneous misrepresentation of the judgement dated 26.02.2020 in the matter of Anuj Jain, Interim Resolution Professional for JP Infratech Ltd. Vs. Axis Bank reported in 2020 SSC online 237.

b. There was a disbursal of debt by the Respondent No. 1 to Respondent No. 2, which is the holding company of Corporate Debtor, the Corporate Debtor further gave guarantee for repayment of such debt. The amount advanced charged by the Corporate Debtor has the element of consideration for time, value and money, when such disbursal was guaranteed and it has to be treated a financial debt under section 5(8) 8a r/w sub clause (i).

c. the grounds of objection raised by the Respondent No. 1

i. The facts and issues involved in the present matter are completely different from the one involved in the Anuj Jain judgement. The IRP does not have any power to file an application under section 43 of the Code for seeking avoidance of transactions.

ii. Transaction is in question does not fall within the relevant time as provided under section 43 of the Code.

iii. Guarantee does not fall within the purview of section 43 of the Code and there is no transfer of property.

iv. The Corporate Debtor offered to guarantee the repayment obligation of the holding company i.e. Respondent No. 2 and therefore sought the NOC from the existing financial creditor Bank of Baroda.

v. The Credit rating of CD as on 5.03.2018 has been moderate. The Debenture Trust Deed and addendum Debenture Trust Deed were executed on 26.03.2018 and 27.06.2018. The deed of the Corporate guarantee dated 26.03.2018 was also executed by the Debenture Trust Deed and the Corporate Debtor under deed of Corporate guarantee the Corporate Debtor irrevocably and unconditionally guaranteed to pay any amount due as where it were principal obligor. As on 31.03.2018, the Corporate Debtor was a beneficiary of guarantees issued on his behalf by the Respondent No. 2 to the tune of Rs. 1,52,66,31,853/-

vi. The Respondent No. 2 availed the total disbursement of Rs. 130 crores in multiple tranches by allotment of 1300 secured non-convertible debenture having face value of Rs. 10 lacs each only to the Respondent. Out of this, Rs. 75 lacs were directly utilised for the benefit of the Corporate Debtor.

vii. The charge were created by the Respondents and registered with ROC. The Respondent No. 2 defaulted in fulfilment of its obligations under Debenture Trust Deed as the result, the debenture trustee called an event of default occurring on 24th of October, 2020, issued notice on 1stOctober 2019 calling upon payment of entire sums of dues under the debenture trust deed. The review of accounts of the Corporate Debtor for the period from 31st March 2018 to 31stMarch 2020 shows that the

Corporate Debtor has been beneficiary in the form of debt and equity from Respondent No. 2 to the extent of Rs. 162.12 crores.

viii. On 31st March, 2018 R2 provided a Corporate guarantee of Rs, 125.66 cores for debts of the Corporate Debtor.

ix. In view of the initiation of CIRP of the Corporate Debtor on 31stAugust, 2020 the Respondent No. 2 lodge his claim of Rs. 257,84,25,381/- in Form C. the applicant on 2ndOctober 2020 by an email rejected the claim of Respondent No. 1 and observed that this transactions are of preferential nature as there were related party and the claim was not admissible.

x. The Respondent No. 1 counsel vide letter dated 3.10.2020 relied upon the contentions of the Applicant and called upon the applicant not to take any further steps or hold meetings of the COC. Instead of considering the letter of Respondent No. 1, the applicant on 3.10.2020 served the Respondent filed the above I.A. seeking relief of avoidance of transactions.

8. **I.A. 1628/2020 in CP 3434/2019**

a. The applicant is a financial service provider and is aggrieved by the rejection and non-admittance of financial claims of Rs. 2,57,84,25,381/- by the Respondent.2. Mercator Ltd. is a Pvt. Ltd. company engaged in shipping and mercantile operations, the Corporate Debtor is a subsidiary of Mercator Ltd. the Mercator ltd, issued debentures and the Corporate Debtor offered to guarantee the repayment of the said amount the Corporate Debtor sought NOC from Bank of Baroda for creation of charge in favour of applicant. The applicant agreed to subscribe to the debenture that were been issued by the Mercator Ltd. Axis Trustee Services Ltd. was appointed as debenture trustee in respect of the aforesaid debentures. A

Debenture Trust Deed dated 26.03.2018 was executed by and between Mercator Ltd., the Debenture Trust Deed (for and behalf of the applicant and the Corporate Debtor). The debenture trust deed inter alia contained a charge created in favour of the applicant on the Corporate Debtor. Deed of Corporate guarantee dated 26.03.2018 was also executed by the Corporate Debtor in favour of the applicant guaranteeing the repayment obligations under the debenture trust deed.

b. Mercator Ltd. availed total disbursement of Rs. 130 crores (in multiple tranches) by allotment of 1300 secured non-convertible debentures having a face value of Rs. 10 lacs. Bank of Baroda granted his NOC to the charge created in favour of the applicant. The applicant charge is duly registered with the ROC

c. The Debenture Trust Deed called an event of default on 04.10.2018 under the Debenture Trust Deed to Mercator Ltd. and to all the guarantors of Mercator Ltd. calling upon Mercator Ltd. to repay the entire sum due under the debenture trust deed and invoking the Corporate guarantee given buy the Corporate Debtor under the deed of Corporate Guarantee.

   By admission of CIRP in respect of Corporate Debtor, Respondent i.e. the IRP was appointed by an order of admission on 31.08.2020. The applicant lodge his claim of Rs. 257,84,25,381/- crores in the prescribed form C as per the Code and rules made there under.

d. The Respondent sought some documents and clarifications regarding the invoking of guarantee regarding the applicant and duly shared by the applicant.

e. On October 2nd, 2020 the Respondent address an email to the applicant stating that the Respondent was not admitting the applicant claim as financial creditor.

f. On 3rdOctober, 2019 at 9 p.m. The applicant through its advocates addressed a letter inter alia reputing the non-admittance of the applicants claims and reasons thereto and called upon the respondent inter alia not to take any further steps or call the meeting of the COC till such time the claim of the applicant is not admitted.

g. At about 10 p.m. the applicant served a copy of the I.A. 1746 of 2020 filed by them before the Hon'ble Tribunal. The applicants on 4thOctober, 2018 sent another letter to the responded calling upon not to hold any meetings of the COC to the applicant exclusion. However, on 5th October the respondents refused the request. The respondent has wrongfully not admitted the claim of the applicant who is the financial creditor who is having the substantial claim against the Corporate Debtor and is entitled to be the part of the CoC. Hence, the applicant prayed that the Tribunal be pleased to order and direct respondent to admitted the claim as a financial debt amounted to Rs. 2,57,84,25,381/- of the applicant as a financial creditor and declare that the applicant to be a member of the COC, pending the hearing and final disposal of the present application also restrained the Respondent from holding any meeting of COC, permit the applicant to attend all meetings of the COC as financial creditors.

9. **Reply of the Respondent/IRP/Limited Reply:**

a. The admission of CIRP of Corporate Debtor was passed on 31/08/2020.

b. The IRP received claims from the Applicant as Financial Creditor claiming an amount of Rs 257,84,25,381/.

c. On verification of books of Corporate Debtor, it was found that there is no direct borrowing by Corporate Debtor from the Applicant.

d. The documents filed by the Respondent No. 1established the facts that Corporate Debtor is a subsidiary of Mercator Ltd. which is the holding company. The holding company issued debentures to the Respondent No. 1 and executed the debenture trust deed dated 26.03.2018 in terms of which Respondent No. 1 was subscribed to the debentures of the holding company to the tune of Rs. 190 crores in three tranches the first tranche of Rs. 100 cores, second tranche of Rs. 65 crores and third tranche of Rs. 25 crores. The first addendum to the debenture trust deed was executed on 27.06.2018, the second tranche amount was revised from Rs. 65 crores to 35 crores. The amounts were accordingly revised to Rs. 100 crores for the first tranche and Rs. 30 crores for the second tranche. The said amount were disbursed to the holding company, the disbursement took place in March 2018 and June, 2018.

e. The Corporate Debtor was required to execute a Corporate guarantee in favour of Axis Trustee Services Ltd., acting as debenture trustee for Respondent No. 1 for guaranteeing the repayment of debt of the holding company to the Respondent No. 1. The Corporate Debtor accordingly executed a Corporate Debtor guarantee on 26.03.2018.

f. The Corporate Debtor were also required to create a second charge on the assets of the company being oil blocks and the exploration at CB9, situated at Bharuch, Gujarat and second charge over all assets, current and future, movable and immovable, tangible and intangible of second charge over all bank accounts of the Corporate Debtor in favour of Axis Trustee Services Ltd. acting as debenture

trustee for Respondent No. 1 for repayment of debts of the holding company to Respondent No. 1. The charge was registered on MCA portal on 11.03.2019.

g. The Corporate Debtor was highly indebted and looking at the projects long cycle and risk associated with the oil blocks, the Corporate Debtor would not have created security/ guarantee for borrowing of the holding company, putting the Corporate Debtor under further stress for huge amount in favour of Respondent No. 1.

h. The Corporate Debtor was not having substantial business or income at the time of issuance of Corporate Guarantee and / or creation of security for the benefit of Respondent No. 2. The following table shows the Financial Position of the Corporate Debtor during the relevant period;

Rs in Crores

FY/ Particulars	2017-18	2018-19	2019-20
Revenue from Operations	Nil	4.92	2.01
Profit / (Loss) before Tax	(1.11)	(5.23)	(5.64)
Bank Borrowings	93.07	92.54	95.29

The aforesaid financial position indicates that the Corporate Debtor was itself under financial burden and was in no position to issue Guarantee or given security for debts of Respondent NO. 2- Related Party.

i. The holding company of the Corporate Debtor and the Corporate Debtor business are completely different. The holding company is in the shipping business and whereas the Corporate Debtor is in the business of oil exploration.

j. The Respondent further stated that the Corporate Guarantee issued by the Corporate Debtor has not been invoked by the

Respondent No. 2 but has merely sent communications to principal debtor / holding company with copies to the Corporate Debtor, informing about the over due payment and accrual of the penal interest. There is no specific invocation of Corporate Guarantee till date.

k. Such uninvoked Corporate Guarantee holder cannot form part of the creditors of the company, further such issuance of the Corporate Guarantee by the Corporate Debtor was preferential and onerous.

l. Such creation of security interest or issuance of Corporate Guarantee was neither in the interest of the Corporate Debtor nor advantageous of the Corporate Debtor. The preference under this transaction is given for the benefit of the Respondent No. 2/ holding company and hence the transactions are to be treated as preferential transactions.

Further Affidavit filed by IRP

10. The Respondent/IRP relied upon the parameters as prescribed at para 20 of judgement of Anuj Jain Judgement and therefore submitted that the claim of the financial Creditor based on a Corporate Guarantee to benefit a related party a holding company and was created to benefit the creditor of related party and therefore such transactions could not be admitted and has filed the application for preferential transaction and avoidance under Sec43 & 44 of the Code.

11. **Findings**

a. The legal questions for consideration arises are as follows;

i. Whether the issuance of the Corporate guarantee in favour of Respondent No. 1(being a Creditor of Related party/Holding Company) and creation of second charge on

all assets including moveable, immoveable assets and oil blocks of the Corporate Debtor in favour of Respondent No. 1 is a preferential transaction under section 43 of IBC.

ii. Whether the Respondent No. 1 UTI can be admitted to COC in the capacity of being a financial creditor of the Corporate Debtor.

iii. Whether the deed of guarantee can be construed as financial debt under section 5(8) (i) of I B Code more so when this transaction amount to related party transaction.

iv. Whether there is evidence to show the indebtedness/no business of the Corporate Debtor it is evident from the financial statements and execution of the Corporate Guarantee is to prefer any creditor.

v. Whether date of registration of charge as contemplated under section 77 of the companies act, 2013 is the date of reckoning as notice of charge and hence amounts of preferential transaction within the 2 years of look back period as prescribed under section 43 of the Code.

b. I.A.1746 of 2020 is filed by the IRP seeking declaration that the issuance of the Corporate Guarantee in favour of Respondent No. 1 and creation of second charge of the assets of Corporate debtor in favour of Respondent No. 1 is a preferential transaction under section 43 of the I and B Code, whereas the I.A. 1628 of 2020 is filed by the UTI against the rejection of claim as financial creditor and non-admittance of its claim as financial creditor by the IRP. Both the I.A.s are have identical issues/mirror issues and hence a common order is been passed.

c. In 2018 Mercator Ltd. (holding company) issued debentures to Respondent No. 1 vide a Debenture Trust Deed dated 26.03.2018, under the terms of the deed the Respondent No. 1 (UTI) agree to subscribe up to 19000secured non-convertible debentures of face value of Rs. 10 lakhs aggregating to Rs. 190 crores in three tranches of Rs. 100 crores, Rs. 65 crores and Rs. 25 crores respectively. There was a subsequent amendment and the deed of first addendum was executed on 27.06.2018.

d. The Corporate Debtor has executed a Corporate Guarantee in favour of Respondent No. 1 on 26.03.2018 and the same was registered on 11.03.2019. Accordingly, the holding company allotted 1300 secured non-convertible debentures having face value of Rs. 10 lacs to the R1 fund and raised approximately Rs. 130 crores, these funds were raised by the holding company. It is an admitted fact that no part of the said investment has been received by the Corporate Debtor. The Corporate Debtor sought the NOC from Bank of Baroda to create a second charge in favour of R1 over all its movable an immovable assets.

e. In view of the admission order of the CIRP on 31stAugust, 2020 the applicant IRP took over the assets of the Corporate Debtor and the IRP also made a public announcement on September, 9, 2020 and invited claims from the creditors pursuant to the above the Respondent No. 1 being UTI fund claimed an amount of Rs. 2,57,84,25,381/- as a financial creditor.

f. The creation / execution of the Corporate guarantee in favour of the Respondent No. 1 on 26.03.2018 for the benefit of Respondent No. 1, given the financial position of the Corporate Debtor during their relevant period as detailed below;

FY/ Particulars	2017-18	2018-19	2019-20
Revenue from Operations	Nil	4.92	2.01
Profit / (Loss) before Tax	(1.11)	(5.23)	(5.64)
Bank Borrowings	93.07	92.54	95.29

g. The financial position therefore indicates that the at the relevant time the Corporate Debtor was itself under the financial burden and was in no position to issue guarantee or debts of Mercator Ltd, being holding company and related party. The Corporate debtor has no revenue from business operations having consistent losses, further looking at the projects long cycle and risk associated with the oil blocks, the Corporate Debtor could not have provided security/ guarantee for borrowing of the holding company, putting the Corporate Debtor under further stress for huge amount in favour of Respondent No. 1.

h. It is relevant to refer to section 43 of the Code. Section 43 is extracted below;

43. "Preferential transactions and relevant time.-

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section44.

(2) A corporate debtor shall be deemed to have given a preference, if–

(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section53.

(3) For the purposes of sub-section (2), a preference shall not include the following transfers–

(a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;

(b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that–

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation. – For the purpose of sub-section (3) of this section, "new value" means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if–

(a) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date."

Sec 44 ***:*** **Orders in case of preferential transactions.-**

(1) The Adjudicating Authority, may, on an application made by the

resolution professional or liquidator under sub-section (1) of section 43, by an order:

(a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;

(b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred;

(c) release or discharge (in whole or in part) of any security interest created by the corporate debtor;

(d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct;

direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate;

(e) direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference; and

(f) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference:

Provided that an order under this section shall not -

(a) affect any interest in property which was acquired from a person other than the corporate debtor or any interest derived from such interest and was acquired in good faith and for value;

(b) require a person, who received a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or the resolution professional.

Explanation-I: For the purpose of this section, it is clarified that where a person, who has acquired an interest in property from another person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate debtor gave the preference, -

(a) had sufficient information of the initiation or commencement of insolvency resolution process of the corporate debtor;

(b) is a related party,

it shall be presumed that the interest was acquired, or the benefit was received otherwise than in good faith unless the contrary is shown.

Explanation-II. – A person shall be deemed to have sufficient information or opportunity to avail such information if a public announcement regarding the corporate insolvency resolution process has been made under section 13.

12. **Conclusion**

a. In terms of the section43(2)(a)and(b), it can be said that any transfer of interest or creation of security interest in favour of guarantor so as to put such guarantor in a beneficial position than it would have been in the distribution of assets being made in accordance with section of the Insolvency and Bankruptcy Code, 2016, is a preferential transactions and was registered as charge under section 77 of the Companies Act, 2013 on 11.03.2019.

b. It is very important to refer section 77 of the Companies Act 2013. The scheme of the Act and intention of legislature which mandates that the duty cast upon any company to register the charges within 30 days of its creation and further stipulates that notwithstanding anything contained in any other law for the time being enforced no charge created by the company shall be taken in to account by the liquidator or any other creditor unless it is duly registered under sub section (1) of Sec 77 within 30 days of execution and a

certificate of registration of such charge is given by the Register under subsection 2.

Section 80 of the Companies Act, 2013 also prescribes the date of notice of charge and confirms that any person acquiring such property, assets undertaking, share or interest therein shall be deemed to have notice of that charge from the date of such registration.

Chapter VI of the Companies Act, 2013 deals with registration of charges and the scheme of Act further prescribes the reckoning date as the date of registration. The section 77 and 80 of the Companies Act. 2013 are as follows;

*"Section 77--**Duty to register charges, etc.**—*
(1) It shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of itscreation:

Provided that the Registrar may, on an application by the company, allow such registration to be made within a period of three hundred days of such creation on payment of such additional fees as may be prescribed:

Provided further that if registration is not made within a period of three hundred days of such creation, the company shall seek extension of time in accordance with section87:

Provided also that any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered.

(2) Where a charge is registered with the Registrar under sub-section (1), he shall issue a certificate of registration of such charge in such form and in such manner as may be prescribed to the company and, as the case may be, to the person in whose favour the charge iscreated.

(3) Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the liquidator or any other creditor unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by the Registrar under sub-section(2).

(4) Nothing in sub-section (3) shall prejudice any contract or obligation for the repayment of the money secured by acharge.

*Section 80- **Date of notice of charge.***

Where any charge on any property or assets of a company or any of its undertakings is registered under section 77, any person acquiring such property, assets, undertakings or part thereof or any share or interest therein shall be deemed to have notice of the charge from the date of such registration."

c. It is a settled law that certain charges are void against liquidator or creditor unless registered. This would also include the Resolution Professional/liquidator under IBC, as IBC was promulgated in the year 2016, which is after the enactment of Companies Act 2013. Sec 77 of Companies Act contemplates registration of charge within 30 days and the Registrar may allow the registration with a late fee, it seems from the facts that the present case that though execution of Corporate Guarantee was on 26.03.2018, the registration of charge was done on 11.03.2019.

d. The Hon'ble Supreme Court in its judgement in **Oil and Natural Gas Corporation Ltd Vs. Official Liquidator of Ambica Mills Co. Ltd. and Ors.** reported in AIR2014SC3011 at para 20 have categorically held as follows:

*"20. We have considered the submissions made by the learned Counsel for the parties. In our opinion, the Appellant cannot claim that the order dated 15th April, 1987 created an enforceable charge on the assets of the company in liquidation. We are of the opinion that the learned Counsel for the Respondents are quite right in their submissions that an injunction was issued only to ensure that the company in liquidation does not further encumber or create charges in favour of third parties over the assets of the company in liquidation. In our opinion, neither the interim order dated 15th April, 1987 nor the undertaking given pursuant thereto can be said to be a charge on the assets of the company in liquidation. This Court in the case of **Indian Bank** v. **Official Liquidator, Chemmeens Exports (P) Ltd. and Ors.** MANU/SC/0364/1998 : (1998) 5 SCC 401 whilst considering the provisions contained in Section 125 of the Companies Act has observed as follows:*

6. *Since the preliminary decree is assailed as being void Under Section 125 of the Act, it would be useful to read here the said provision, insofar as it is relevant for our purposes. It reads:*

125. Certain charges to be void against liquidator or creditors unless registered.-(1) Subject to the provisions of this Part, every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration in the manner required by this Act within thirty days after the date of its creation:

Provided that the Registrar may allow the particulars and instrument of copy as aforesaid to be filed within thirty days next following the expiry of the said period of thirty days on payment of such additional fee not exceeding ten times the amount of fee specified in Schedule X as the Registrar may determine, if the company satisfies the Registrar that it had sufficient cause for not filing the particulars and instrument or copy within that period.

(2) Nothing in Sub-section (1) shall prejudice any contract or obligation for the repayment of the money secured by the charge.

(3) When a charge becomes void under this section, the money secured thereby shall immediately become payable.

(4) This section applies to the following charges:

(a) a charge for the purpose of securing any issue of debentures;

(b) a charge on uncalled share capital of the company;

(c) a charge on any immovable property, wherever situate, or any interest therein;

(d) a charge on any book debts of the company;

(e) a charge, not being a pledge, on any moveable property of the company;

(f) a floating charge on the undertaking or any property of the company including stock-in-trade;

(g) a charge on calls made but not paid;

(h) a charge on a ship or any share in a ship;

(i) a charge on goodwill, on a patent or a licence under a patent, on a trade mark, or on a copyright or a licence under a copyright.

(5) to (8) * **

7. On a plain reading of Sub-section (1) it becomes clear that if a company creates a charge of the nature enumerated in Sub-section (4), after 1-4-1914 on its properties, and fails to have the charge

together with instrument, if any, by which the charge is created, registered with the Registrar of the Companies within thirty days, it shall be void against the liquidator and any creditor of the company. This, however, is subject to the provisions of Part V of the Act. The proviso enables the Registrar to relax the period of limitation of thirty days on payment of specified additional fees, on being satisfied that there has been sufficient cause for not filing the particulars and instrument or a copy thereof within the specified period. Sub-sections (2) and (3) deal with repayment of money secured by the charge. Sub-section (2) provides that the provision of Sub-section (1) shall not prejudice the contract or obligation for repayment of money secured by the charge and Sub-section (3) says that when a charge becomes void under that section, the money secured shall become payable immediately. Though as a consequence of non-registration of charge under Part V of the Act, a creditor may not be able to enforce the charge against the properties of the company as a secured creditor in the event of liquidation of the company as the charge becomes void against the liquidator and the creditor, yet he will be entitled to recover the debt due by the company on a par with other unsecured creditors. It is also evident that Section 125 applies to every charge created by the company on or after 1-4-1914. But where the charge is by operation of law or is created by an order or decree of the court, Section 125 has no application."

e. Sec. 125 of Companies Act 1956 is analogous to Sec77 of Companies Act 2014. A similar legal position is envisaged under the Companies Act 2013, wherein it is the bounden duty of the company to register particulars of charge together with instruments within 30 days of creation. However, the Registrar may allow registration to be made within 300 days of creation on payment of additional fee. The non-obstante clause of Sec77(2) prescribes that no charge shall be taken into account by liquidator or creditor unless it is duly registered under sub section (1) and certificate of registration is given by Registrar under sub-section (2).

f. The ratio of consequences of Non-Registration of charge as laid down by the Hon'ble Supreme Court referred above at para 20, I am

reproducing the said relevant portion again even at the cost of repetition.

> *"Though as a consequence of non-registration of charge under Part V of the Act, a creditor may not be able to enforce the charge against the properties of the company as a secured creditor in the event of liquidation of the company as the charge becomes void against the liquidator and the creditor, yet he will be entitled to recover the debt due by the company on a par with other unsecured creditors".*
>
> Emphasis supplied

g. Therefore, it can be said that date of registration of charge is to be considered while admitting the claim of a creditor whether it is a liquidation under Companies Act or Resolution Process/Liquidation under IBC. No charge shall be taken into account by liquidator or creditor unless it is duly registered as laid down by Hon'ble Supreme Court.

h. The Corporate Guarantee was registered on 11.03.2019, which is within the two year look back period as prescribed by Sec.43 of the Code. The only question further remains is whether such creation of security interest amounts to preference being given to him.

1) Section 43(2)(a) essentially provides that preference is deem to be given if there is a transfer of property or an interest thereof of the Corporate Debtor. In the instant case, the Corporate Debtor executed the Corporate Guarantee to secure repayment of holding company/Related party and created a second charge on its assets including moveable and immoveable properties and the oil blocks of Corporate Debtor.
2) From the facts of the present case, it is evident that Mercator Ltd. is the holding company of the Corporate Debtor and holds 76.53 % of shares in Corporate Debtor, holding the value of Rs. 47,93,00,000/-.
3) The issuance of Corporate guarantee in favour of the Respondent no.1/UTI Trust at the relevant time as on 11.03.2019 and creation

of security interest to secure the antecedent debt of the Related party Holding company demonstrate that this transaction was preferential and beneficial to Respondent No.1 than it would have been at the time of distribution of assets under Sec 53 of IBC.

4) This transaction to create further securities to related parties at the relevant time within two years look back period as provided under Sec43 of IBC and when the Corporate Debtor was facing financial crunch and was facing insolvency claims from several operational creditors, squarely falls within the ambit of preferential transaction as prescribed by law under Sec 43 of IBC and cannot be done in the ordinary course of business. As a flow of business in normal parlance no further security can be created with the given financial position of corporate Debtor, when there is no direct lending between the Corporate Debtor and the Applicant, but such a security by way of guarantee deed to secure repayment of Holding Company/Related party is done to favour/prefer the creditor of Holding party. It is pertinent to note the financial position of the Corporate debtor at the time of execution of Corporate guarantee in favour of Respondent No.1. The Financial position is tabled below:

FY/ Particulars	2017-18	2018-19	2019-20
Revenue from Operations	Nil	4.92	2.01
Profit / (Loss) before Tax	(1.11)	(5.23)	(5.64)
Bank Borrowings	93.07	92.54	95.29

5) Such a transaction cannot be said to have been done in the ordinary course of business.

6) It is relevant to note the definition of ordinary course of business as defined under UNICITRAL legislative guide on Insolvency Law at para 165, 166 and 183. Article 165, 166 and 183 is reproduced below;

"165 State define the "ordinary course of business" with varying emphasis on different elements. However, in most jurisdictions a common purpose of the definition is to determine what constitutes routine conduct of business and allow a business to make routine payments and enter into routine contracts, without subjecting those transactions to possible avoidance in insolvency. Those routine payments might include the payment of rent, utilities such as electricity and telephone and possibly also payment for trade supplies.

166 To define what constitutes "ordinary course of business" with respect to a particular debtor, some loss focus on the prior conduct of the debtor and the parties with which it deals, focusing on elements of their relationship such as the method, quantity and regularity of supply and payment. In such a case, any variation from contract, custom or what may be deemed to be regular practice between the parties, for example a payment by abnormal means, will be regarded as being outside the "ordinary course of business". Another approach focuses on the intention of one or both of the parties and asks whether the creditor had knowledge, or ought to have had knowledge, of the debtor's as financial state or whether the debtor are intended to prefer one creditor to other.

7) The Hon'ble Supreme Court in Anuj Jain's judgement at para 20 has laid down the test to conclude a certain transaction squarely falls within the ambit of Sec43 of the code. Para 20 is extracted below:

(i)"As to whether such transfer is for the benefit of a creditor or a surety or a guarantor?

(ii) As to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor?

(iii) As to whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would

have been in the event of distribution of assets being made in accordance with Section 53?

(iv) If such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the period of two years preceding the insolvency commencement date; and if such transfer had been for the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the insolvency commencement date?

(v) As to whether such transfer is not an excluded transaction in terms of sub-section (3) of Section 43?"

8) In view of the above test laid down by Supreme Court, it can be concluded that the conduct of Corporate Debtor in executing a Corporate Guarantee to secure the repayment of antecedent debt of its Holding Company/Related party in 2018 and registration of the charge on 11.03.2020 to favour a particular creditor, at the relevant time within two years look back period as prescribed by Sec 43, further with an intention to prefer a creditor so that he is benefited from such preference at the time of distribution of assets and such a guarantee is not excluded in terms of Sec43(3) of the Code. The Judgement of Supreme Court applies generally to all such transactions of transfer of interest in property or creating a security interest by way of guarantee or second charge over the assets(which includes immoveable and moveable assets and oil blocks) of Corporate Debtor, as was done in the present case. This could not have been done in ordinary course of business.

9) The rights enforcement of Guarantee under the Guarantee document is well defined/protected under the Law of Contract, but the conduct of Corporate Debtor to create security interest to a

Guarantor of a Related Party at a relevant time to favour a particular creditor, the respondent No.1 having knowledge about the financial position and indebtedness of Corporate Debtor and that there is an imminent threat of insolvency, in view that he would substantially stand to be benefitted by this transaction is under challenge.

10) The execution of the Corporate Guarantor in favour of Respondent No. 1 entitles him to receive large percentage of his claim from the Corporate Debtor assets, than other creditors of same rank or class.
11) The Corporate Debtor having availed a term loan of Rs. 95 crores in the year 2016 had created a first charge on all its movable and immoveable assets of oil exploration project and was highly indebted. In such a scenario no prudent person would provide any guarantee or security of the holding in the ordinary course of business. The fact that Bank of Baroda has given NOC to create this second charge cannot change/alter the position of Bank of Baroda, it will only negate the claim of third party creditors of Corporate Debtors.
12) The learned Senior counsel for the Respondent No.1 relied upon the judgement of NCLAT in the matter of Ascot RealtyPvt. Ltd v.Ajay Kumar Agarwal(IRP) in Company Appeal(CT)No. 668/2020, . wherein the Hon'ble NCLAT declared that the corporate guarantee is a financial debt under Sec5(8) of IBC and concurred with the inclusion of Financial creditor in the COC.
13) In view of the above judgement, it is a settled law that Corporate Guarantee constitutes form of financial debt under Sec5(8) of the Code, the only question remains is whether such Corporate Guarantee was created to prefer any particular creditor amounting

to a preferential transactions as envisaged under Sec43 of the Code. In view of the discussions in the aforesaid paras, it can be said that the impugned transaction in question has been executed within the two years look back period i.e., on 11.03.2019 and Corporate Debtor's conduct of securing the antecedent debt of related party/holding company at the crucial time when it was facing insolvency claims from several operational creditors and was facing severe financial crunch given such bad financial position as detailed above and having no revenue from business, therefore it is declared that the Corporate Gurantee as executed on 26.03.2018 and registered as charge on 11.03.2019 is a preferential transaction and the Applicant/IRP has rightly applied for avoidance of such transaction. I am not going into the aspect whether the guarantee remained uninvoked, as the Respondent/UTI failed to exercise the prescribed procedure for invoking such guarantee under the Corporate Guarantee. However, the execution of such Corporate Gurantee to the Creditor of Related party(Holding Company) is set aside for the reasons aforesaid explained.

14) The objection that the IRP cannot file the application under section 43 of the Code is unwarranted and as the IRP is empowered with the management of affairs of the Corporate Debtor under section 17 & 18 of the Code and shall be deemed Resolution Professional, when he is not replaced as an IRP by the COC.

13. In view of the aforesaid findings and powers conferred under Sec44 (1)(a)(c) &(e) of the I & B Code, it is ordered as follows:

a. I.A. 1746 of 2020 is hereby allowed and the Corporate guarantee issued in favour of the Respondent No.1/ UTI Trust in the capacity of Creditor of Related Party/Holding Company is declared to be of preferential nature and consequently creation of second charge on

the assets (Moveable, Immoveable and oil blocks) of Corporate Debtor in favour of Respondent No. 1 is set aside.

b. The Respondent No. 1 is directed to release/ discharge security created by the Corporate Debtor under the Corporate Guarantee dated 26.03.2018/registered charge dated 11.03.2019, in favour of Respondent No.1 to the IRP forthwith immediately.

c. I.A. 1628 of 2020 is dismissed.

Sd/-

Suchitra Kanuparthi
Member (J)

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BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT -5

IA No. 1628 OF 2020
IA No. 1746 OF 2020
IN
CP No. 3434 OF 2019
In the matter of
Halliburton Offshore Services Inc.
….Petitioner
Vs
Mercator Petroleum Ltd.
…..Corporate Debtor

IA No. 1628 OF 2020
Under Section 60(2) of the Insolvency and Bankruptcy Code, 2016
In the matter of

UTI Structured Debt Opportunities Fund – I

…..Applicant

Vs

Ms. Pinkush Jaiswal, IRP

…..Respondent

IA No. 1746 OF 2020

Under Section 60(2) of the Insolvency and Bankruptcy Code, 2016

In the matter of

Ms. Pinkush Jaiswal, Interim Resolution Professional

...Applicant

Versus

UTI Structured Debt Opportunities Fund &Anr.

...Respondents

ORDER

1. The orders were reserved on 27.11.2020 by this bench, the order was pronounced today, the lead judgement was rendered by Shri Chandra Bhan Singh, Member, technical and the **dissenting** judgement is passed by Member Judicial.

2. The members are divided on two legal issue:

a. Whether the issuance of the Corporate guarantee in favour of Respondent No. 1(being a Creditor of Related party/Holding Company) and creation of second charge on all assets including moveable, immoveable assets and oil blocks of the Corporate Debtor in favour of Respondent No. 1 is a preferential transaction under section 43 of IBC.
b. Whether the Respondent No. 1 UTI can be admitted to COC in the capacity of being a financial creditor of the Corporate Debtor.

3. The Registry is directed to place the record before the Hon'ble Acting President for constituting **appropriate** 3rd member for his opinion, so that the order in IA is rendered in accordance with the opinion of majority.

SD/-
CHANDRA BHAN SINGH
Member (Technical)

SD/-
SUCHITRA KANUPARTHI
Member (Judicial)