IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH - I

C.P. (IB) NO. 5/MB/2021

Under Section 100 *r/w* Section 95 of the Insolvency & Bankruptcy Code, 2016 *r/w* Rule 7 (2) of the Insolvency and Bankruptcy (Application to the Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors), Rules, 2019.

In the matter of

Union Bank of India.

...Applicant/Financial Creditor

Versus

Mr. Kapil Wadhawan

…Respondent/Personal Guarantor

Order Pronounced On : 02.04.2024

Coram:

Hon'ble Member (Judicial)	:	Justice V. G. Bisht (Retd.)
Hon'ble Member (Technical)	:	Mr. Prabhat Kumar

Appearances:

For the Petitioner	: Mr. Chetan Kapadia, Senior Advocate
For the Resolution Professional	: Mr. Ashish Kamat, Senior Advocate
For the Respondent	: Mr. J.P. Sen, Senior Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

Brief facts:

1. The present Petition is filed *u/s.* 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC, 2016") *r/w.* Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 by **Union Bank of India.** ("hereinafter referred to as Applicant/Financial Creditor") for the purpose of initiating insolvency process against **Mr. Kapil Wadhawan** ("hereinafter referred to as Personal Guarantor") for recovery of Rs. 39,58,30,48,963.71/- (Rupees Three Thousand Nine Hundred Fifty Eight Crores Thirty Lakhs Forty Eight Thousand Nine Hundred and Sixty Three only). The Date of Default, as specified in Part-III of the present petition, is **23.09.2020**.

2. The Applicant submits that (Andhra Bank and Corporation Bank were amalgamated into UBI with effect from April 1, 2020). Mr. Kapil Wadhawan is the erstwhile Promotor and Non-Executive Director of DHFL and holds 18,00,000 shares in DHFL. Pursuant to various loan documents such as the Consortium Agreement dated July 24, 2010, First Supplemental Consortium Agreement dated June 29, 2011, Second Supplemental Consortium Agreement dated June 26, 2012, Third Supplemental Consortium Agreement dated June 20, 2013, Fourth Supplemental Consortium Agreement dated June 25, 2014 and Fifth Supplemental Consortium Agreement dated June 18, 2015 (collectively "DHFL Facility Agreements"), DHFL had availed various Term Loan Facilities to the tune of INR 4009.51 Crores and Working Capital Facilities to the tune of INR 450 Crores (Term Loan Facilities and Working Capital Facilities are collectively referred to as "Credit Facilities"), from the Creditor.

3. The Personal Guarantor had executed the Joint Deed of Guarantee June 22, 2019, guaranteeing jointly and severally, absolutely, irrevocably and

unconditionally to the consortium of banks (including the Creditor), the performance of DHFL's obligations in/ under the Credit Facilities, repayment as the principal obligor for the Credit Facilities availed by DHFL, and payment on demand without demur and/or contest the principal sum therein pursuant to the Credit Facilities together with contractual interests and charges.

4. The Applicant has relied on Clause 41 of the Joint Deed of Guarantee, the Personal Guarantor has created security by way of a general lien and set-off on all of Personal Guarantor's other accounts and/or securities in favour of the consortium of banks (including the Creditor), for the repayment of loan.

5. By an order dated December 3, 2019, an application (being C.P. (IB)-4258/MB/2019) filed by the Reserve Bank of India ("RBI"), was admitted by this Tribunal and inter alia the corporate insolvency resolution process ("CIRP") was commenced in respect of DHFL. Pursuant to the public announcement by the Administrator, the Creditor had filed claim for an amount of INR 36,45,56,87,597.83 before the Administrator, out of which the claim to the tune of INR 35,17,30,39,020 was admitted by the Administrator.

6. Upon occurrence of Events of Default under the DHFL Facility Agreements, the Applicant Creditor issued invocation cum demand notice dated September 10, 2020 along with supplementary demand notice dated September 21, 2020 to the Personal Guarantor to pay the outstanding amounts aggregating to INR 39,58,30,48,963.71 as on August 31, 2020, in respect of the Credit Facilities ("Default Amount").

7. As the Personal Guarantor failed to pay the amounts within the prescribed time, the debt became due from the Personal Guarantor on September 23, 2020 in terms of the invocation-cum-demand notice dated September 10, 2020 and on October 2, 2020 in terms of the supplementary invocation-cum-demand notice dated September 21, 2020. Pursuant to the above notice, the Creditor issued a demand notice

to the Personal Guarantor under the provisions of the IBC, read with the Personal Guarantor (Application to Adjudicating Authority) Rules on October 7, 2020 ("IBC Demand Notice"), which is not replied to by the Personal Guarantor till date.

8. The present Application was filed by the Applicant 30.08.2021. The Resolution Professional Mr. Devendra Mehta was appointed vide Order dated 12.06.2023 in terms of Section 99(7) of the Code. On 13.07.2023 the Resolution professional filed its report inter alia recommended admission of the Petition.

9. The Petitioner addressed an email dated 24.03.2022 to the Resolution Professional stating that UBI has received cash amounting to Rs.697,80,16,091/- and non-convertible debentures amounting to Rs. 838,90,71,000/- i.e. total aggregating to Rs.1536,70,87,091/- under the Resolution Plan approved by DHFL. The Resolution Professional has taken into consideration the part payment received by UBI and states that the net balance pending is Rs.2421,59,61,872/-.

10. It is useful at this juncture to refer to the report filed by the Resolution Professional Mr. Devendra Mehta. At the outset he sought certain clarifications from the Petitioner which were provided through email.

11. In the meantime, under Section 99(2) of the Code, the RP issued a notice dated June 23, 2023, to the Respondent, inter alia, calling upon the Respondent to prove repayment of the debt claimed as unpaid by the Petitioner, by furnishing evidence of (i) electronic transfer of the unpaid amount from the bank account of the debtor, or (ii) encashment of a cheque issued by the debtor or (iii) a signed acknowledgment by the creditor accepting the receipt of dues.

12. It is submitted that several attempts were made by the RP to serve the Notice upon the Respondent. While the service attempts of the Notice upon the Respondent at his residential address and at Taloja prison (where he was then imprisoned) were unsuccessful, the Notice was successfully served upon the advocates-on-record for the Respondent on

June 23, 2023.

13. The advocates on record for the Personal Guarantor responded to the Notice on June 28, 2023. In the said response, the Personal Guarantor broadly claimed that (i) the Petitioner had no locus to file the Petition, (ii) the consortium of lenders, which included the Petitioner had failed to protect public money -in fact the Resolution Plan has been challenged by the Respondent before the Hon'ble Supreme Court for the reasons that the committee of creditors of DHFL had not considered the Respondent and Mr. Dheeraj Wadhawan's settlement proposal and (iii) the Respondent had challenged the constitutional validity of the personal guarantee regime under the Code.

14. The Resolution Professional has recommended admission of the Petition and has considered the following grounds:

i. Clause 2.5.7 of the Resolution Plan which provides that the creditors of DHFL are entitled to take all steps and recourses available to them under the applicable law to recover the unrecovered financial debt from Third Party Security providers (as defined therein and including the Personal Guarantor).

ii. Paragraph 4(b) of Schedule II (Implementation Schedule) of the Resolution Plan, reiterates that the creditors of DHFL (including the Petitioner) are entitled to take all steps and recourses available to them under the applicable law to recover the unrecovered financial debt from inter alia, the Personal Guarantor

iii. Clause 3.7 of the Assignment Agreement (in relation to the Resolution Plan), which allows the Assignor (as defined therein) to exercise all the rights and remedies under contract or law with respect to Third Party Security (which includes the guarantee provided by the Personal Guarantor).

iv. Clauses 11, 14, 17 and 18 of the Guarantee Deed, which, inter alia, establish that the liability of the Personal Guarantor is continuing,

irrevocable, and joint and several till all the monies are fully repaid to, inter alia, the Petitioner in terms of the Credit Facilities and that the Personal Guarantor's liability does not extinguish on account of DHFL's CIRP.

15. Further, the Resolution Professional submits that no proof of payment of the Balance Amount is submitted by the Respondent.

Submissions advanced by the Respondent/Personal Guarantor:

16. The Respondent has at the outset disputed the service of the Demand Notice under Rule 7, the Respondent was in judicial custody at Taloja i.e. Navi Mumbai and the notice was required to be served upon the Respondent at Taloja Jail. However, it is submitted that the Petition was served at Taloja Jail. Hence, the Respondent disputes the service of demand notice itself.

17. The Respondent submits that the Petitioner has no locus to maintain the Present Petition. At the outset the primary defense raised by the Respondent is that he executed a Joint Deed of Guarantee dated 22nd June 2019 ("Joint Deed of Guarantee") in favor of Catalyst Trusteeship Ltd (the Security Trustee"), being the security trustee appointed by the consortium comprising, at that relevant time, 29 banks ("Consortium"). The Security Trustee had been appointed by the Consortium from time to time by Security Trustee agreements dated 26th June 2012, 20th June 2013, 25th June 2014, and 18th June 2015 ("Security Trustee Agreements") for accepting the securities furnished to secure the loans advanced by the Consortium to Dewan Housing Finance Corporation Ltd., the principal borrower, and for holding the same in trust for the benefit of the Consortium.

18. The Respondent has relied on the following relevant provisions of the most recently executed Security Trustee Agreement dated 18th June 2015 are as under: -

(i) Recital E provides that the principal borrower agreed to settle a trust

and appoint the Security Trustee for the benefit of the Consortium, and further that the security interest for the lending by the Consortium would be created in favour of the Security Trustee, for the benefit of the said Banks.

(ii) Article 1 contains the Definitions and Interpretation of terms for the purpose of the Agreement, of which certain pertinent definitions are reproduced hereunder:

"Banks or said Banks shall mean collectively the Original Banks who are executing the Agreement on the date hereof and the Acceding Banks who may accede to this Agreement at any time hereafter by executing the Deed of Accession, and Bank shall mean any one of them, as the context may require or permit."

"Security Documents shall mean as the context may require or admit, any or all of the following documents, as may be amended from time to time, namely-

(iii)joint and several guarantee from Shri. Kapil Wadhawan and Shri. Dheeraj Wadhawan;"

19. The Joint Deed of Guarantee is sought to be enforced by the Petitioner in breach of the terms thereof read with the Security Trustee Agreements and the Facility Documents, as well as general principles of trust law.

20. The Respondent submits that the obligation as well as the duty of enforcement of the security documents (which includes the Joint Deed of Guarantee) is that of the Security Trustee; in the alternative, and the same may be enforced by the Consortium all together. De hors the Security Trustee, Clause 8.5 of the Agreement provides that the "said Banks", i.e., the Consortium in its entirety, can take any action to enforce the security documents (including the Joint Deed of Guarantee), and not any individual bank. This is line with Clause 43 of the Joint Deed of Guarantee which provides that in the event of default by the guarantor, only the "said Banks" are entitled to proceed against the guarantor. The

term "said Banks" is a defined term in the Security Trustee Agreement, and is required to be read as per its definition wherever it appears in any of the documents which are required to be read together to give true meaning to the transaction.

21. It is submitted that on a joint reading of the Security Trustee Agreements and the Joint Deed of Guarantee, it is respectfully submitted that there are only 2 modes of enforcement available thereunder:

    a. by the Security Trustee, on written instructions of any member of the Consortium, and with the joint consensus of the Consortium; or

    b. by the Consortium in its entirety.

Findings

22. Heard learned counsel for the Applicant and Respondent and perused the record.

23. At the outset we need to deal with issue relating to service of demand notice. The Respondent contends that the demand notice was served at an address in Bandra on Mr. Kartik Wadhawan, the son of the Respondent. The said letter was returned by Mr. Kartik Wadhawan stating that the Respondent is in judicial custody in Taloja Jail. Per contra, the Petitioner contends that the demand notice was served on the Petitioner through jailor at Taloja Jail. Nonetheless, it is apposite to notice Rule 3(g) of Application to Adjudicating Authority Rules for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors Rules, 2019 defines 'serve'. The definition is iterated hereinbelow for reference:

    "(g) serve" means sending any communication by any means, including registered post, speed post, courier or electronic form, which is capable of producing or generating an acknowledgement of receipt of such communication: Provided that where a document cannot be served in any of the modes, it shall be affixed at the outer door or some other conspicuous part of the house or building in which the addressee ordinarily resides or

carries on business or personally works for gain;"

24. At this juncture, it would be relevant to rely on the order of this Tribunal in the matter of ***Union Bank of India vs Dheeraj Wadhawan CP(IB) No. 4 of 2021 dated 01.02.2022***, wherein the issue for consideration before the bench was identical to the issue before us relating to service of demand notice on the personal guarantor. The said order dated 01.02.2022 is confirmed by the Hon'ble NCLAT and the Hon'ble Supreme Court. The relevant paragraphs are iterated hereinbelow for reference:

"23. This Bench further relies upon the judgement of Hon'ble NCLAT in Ravi Ajit Kulkarni vs State Bank of India [(Company Appeal (AT) (Insolvency) No. 316 of 2021], wherein it was held at Para 22 that an Application u/s. 95 shall be filed post issuance of demand notice. The notice of demand was sought to be issued as per Rule 7 in Form-B and the service of notice to be affected as per Rule 3 (1) (g). Para 22, 23 and 24 of the Judgement is reproduced below:

22. Coming back to Section 95(4), the application under Section 95(1) needs to be accompanied with details and documents relating to (a) the debts owed by the Debtor to the Creditor or Creditors submitting the application for insolvency resolution process as on the date of application; and (b) the details and documents relating to failure by the debtor to pay the debt within a period of 14 days of service of notice of demand. The notice of demand as per Rule 7(1) has to be in Form C (supra). The service of notice has to be effected as per Rule 3(1)(g). "Service" has been defined in the Rules as follows: "(g) —serve‖ means sending any communication by any means, including registered post, speed post, courier or electronic means, which is capable of producing or generating an acknowledgement of receipt of such communication: Provided that where a document cannot be served in any of the modes, it shall be affixed at the outer door or some other conspicuous part of the house or building in which the addressee ordinarily resides or carries on business or personally works for gain.

23. Reverting again to Section 95(4), the application under subsection (1)

should be accompanied with details and documents disclosing "relevant evidence of the default or non-repayment of debt".

24. Section 95(5) requires the Creditor to provide copy of the application under sub-section (1) to the Debtor. This section needs to be read with Rule 3(1)(g) reproduced above. It is evident from reading the Section alongwith the Rule that what Creditor has to serve is copy of the application "made under sub-section (1)" to the Debtor. Reading Rule 7(2) with Rule 3 shows that the application filed under sub-section (1) of Section 95 shall be submitted in "Form C" and that the Creditor will serve forthwith "a copy of the application" to the Guarantor and the Corporate Debtor for whom the Guarantor is a Personal Guarantor. Thus, what has to be served is the copy of application which has been "submitted". What is contemplated is that the application in Form C should be "submitted" and then the Creditor should serve forthwith a copy of the application to the Guarantor and the Corporate Debtor for whom the Guarantor is a Personal Guarantor. The procedure thus prescribed will give the Personal Guarantor notice of the application already filed before the Adjudicating Authority. Section 95(5) requires Creditor to provided copy of the application "made under sub-section (1)" to the Debtor. Thus, serving advance copy is not contemplated."

24. This Bench further relies upon the judgement of Hon'ble Supreme Court in the matter of Nirodhi Prakash Ganguly and Ors. Vs. State of Bihar and Or. [2008 (56) BLJR 152], wherein it was held at Para 16 that it is a settled law that when a statute prescribes for a particular mode of service, service must be affected in that manner alone and not to the general law. Para 16 is reproduced below:

"16. It is a settled law that when a statute prescribed for a particular mode of service, service must be effected in that manner alone and not through the provision of general law. This is held by the Supreme Court in various decisions. Let us not refer to those decisions:…..

25. In the light of above decisions of Hon'ble Supreme Court and Hon'ble

NCLAT, this Bench concludes that the Code does not prescribe personal service but in fact contemplates that when there is inability to serve of any notice, it can be overcome by affixing notice on the outer door. In strict interpretation of the Statute, this Bench concludes that the Form B notice served upon the address of the Respondent is a valid service of a demand notice which is a prerequisite for filing a Petition u/s. 95. The Petition u/s 95 was served upon the Respondent in jail. Hence, the objection raised by the Respondent is untenable and set aside."

25. In the aforesaid decision of this Tribunal, it was held that the notice served upon the address of the Respondent was a valid service. In fact, even if we consider that the notice was served on Mr. Kartik Wadhawan, the son of the Respondent, the said service is placed on a higher footing than a mere affixture which is also deemed as valid service under rule 3(g) of Application to Adjudicating Authority Rules for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors Rules, 2019. Accordingly, we have no hesitation to hold that the notice was duly served by the Petitioner on the Personal Guarantor.

26. The primary defence raised by the Respondent is that the guarantee cannot be invoked by the Petitioner herein. The security trustee i.e. Catalyst Trusteeship Limited appointed under the security trustee agreement for the benefit of consortium of banks is vested with the rights of invoking the guarantee in event of default. The Respondent submits that the guarantee herein was invoked by the Financial Creditor/Petitioner alone without the consent of the other members of the consortium.

27. The Respondent in furtherance of his submission has relied on the matter of ***IDBI Bank Limited vs Manoj Gaur (Personal Guarantor of Corporate Debtor Jaypee Infratech Limited) IB-29(PB)/2022*** wherein the issue was in the presence of a security trustee, the personal guarantee could be enforced by the security trustee. The relevant paragraphs are iterated hereinbelow for reference:

"20. Apparently, a trustee is appointed to hold the trust property for the benefit of the beneficiaries of the trust, who have a beneficial interest in the trust property. Where, there are multiple beneficiaries, the trustee is bound to execute the trust for the benefit of all the beneficiaries in accordance with the Trust Deed only after taking consent of other co-lenders. This clause was apparently incorporated with an intent to save the guarantor from being harassed at the hands of unscrupulous individual lender. In the matter in hand, there were other banks which extended loan facilities to corporate debtor apart from the applicant bank although it was having major share in comparison to other co-lenders. The security agreement clearly lays down Lenders shall mean collectively the refinancing lenders and the RTL facility Lenders (Vol-IV, Pg-560). The, word "lender" herein cannot be interpreted to be used as plural, once all the lenders to be taken as collectively. Hence, all the bankers must decide together to revoke the guarantee. In the absence of the same, an individual Beneficiary (such as the Applicant Bank) was under obligation to take consent of co-lenders/beneficiaries.

21. No doubt, the deed of personal Guarantee has been executed by Mr. Manoj Gaur, (the Respondent) in favour of IDBI Trusteeship Services Limited as the Security Trustee, but we are unable to agree with the contention raised by the Applicant Bank that IDBI can act on behalf of all the Lenders without obtaining their formal consent and it can act in place of the Security Trustee. The invocation of Personal Guarantee and the application under Section 95 can be maintained by Security Trustee as per the clause laid down in the deed of Personal Guarantee dated May, 25, 2015. The Applicant Bank neither can itself invoke the Personal Guarantee, accordingly, nor can maintain the application under Section 95 against personal guarantor Mr. Manoj Gaur."

28. Further, the Respondent has placed reliance on the Judgment of the Hon'ble NCLAT in the matter of ***Mr. Rakshit Dhirajlal Doshi vs IDBI Bank Limited and Ors. Company Appeal (AT) (Insolvency) No. 658 of 2022*** 15.11.2022 wherein the Hon'ble Appellate Tribunal was faced with a

similar issue pertaining to invocation of guarantee by a creditor whilst the subsistence of security trustee agreement. The relevant paragraphs are as follows:

> *"27. Thus, it is clear that even though clause 7.2 of the Inter-se Agreement stipulated that even if an individual bank wanted to declare an 'Event of Default', it had to follow the procedure set out in clause 7.2 of the Inter-se Agreement (as well as Clause 4 of the Security Trustee Agreement) and intimates the Security Trustee of its intention to declare default, it has clearly not been done by Respondent IDBI Bank. The Respondent IDBI Bank has not made any averments that it had communicated its intention of declaring an 'Event of Default' to the Security Trustee or the Lead Bank Bank of Baroda. Thus we find that the 'Event of Default' declared by the Respondent IDBI Bank has not been declared in accordance with the Inter-se Agreement entered into between participating banks of the Bank of Baroda consortium and the Security Trustee Agreement, and therefore cannot be called a valid 'Event of Default'.*
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> *28. We note that in the Impugned Order the Adjudicating Authority has relied on clause 7.5 of the Inter-se Agreement to hold that any lender is at liberty to take any decision or action on any other matter and is not required to take any approval from any other lender. We find that clauses 7.1 and 7.2 of the Inter-se Agreement clearly lay down that an 'Event of Default' is covered under the actions for which the provisions are made in the Inter-se Agreement and the modality of taking such action is clearly set out in clause 7.2. Even for the enforcement of securities, clause 7.3 of the Inter-se Agreement clearly provides that the enforcement of any or all of the securities, shall be done by the Security Trustee as per provisions of the Security Trustee Agreement on behalf of all the lenders and as instructed by the majority lenders. Therefore, clause 7.5 has to be read conjointly with clauses 7.1, 7.2 and 7.3 of the Inter-se Agreement. If that is done, we find that the action taken by the IDBI Bank in declaring 'Event of Default' is not in*

consonance with the provisions of Inter-se Agreement. We, therefore, conclude that the Adjudicating Authority has committed an error by placing reliance on a faulty interpretation and understanding of clause 7.5 of the Inter-se Agreement.

29. From the above discussion, it is clear that the Respondent IDBI Bank was not entitled to act independently in declaring an 'Event of Default' in respect of its individual loan and recalling the loan advanced by it to the borrower Doshion and seeking repayment of the said loan from the guarantor FIPL. We are, therefore, of the view that the locus standi of the Respondent IDBI Bank in taking unilateral action for declaring an 'Event of Default' in the repayment of the loan advanced by it is not established as the IDBI Bank being a participating bank of the Bank of Baroda consortium was bound to act under the clauses/provisions of the Inter-se Agreement and the Security Trustee Agreement."

29. Per contra, the Applicant has relied on the Judgment of the Hon'ble NCLAT in the matter of ***Amitabh Kumar Jha vs Bank of India and Anr. Company Appeal (AT) (Insolvency) No. 1392 of 2019*** dated 22.05.2020 the issue before the Hon'ble bench was can an individual creditor maintain an action against the Corporate Debtor while there was an inter-creditor agreement entered into between the lenders inter se. The relevant paragraphs are reproduced hereinbelow for reference:

"…9. It is also not in controversy that the financial debt in respect whereof the 'Financial Creditor' herein sought triggering of 'Corporate Insolvency Resolution Process' is payable both in law as also in fact. The 'Corporate Debtor' is merely banking upon the Financing Documents including CLA, STA and ICA to assail the impugned order notwithstanding the fact that neither the claim is barred by law nor do such Financing Documents clothe the 'Corporate Debtor' with a right to disentitle the 'Financial Creditor' from enforcing its claim, in its individual capacity, despite being a member of the consortium of lenders. It is queer that the 'Corporate Debtor' is making a vain bid to

get out of the rigours of its liability in terms of loan documents sanctioning the loan and giving rise to contractual liability as against it on the basis of an 'Inter-Creditor Agreement', to which admittedly it is not a party. It would be a travesty of justice to raise a plea that since the Creditors has an inter se agreement in regard to enforcement of the liability of the debtor qua the Creditor, an individual Creditor should not be permitted to enforce its right arising under a contract in regard to discharge of liability for loan advanced by the Creditor which is otherwise payable in law and not barred by any legal framework including the law of limitation. What transpires among the Creditors in regard to 'Inter-Creditor Agreement' is a matter exclusively inter se the Creditors. The debtor has no locus to meddle with the internal arrangement and affairs of the Creditors in regard to their joint or individual interests, more so when in the instant case the Intervenors who are the consortium of lenders have supported the action taken by the 'Bank of India' in triggering 'Corporate Insolvency Resolution Process'. None of the members of the consortium of lenders has taken exception to enforcement of individual rights by the 'Bank of India' in regard to the financial debt payable to it and to the extent of its interest.

10. The statutory right across the ambit of Section 7 of the 'I&B Code' cannot be curtailed or made subservient to any 'Inter-Creditor Agreement'. The contractual rights, unless recognised by the statute as a permissible mode, would not override the statutory mechanism and right created and enforceable under statute."

30. Lastly, the Applicant has relied on the order of NCLT Bangalore Bench in the matter of ***KKR India Asset Finance Limited vs Mantri Developers Private Limited CP(IB) No. 103/BB/2021.*** The relevant paragraph is as follows:

19. Admittedly, Annexure-10 the Deed of Corporate Guarantee was executed by the Respondent/Corporate Debtor in favour of M/s. IL&FS Trust Company Limited, now known as M/s. Vistra ITC (India) Limited. It is also clear from the said Deed of Corporate

Guarantee that M/s. IL&FS Trust Company Limited has been appointed as the Security Trustee to act for and on behalf of the Lender under the Security Trustee Agreement. The conjoint reading of the Loan Agreement dated 07.05.2016, Deed of Corporate Guarantee dated 07.05.2016 and the Security Trustee Agreement also dated 07.05.2016 clearly shows that the Petitioner is empowered and entitled to file the instant C.P., independently or jointly with the Security Trustee, in whose favour the Respondent/Corporate Debtor executed the Deed of Corporate Guarantee. Further, since the Guarantee was executed by the Corporate Debtor for securing loan facility by SDPL, the Petitioner is the Financial Creditor to the Respondent. Hence, this issue held against the Respondent.

20. As rightly contended by the learned Senior Counsel appearing for the Petitioner the liability of the Guarantor is co-extensive with that of the Principal Borrower and the Financial Creditor can initiate CIRP against the Guarantor even without initiating CIRP against the Principal Borrower. None of the decisions relied on by the Respondent expressed any different view. Hence, this issue is held against the Respondent."

31. The relevant clauses of the latest security trustee agreement are as follow:

The Security Trustee Agreement contains the Definitions and Interpretation of terms for the purpose of the Agreement, which reads as follows :

Article 1

"*Banks or said Banks shall mean collectively the Original Banks who are executing the Agreement on the date hereof and the Acceding Banks who may accede to this Agreement at any time hereafter by executing the Deed of Accession, and Bank shall mean any one of them, as the context may require or permit*."

Article 2.2.1.

"The Security Trustee hereby agrees, that it shall, for the benefit of the said Banks: (c) enforce the security in accordance with the provisions of the Security Documents and receive and distribute the proceeds thereof in accordance with any sharing agreement amongst the said Banks"

Article 2.2.2:

"*Notwithstanding anything contained in these presents, it is clarified that the Security Trustee shall, before initiating any action for enforcing security or granting any consent or waiver under this Agreement or any other Security Document, seek written instructions from the Lead Bank or the said Bank seeking to enforce its obligations under the Finance Documents. Only upon receipt of such written instructions, shall the Security Trustee exercise such rights and perform such duties and obligations under this Agreement, the other Security Documents and each of the documents, agreements, instruments and certificates referred to in Article 2.2.1 above*."

Article 2.3:

"(a) The Security Trustee hereby declares that it shall hold in trust for the benefit of the said Banks, their respective successors, assigns, transferees and novates executing a Deed of Accession pursuant to Article 3.5 hereof substantially in the form set out in Schedule IV hereto:

i. *The Security Interest created by the Borrower under the Security Documents in its favour, pursuant to this Agreement and the Facility Agreement and other relevant documents, if any, delivered pursuant to such Security Interest; and*

ii. *Monies or instruments representing monies received on account of or upon realization or enforcement of such Security Interest"*

Article 3.1:

Duties: "The Security Trustee shall, acting on behalf of and for the

benefit of the said Banks:

…(f) take all appropriate actions as it deems fit to enforce and foreclose the Security Interest under the Security Documents and recover and hold upon trust the monies thereon for the said Banks and disburse/distribute proceeds of any Security Interest created in its favour in accordance with provisions the Inter Se Agreement or any other agreement;

Article 3.2:

Notice of Certain Events: "(a) In the event that the Security Trustee shall have knowledge of occurrence of any Event of Default it shall give notice thereof to all the said Banks. The Security Trustee shall take or refrain from taking such action, not inconsistent with the provisions of the Inter Se Agreement, with respect thereto as any of the said Banks shall direct by written instructions, with simultaneous notice to the other Bank."

Article 3.3:

Action upon Instructions: "(a) Upon the written instructions of the Lead Bank/the said Banks with notice to the Borrower of such instruction consistent with the provisions of the Inter Se Agreement and the Letters of Sanction, the Security Trustee shall take or refrain from taking such action or actions in relation to the security held by it pursuant to this Agreement, as may be reasonably be specified in such instructions;

(b) Provided that if there are conflicting or ambiguous instructions issued by the Lead Bank the said Banks, the Security Trustee shall promptly endeavour to obtain consensus of or clarity from all the said Banks on such instructions, before acting upon the same."

Article 3.4:

Enforcement of Security "(a) The security created under each Security Documents may be enforced on the written instructions received from

the Lead Bank/said Banks in accordance with the provisions of the Inter Se Agreement. (b) Under such circumstances, the Security Trustee shall immediately, in writing, along with a copy of the written instructions received from the Lead Bank/said Banks, inform all the other said Banks of the course of action proposed to be initiated by the Security Trustee towards enforcement of security."

Article 4.7:

Action of Security Trustee "The Security Trustee shall undertake an enforcement action that it considers to be in the best interests of all the said Banks, acting reasonably. If it should decline to act pursuant to this Section, the Security Trustee shall inform the enforcing party under the Inter Se Agreement and each other said Bank of its decision and the reasons for doing so."

Article 8.5 :

"Performance by the said banks "Any duty or obligation of the Security Trustee hereunder or under any Security Document or other agreement, document or instrument contemplated herein or therein may be performed by the said Banks and any such performance shall not be construed as a revocation of the trust or agency created hereby."

32. The above clauses contained in the Security Trustee Agreement demonstrate that security trustee, in addition to the banks, had power to invoke the guarantee, and in case of direction for such invocation from the lead bank or said banks, the security trustee was under obligation to notify the other banks about the direction for such invocation and take the action accordingly. It is not in dispute that the said banks or lead bank had the power to invoke the guarantee dehors the security trustee also. The issue in the present Petition is whether the term banks include a singular member also or does it connote all the banks.

33. We have perused the judgments relied on by both sides. It is ex-facie apparent that a common theme running through the Judgements relied

on by both sides is that the ratio was arrived at after piercing through the clauses of the relevant agreements entered into between the parties therein and not basis principles of trite law. Therefore, it is important to examine the clauses of Deed of Guarantee and the Security Trustee Agreement. The relevant clauses for consideration are reiterated hereinbelow for the sake of convenience:

Recital to clause 29

"All of UNION BANK, ALB, BOM, OBC, SYB, BOI, SIBL, IOB, PNB, CB, BOB, PSD, CORPB, CBI, IB, UNITED, IDBI, AXIS, SBI, YBL, FBL, AB, HDFCB, ICICI, KMB, KBL, DCB, SCB and UCO are hereinafter collectively referred to as "the said Banks" or "the Union Bank Consortium" or "the Consortium" which expressions shall, unless they be repugnant to the subject, meaning or context thereof, be deemed to mean and include each of them or any one or more of them and each of their respective successors and assigns, as the context may require or admit

Clause 43. *Each of the Guarantors agree and confirm that in the event of the occurrence of an event of default by the Borrower as specified under the Facility Agreements, the said Banks shall be entitled to proceed against the Guarantors even without exhausting the remedies available with the said Banks against the Borrower. The liability of the Guarantors shall be immediate. In the event any of the Guarantors refuses to comply with the demand made by the said Banks, despite having sufficient means to make payment of the dues, such Guarantor would also be treated as a wilful defaulter.*

Clause 10. *In order to give effect to the guarantee herein contained, the said banks shall be entitled to act as if the guarantors were principle debtors to the said banks for all payments guaranteed by them as aforesaid to the said Banks.*

34. We note that clause 8.5 of the Security Trustee Agreement provides as under:

Article 8.5 *Performance by the said banks "Any duty or obligation of the Security Trustee hereunder or under any Security Document or other agreement, document or instrument contemplated herein or therein may be performed by the said Banks and any such performance shall not be construed as a revocation of the trust or agency created hereby."*

35. The definition of 'said banks' contained in the recital of the Deed of Guarantee is an inclusive definition and later part of this definition make it abundantly clear that that the term 'said banks' mean to include each of bank of the consortium. Accordingly, combined reading of clause 10 and 43 of the Deed of Guarantee read with clause 8.5 of the Security Trustee Agreement makes it clear that the 'said banks' which includes *each of them or any one or more of them, an* independent action can be maintained by the bank against the guarantor. In our considered view the word 'banks' has to be understood to include the bank also. Secondly, clause 10 explicitly mentions that in order to give effect to the guarantee, the said bank could proceed against the guarantor as if he was the principle debtor and therefore the necessary corollary that follows is that the individual banks were vested with power to proceed against the guarantor independently.

36. It is noteworthy that the description of the security trustee agreement dated 18.06.2015 provides that the word banks referred to in the agreement shall mean to include each of them or any one or more of them. The relevant provisions are iterated hereinbelow for reference:

THE BANKS as set out in PART A of SCHEDULE I of this Agreement (hereinafter collectively referred to as the "the Original Banks" which expression shall, unless it be repugnant to the subject, meaning or context thereof, be deemed to mean and include each of them or any one or more of them and their respective successors, assigns, transferees and novatees, of the SECOND PART;

Article I Definitions and Interpretation

"Banks" or "said Banks" shall mean collectively the Original Banks who are executing this Agreement on the date hereof and the Acceding Banks who may accede to this Agreement at any time hereafter by executing the Deed of Accession, and Bank shall mean any one of them, as the context may require or permit.

37. Accordingly, a conjoint reading of the aforesaid clauses of the security trustee agreement and deed of guarantee clearly provides that an individual lender can maintain an action against the guarantor and therefore the Petition is maintainable. The Judgement relied on by the Respondent of the Hon'ble NCLAT in *Mr. Rakshit Dhirajlal Doshi (supra)* cannot be applicable to present case as in the present case the banks, which includes individual bank also as concluded in the earlier paragraphs, have the power to invoke the guarantee dehors security trustee in terms of clause 10 read with clause 43 of the Deed of Guarantee. Further, the said decision of the Hon'ble Appellate Tribunal is distinguishable as in that case the issue was whether the Respondent Creditor could have declared an 'Event of Default' in accordance with inter se agreement of the creditors. However, in the present matter the Petitioner under clause 43 of Deed of Guarantee clause provides that the said banks shall be entitled to proceed against the guarantor without exhausting remedies available against the principle borrower. We have already clarified in the preceding paragraph that banks in the present case also mean to include each of the bank. Accordingly, the event of default could be declared by an individual bank in the present case.

38. Considering the above facts and circumstances and upon perusal of the documents on record, the C.P. (IB)/5/MB/2021 filed under Section 95 of the IBC, 2016 is hereby **Admitted** and the Insolvency Resolution Process stands initiated against Mr. Kapil Wadhawan *viz.* the Respondent herein. We hereby direct as hereinafter:

I. Initiate Insolvency Resolution Process against the Respondent/Personal Guarantor and moratorium in relation to all the debts is declared, from today *i.e.* date of admission of the application, and shall cease to have

effect at the end of the period of 180 days, or this Tribunal passes order on the repayment plan under Section 114 whichever is earlier as provided under Sec 101 of IBC, 2016. During the moratorium period,

a. Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed, and

b. The creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt; and

c. The debtor shall not transfer, alienate, encumber, or dispose of any of his assets or his legal rights or beneficial interest therein;

d. The provisions of this section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

II. The Resolution Professional *viz.* **Mr. Devendra Mehta,** is directed to cause a public notice published on behalf of the Adjudicating Authority within 7 days of passing this Order on the website of the NCLT Mumbai Bench, inviting claims from all Creditors, within 21 days of such issue. The notice under Sub Section (1) of Section 102(2) shall include: -

a. details of the order admitting the application;

b. particulars of the resolution professional with whom the claims are to be registered; and

c. the last date for submission of claims.

III. The publication of notice shall be made in two newspapers, one in English and other in Vernacular, which have wide circulation in the State where the Corporate Debtor and Personal Guarantor resides. The Resolution Professional shall furnish two spare copies of the notice to the Registry for the record.

IV. The Resolution Professional, in exercise of the powers conferred under Section 104, shall prepare a list of creditors on the basis of:

a. the information disclosed in the application filed by the debtor under Sections 94 or 95, as the case may be, and

b. claims received by the Resolution Professional under Section 102 within 30 days from the date of the notice. The debtor shall prepare

a repayment plan under Section 105, in consultation with the Resolution Professional, containing a proposal to the Creditors for restructuring of his debts or affairs.

The repayment plan may authorize or require the Resolution Professional to:

a. carry on the debtor, business or trade on his behalf or in his name: or

b. realise the assets of the debtor; or

c. administers or dispose of any funds of the debtor.

The repayment plan shall include the following, namely;

a. justification for preparation of such repayment plan and reasons based on which the creditors may agree upon the plan;

b. provision for payment of fee to the Resolution Professional;

c. such other matters as may be specified.

V. The Resolution Professional shall submit the repayment plan along with his report on the plan to this Authority within a period of **21 days** from the last date of submission of claims, as provided under Section 106.

VI. In case the Resolution Professional recommends that a meeting of the creditors is not required to be called, he shall record the reasons thereof. If the Resolution Professional is of the opinion that a meeting of the creditors should be summoned, he shall specify the details as provided under Section 106(3) of IBC, 2016. The date of meeting should not be less than 14 days or more than 28 days from the date of submission of the Report under sub- section (1) of Section 106 of IBC, 2016, for which at least 14 days' notice to the creditors (as per the list prepared) shall be issued by all modes. Such notice must contain the details as provided under the provisions of Section 107 of IBC, 2016.

VII. The meeting of the creditors shall be conducted in accordance with Sections 108, 109, 110 & 111 of IBC, 2016. The Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan with all details as provided under Section 112 of IBC,

2016 and submit the same to this Tribunal, copies of which shall be provided to the Debtor and the Creditors. It is made clear that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of IBC, 2016.

VIII. The Resolution Professional shall submit his periodic reports before this Tribunal, every 30 days.

IX. The Applicant is directed to deposit **INR 3,00,000/-** (Indian Rupees Three lakhs) to the bank account of the Resolution Professional within **one week**, towards his fees. This shall be subjected to the rules and regulations under the provisions of the Insolvency and Bankruptcy Code, 2016.

X. The Registry is directed to communicate a copy of order, report and application within **seven** working days and upload the same on the website immediately after the pronouncement of order.

39. IA No. 1561 of 2022 was filed by the Petitioner herein seeking interim relief of restraining the Respondent Mr. Kapil Wadhawan, from transferring, encumbering, alienating or disposing of his assets. At this juncture, the said Application is rendered infructuous in view of admission of Company Petition No. 5 of 2021.

Sd/-	**Sd/-**
PRABHAT KUMAR	**JUSTICE V. G. BISHT**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

02.04.2024
Priyal