NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS.) No. 8 of 2023

(Filed under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Against the Order dated 21.07.2022, passed by the `Adjudicating Authority', `National Company Law Tribunal', Bench-I, Hyderabad in CP (IB) No. 335 / 95 / HDB / 2020)

In the matter of :

Mahendra Kumar Agarwal
Personal Guarantor of
Gati Infrastructure Bhamsey Power Pvt. Ltd.,
Flat No. 2A, 8-2-415/1,
4, Banjara Hills,
Hyderabad, Telangana – 500034 **…. Appellant/1st Respondent/ Personal Guarantor**

v.

PTC India Financial Services Ltd.,
Through its Authorised Representative
Registered Office at:
7th Floor, Telephone Exchange Building
8, Bhikaji Cama Palace,
New Delhi - 110066 **…..1st Respondent / Financial Creditor / Petitioner**

Devvart Rana
Resolution Professional
R/o. Apt No. 684, Sector-A,
Block B & C, Vasant Kunj
New Delhi - 110070 **…..2nd Respondent / Resolution Professional**

Present:

For Appellant : Mr. Sandeep Bajaj, Advocate

For Respondent No. 1 / Financial Creditor : Ms. Pragya Chauhan, Advocate

For Respondent No.2 / Resolution Professional : Mr. Devvart Rana (in person)

J U D G M E N T
(Physical Mode)

Justice M. Venugopal, Member (Judicial):

Introduction:

Comp. App (AT) (CH) (INS.) No. 8 / 2023:

The `Appellant' / `1st Respondent' / `Personal Guarantor' of `M/s. Gati Infrastructure Bhamsey Power Private Limited', has preferred the instant Comp. App (AT) (CH) (INS.) 8 / 2023, on being `Aggrieved', in regard to the `impugned order', dated 21.07.2022, passed by the `Adjudicating Authority' (`National Company Law Tribunal', Hyderabad Bench -I) in CP (IB) No. 335 / 95 / HDB / 2020.

2. The `Adjudicating Authority' / `Tribunal', while passing the `impugned order', in CP (IB) No. 335 / 95 / HDB / 2020 (Filed by the 1st Respondent / Financial Creditor / Petitioner), at Paragraph Nos. 16 to 22, had observed the following:

16. ``A plain reading of Section 179 supra, reveals that Section 179 itself is "subject to Section 60" and DRT is the Adjudicating Authority for insolvency resolution for all other categories of individuals and partnership firms.

17. That apart Hon'ble Supreme Court of India in re: Lalit Kumar Jain vs Union of India & Ors has categorically held as under:- "There is sufficient indication in the Code- by Section 2(e), Section 5(22), Section 60 and Section 179 indicating that personal guarantors, though forming part of the larger grouping of individuals, were to be, in view of their intrinsic connection with corporate debtors, dealt with differently, through the same adjudicatory process and by the same forum (though not insolvency provisions) as such corporate debtors".

18. In so far as the Ld. Counsel for the Personal Guarantor that by virtue of Sub-Section (4) of Section 60 of IBC, 2016, the jurisdiction of the NCLT in respect of matters relating to the Personal Guarantors has been ousted, the same nothing but farfetched. Sub-Section (4) of Section 60 neither expressly nor impliedly taken away the Jurisdiction of NCLT, for the purpose of insolvency resolution and liquidation of Corporate Persons including Corporate Debtors and Personal Guarantors as provided under sub-section (1) of Section 60. What sub-section (4) of Section 60 of IBC states is that the NCLT shall be vested with all the powers of DRT as contemplated in part-III of the Code for the purpose of sub-section (2).

19. Ld. Counsel for Personal Guarantor relied on Ebix Singapore Pvt Ltd Vs CoC of Educomp Solutions Ltd & Anr. While fully agreeing with the dictum laid down in the above ruling by the Hon'ble Supreme Court of India, approving the ruling in Laxmi Pat Surana Vs Union Bank of India 2020 SCC Online SC 1187, Hon'ble Supreme Court, held that "That importing principles of any other law or statue like the Contract Act into IBC regime would introduce necessary complexity into the working of the IBC and may lead to protracted litigation on considerations that are alien to IBC". "Remedies that are specific to the Contract Act cannot be applied, dehors the overriding principles of the IBC".

20. We may state herein that for the purpose of deciding the jurisdiction of this Tribunal in the case on hand, it is not required for us to place any reliance on the provisions of Indian Contract Act nor the parties have placed any reliance on this. We therefore hold that the above ruling on facts is not applicable to the case on hand.

21. In so far as contention that sub-section (2) of Rule 7 of (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019) has not been complied by the Financial Creditor, we are unable to accept the said contention as the record of the proceedings would go to show that the personal guarantor having entered appearance have filed counter and also additional counter to the Company Petition. Needles to say that filing of counter is not possible without the copy of the Company petition served on the personal guarantor.

22. Thus, we do not find any force in the argument of the Ld. Counsel for the personal guarantor that sub-section (4) of Section 60, has divested NCLT its Jurisdiction in respect of insolvency resolution and liquidation of Corporate Persons including Corporate Debtors and Personal Guarantors as provided under sub-section (1) of Section 60. Therefore, in the light of the discussion as above, we hereby reject the contention of the Ld. Counsel for the Personal Guarantor that this Tribunal has no jurisdiction to try this Company Petition. The Point is answered accordingly.''

and admitted the `Petition', under Section 95 of the I & B Code, 2016, and appointed `2nd Respondent, as a `Resolution Professional', etc.

Appellant 's Submissions:

3. Assailing the correctness, validity, propriety and legality of the `impugned order', dated 21.07.2022, passed by the `Adjudicating Authority' (`National Company Law Tribunal', Bench – I, Hyderabad) in CP (IB) No. 335 / 95 / HDB / 2020 (Filed by the 1st Respondent / Financial Creditor / Petitioner, under Section 95 of the I & B Code, 2016, read with Rule 7 (2) of I & B (`Application to Adjudicating Authority for Insolvency Process for Personal Guarantors to Corporate Debtors') Rules, 2019, the Learned Counsel for the Appellant / 1st Respondent / Personal Guarantor, submits that the `Appellant', is a `Personal Guarantor' of

`GATI Infrastructure Bhasmey Power Pvt. Ltd.' (referred to as `Principal Borrower'), and that the `impugned order', was passed by the `Adjudicating Authority' / `Tribunal', without any jurisdiction and in an erroneous manner.

4. The Learned Counsel for the Appellant, contends that the `impugned order, passed by the `Adjudicating Authority' / `Tribunal', dated 21.07.2022 in CP (IB) No. 335 / 95 / HDB / 2020, had failed to take into consideration of the fact that there was no pending `Corporate Insolvency Resolution Process' or `Liquidation Proceedings', against the `Principal Borrower'.

5. According to the Learned Counsel for the Appellant, the `Adjudicating Authority' / `Tribunal', had failed to correctly interpret Section 60 and 179 of the I & B Code, 2016, in the light of the `Legislative Intent', behind introducing the said provisions, pertaining to the `Personal Guarantors', to `Corporate Debtor'.

6. According to the Appellant, the `Adjudicating Authority' / `Tribunal', had failed to consider Rule 3(1)(a) of the Insolvency and Bankruptcy (`Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors') Rules, 2019, wherein it was held that the `Adjudicating Authority', in respect of `Personal Guarantors' to `Corporate Debtor', shall be both the `National

Company Law Tribunal', and the `Debt Recovery Tribunal', in different scenarios, as mentioned therein.

7. The Learned Counsel for the Appellant, comes out with a plea that in case of `Personal Guarantor' of a `Corporate Debtor', the `Adjudicating Authority' / `Tribunal', shall ordinarily be the `Debt Recovery Tribunal', under Section 179 of the I & B Code, 2016. But, in respect of the `Corporate Insolvency Resolution Process' or `Liquidation Process', against the `Personal Guarantor', which was initiated, the jurisdiction, shall lie with the `Adjudicating Authority' / `Tribunal'.

8. The Learned Counsel for the Appellant, points out that all `Applications', under Part 3 of the I & B Code, 2016, are required to be filed before the `Adjudicating Authority' / `Tribunal', as defined under Section 79 (1) of the `Code', Viz. `Debt Recovery Tribunal'. However, Section 60 of the Code under Part II, provides for an `Exception' and specifies that an `Adjudicating Authority' for the `Personal Guarantor', shall be the `National Company Law Tribunal', subject to a condition, as provided under Section 60 (2) of the `Code'.

9. The Learned Counsel for the Appellant, takes a stand that Section 60 (1) of the Code locates the `Tribunal', which has territorial jurisdiction in `Insolvency Resolution Process', against the `Corporate Debtor'. Also Section 60 (2) of the Code, mentions that an `Application', relating to

`Interim Resolution Professional' of a `Personal Guarantor', shall be filed before the `National Company Law Tribunal', where the `Corporate Insolvency Resolution Process' or `Liquidation Proceeding' of a `Corporate Debtor', is pending. Thereafter, for the purpose of Section 60(2), Section 60(4) vest the `National Company Law Tribunal', with the powers of `Debt Recovery Tribunal'.

10. The Learned Counsel for the Appellant, adverts to the `Judgment' of the Hon'ble Supreme Court of India, dated 14.08.2018, in State Bank of India v. Mr. V. Ramakrishnan and Anr. (vide Civil Appeal No. 3595 of 2018 with No. 4553 of 2018), wherein at Paragraphs 22 to 24, it is observed as under:

> *22. ``We are afraid that such arguments have to be turned down on a careful reading of the Sections relied upon. Section 60 of the Code, in sub-section (1) thereof, refers to insolvency resolution and liquidation for both corporate debtors and personal guarantors, the Adjudicating Authority for which shall be the National Company Law Tribunal, having territorial jurisdiction over the place where the registered office of the corporate person is located. This sub-section is only important in that it locates the Tribunal which has territorial jurisdiction in insolvency resolution processes against corporate debtors. So far as personal guarantors are concerned, we have seen that Part III has not been brought into force, and neither has Section 243, which repeals the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. The net result of this is that so far as individual personal guarantors are concerned, they will continue to be proceeded against under the aforesaid two Insolvency Acts and not under the Code. Indeed, by a Press Release dated 28.08.2017, the Government of India, through the Ministry of Finance, cautioned that Section 243 of the Code, which provides for the repeal of said enactments, has not been notified till date, and further, that the provisions relating to insolvency resolution and bankruptcy for individuals and partnerships as contained in Part III of the Code are yet to be notified. Hence,*

it was advised that stakeholders who intend to pursue their insolvency cases may approach the appropriate authority/court under the existing enactments, instead of approaching the Debt Recovery Tribunals.

23. It is for this reason that sub-section (2) of Section 60 speaks of an application relating to the "bankruptcy" of a personal guarantor of a corporate debtor and states that any such bankruptcy proceedings shall be filed only before the National Company Law Tribunal. The argument of the learned counsel on behalf of the Respondents that "bankruptcy" would include SARFAESI proceedings must be turned down as "bankruptcy" has reference only to the two Insolvency Acts referred to above. Thus, SARFAESI proceedings against the guarantor can continue under the SARFAESI Act. Similarly, sub-section (3) speaks of a bankruptcy proceeding of a personal guarantor of the corporate debtor pending in any Court or Tribunal, which shall stand transferred to the Adjudicating Authority dealing with the insolvency resolution process or liquidation proceedings of such corporate debtor. An "Adjudicating Authority", defined under Section 5(1) of the Code, means the National Company Law Tribunal constituted under the Companies Act, 2013.

24. The scheme of Section 60(2) and (3) is thus clear – the moment there is a proceeding against the corporate debtor pending under the 2016 Code, any bankruptcy proceeding against the individual personal guarantor will, if already initiated before the proceeding against the corporate debtor, be transferred to the National Company Law Tribunal or, if initiated after such proceedings had been commenced against the corporate debtor, be filed only in the National Company Law Tribunal. However, the Tribunal is to decide such proceedings only in accordance with the Presidency Towns Insolvency Act, 1909 or the Provincial Insolvency Act, 1920, as the case may be. It is clear that sub-section (4), which states that the Tribunal shall be vested with all the powers of the Debt Recovery Tribunal, as contemplated under Part III of this Code, for the purposes of sub-section (2), would not take effect, as the Debt Recovery Tribunal has not yet been empowered to hear bankruptcy proceedings against individuals under Section 179 of the Code, as the said Section has not yet been brought into force. Also, we have seen that Section 249, dealing with the consequential amendment of the Recovery of Debts Act to empower Debt Recovery Tribunals to try such proceedings, has also not been brought into force. It is thus clear that Section 2(e), which was brought into force on 23.11.2017 would, when it refers to the application of the Code to a personal guarantor of a corporate debtor, apply only for the limited purpose contained in Section 60(2) and (3), as stated hereinabove. This is

what is meant by strengthening the Corporate Insolvency Resolution Process in the Statement of Objects of the Amendment Act, 2018.''

11. The Learned Counsel for the Appellant, refers to Rule 10 of the Personal Guarantors Rules, which provides for the manner in which, an `Application', under Section 95 of the Code, is required to be filed, which reads as under:

10. `Filing of application and documents.— (1) Till such time, rules of procedure for conduct of proceedings under the Code are notified, the applications under rules 6 and 7 shall be filed and dealt with by the Adjudicating Authority in accordance with —

(a) rules 20, 21, 22, 23, 24 and 26 of Part III of the National Company Law Tribunal Rules, 2016 made under section 469 of the Companies Act, 2013 (18 of 2013); or

(b) rule 3 of the Debt Recovery Tribunal (Procedure) Rules, 1993 made under section 36 of the Recovery of Debts and Bankruptcy Act, 1993 (51 of 1993) and regulations 3, 4, 5 and 11 of the Debt Recovery Tribunal Regulations, 2015 made under section 22 of the Recovery of Debts and Bankruptcy Act, 1993, as the case may be.

(2) The application and accompanying documents shall be filed in electronic form, as and when such facility is made available and as directed by the Adjudicating Authority:

Provided that till such facility is made available, the applicant may submit accompanying documents, and wherever they are bulky, in electronic form, in scanned, legible portable document format in a data storage device such as compact disc or a USB flash drive acceptable to the Adjudicating Authority.''

12. The Learned Counsel for the Appellant, proceeds to point out to sustain an `Application', under Section 95 of the `Code', before the `Adjudicating Authority' / `Tribunal', is that the `Corporate Insolvency Resolution Process' or `Liquidation' proceeding' of a `Corporate Debtor',

must be pending before it, and the phrase `Pending', may be well appreciated in the teeth of undermentioned provisions, which runs as under:

> *(i) Section 5 (12) defines Insolvency Commencement Date as the date on which an Application U/s 7, 9 & 10 is admitted by an adjudicating authority.*
>
> *(ii) Section 5 (14) states that the insolvency resolution process period means the period of 180 days beginning from the date abovementioned.*
>
> *(iii) Section 7 (6) also states that Corporate Insolvency Resolution Process shall commence from the date of admission of the application.*

13. According to the Learned Counsel for the Appellant, Rule 3(a) of the Insolvency and Bankruptcy (`Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors') Rules, 2019, defines an `Adjudicating Authority', as the `Debt Recovery Tribunal'. Furthermore, the stand of the Appellant is that, `Corporate Insolvency Resolution Process', can said to be pending, only when an `Application', under Section 7, 9 or 10, is admitted, by an `Adjudicating Authority', as the `Insolvency Resolution Process', only begins when an `Application', under Section 7, 9 or 10, is admitted, as such, it is projected on the side of the `Appellant' that `no Application', can said to be `maintainable', under Section 95 of the I & B Code, 2016, prior to the commencement of `Insolvency Resolution Process', as defined in the I & B Code, 2016. That apart, Section 5 (14) of the `Code', enjoins that an

`Insolvency Resolution Process', begins from the `Commencement Date', and ends on `180th day', unless extended, in terms of Section 12 of the I & B Code, 2016.

14. The Learned Counsel for the Appellant, contends that in the Order dated 10.08.2021 (vide CP(IB) No.1365/MB-IV/2020) in Insta Capital Pvt. Ltd. v. Ketan Vinod Kumar Shah, it is observed that an `Application', for `Insolvency' of the `Personal Guarantors', is not `maintainable', unless `Insolvency / Liquidation', is `ongoing', against the `Corporate Debtor'.

15. According to the Appellant, in `Altico Capital India Limited v Rajesh Patel in IA No. 1062 of 2021 in CP (IB) No. 293 of 2020)', the `Adjudicating Authority' / `Tribunal', had opined that preferring of `Applications', seeking `Insolvency' of `Personal Guarantors', without the `Corporate Debtor', undergoing `Insolvency' / `Liquidation', would be tantamount to vesting the `Adjudicating Authority' / `Tribunal', with the jurisdiction of `Debt Recovery Tribunal', and the same view, was taken by the `Hon'ble Madras High Court' (vide C.R.P. (PD) No.1289 of 2021), paragraph 22.

16. The Learned Counsel for the Appellant, points out that the `Adjudicating Authority' / `Tribunal' (Delhi Bench), through an `Order' dated 29.09.2021, in Punjab National Bank Housing Finance Limited v.

Mohit Arora & Ors., took a contrary view, subsequent to the `Order', made in Insta Capital Pvt. Ltd. v. Ketan Vinod Kumar Shah case.

17. The Learned Counsel for the Appellant, refers to the Working Group on `Individual Insolvency', as constituted by the `Insolvency and Bankruptcy Board of India', which gave its 1st Report in Aug'2017, and the said `Report', reads as under:

> *``The Code, therefore, does not contemplate categories of individuals or partnerships within Part III of the Code. The only distinction created by the Code is that the Adjudicating Authority for Insolvency and Bankruptcy of personal guarantor of a corporate debtor is National Company Law Tribunal (NCLT) in cases where a corporate insolvency process has been initiated or is pending against the corporate debtor of personal guarantor. In cases where there a corporate insolvency process is not pending against the corporate debtor, the jurisdiction in respect of Insolvency and Bankruptcy of personal guarantor is Debt Recovery Tribunal.''*

18. The Learned Counsel for the Appellant, points out the `Working Group Final Report', wherein, while discussing the outline of Part III of the I & B Code, 2016, it is mentioned as under:

> ``*Adjudicating Authority:*
>
> *4.9. ``Section 179 of the Code provides that the Adjudicating Authority for individuals and partnership firms is the Debt Recovery Tribunal (``DRT''). However, for personal guarantors, both the National Companies Law Tribunal (``NCLT'') and DRT have jurisdiction in different scenarios.*
>
> *4.10. Section 60(2) lays down that if a corporate insolvency resolution process (``CIRP'') or liquidation process is ongoing against a corporate debtor, then an application for IRP or bankruptcy of the personal guarantor to the corporate debtor shall be filed with the NCLT in which the CIRP or liquidation is going on. Therefore, the Adjudicating Authority for personal*

guarantors will be the NCLT if a parallel CIRP or liquidation proceeding is going on for the corporate for whom the guarantee is given.

4.11. The same applies when any insolvency or bankruptcy proceeding is going on against the personal guarantor in a court or tribunal and an IRP or liquidation is initiated against the corporate debtor. For example, if `X' is an individual going through an IRP in a DRT and X has given a personal guarantee for a debt owed by company `Y', then if CIRP is initiated against Y in an NCLT it would have the effect of transferring the proceedings going on against X in the DRT to the NCLT.''

19. The Learned Counsel for the Appellant, refers to the `Order' of the Hon'ble Madras High Court, dated 28.07.2021, (vide C.R.P.(PD) No.1289 of 2021), in Rohit Nath v. KEB Hana Bank Ltd., reported in (2021) SCC Online Mad 2734, wherein, at paragraph 23, it is observed as under :

23. ``The text of Section 60(2) discloses that Section 60 of the Code would apply to an individual only if there is a corporate insolvency resolution process pertaining to the corporate entity which is the principal debtor, that has been filed or commenced. In other words, in case of company 'A' being the principal debtor and an individual 'P' the guarantor promising repayment of the credit facilities obtained by 'A', if a corporate insolvency resolution process is initiated under the provisions of the Code pertaining to company 'A', the insolvency resolution process pertaining to guarantor 'P' would per force be before the same adjudicating authority, viz., the National Company Law Tribunal. But, where there is no corporate insolvency resolution process initiated in respect of company 'A', insolvency proceedings pertaining to guarantor 'P' must necessarily be carried only to the jurisdictional Debts Recovery Tribunal and not to any other forum. To repeat, the provisions of the Acts of 1909 and 1920 will have no manner of application to guarantors who have furnished guarantees in connection with credit facilities obtained by corporate entities.''

20. The Learned Counsel for the Appellant, submits that the `Appellant', had filed a `Writ Petition', before the Hon'ble Supreme

Court of India, among other things, raising challenge(s) to the Vires of Part III of the Code, and the same is pending `Adjudication'.

Appellant's Decisions:

21. The Learned Counsel for the Appellant, cites the `Order' of the Hon'ble High Court of Bombay, in Surendra B. Jiwrajka v. Omkara Assets Reconstruction Pvt. Ltd., reported in (2021) SCC Online Bom. 9260, wherein, at paragraphs 17 & 18, it is observed as under:

> *17. `` Thus from an analysis of the provisions contained in sections 95 to 100 of IBC, we find that a definite time-line has been provided at each stage of the proceeding. That apart, the interim moratorium in terms of section 96 which commences from the date of the application remains in force till the date of admission of such application under section 100. Though time-lines have been prescribed at each stage of the proceeding leading to acceptance or rejection of the application under section 100, we find that no such time-line has been prescribed for submission of report by the resolution professional though section 100 provides that the adjudicating authority shall take a decision either admitting or rejecting the application within 14 days from the date of submission of the report. That apart on a careful examination of section 100, we are of the view that before the adjudicating authority takes a decision to either admit or reject the application upon receipt of report from the resolution professional, the parties to the insolvency resolution process are required to be heard. Though the legislature itself has provided in section 99(10) that a copy of the report of the resolution professional be furnished to the debtor or to the creditor thus complying with the requirement of the principles of natural justice, it would be in the fitness of things and in furtherance of the principles of natural justice that the parties are also heard before the decision is taken by the adjudicating authority one way or the other under section (1) of section 100.*
>
> *18. In such circumstances, we do not find any good ground to interfere with the impugned orders save and except that the resolution professional should submit the report within a definite time period. This is because under sub-section (1) of section 96 the interim moratorium automatically commences from the date of the application and continues till the date of admission of such*

application (or rejection as the case may be). The legislative intent which is discernible is that such interim moratorium should be for a limited duration. Therefore, the resolution professional should expedite preparation and submission of report but at the same time complying with the requirements of section 99 of IBC. We may note that in this case the resolution professional has already been appointed.''

22. The Learned Counsel for the Appellant, refers to the `Order', dated 28.10.2021 of the Hon'ble Supreme Court of India in Surendra B. Jiwrajka v. Omkara Assets Reconstruction Private Limited (vide Petition(s) for Special Leave to Appeal (C) No(s) 16464 of 2021, wherein, it is observed as under:

> ``*In the meanwhile, the Resolution Professional shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein.*
>
> *Learned senior counsel for the petitioner has given assurance that the petitioner would not seek any adjournment in the proceedings before the Debt Recovery Tribunal.''*

23. The Learned Counsel for the Appellant, refers to the `Order' of the Hon'ble Supreme Court of India, dated 29.10.2021 (on joint mentioning), in Surendra B. Jiwrajka v. Omkara Assets Reconstruction Private Limited, wherein, it is observed as under:

> ``*In the meanwhile, the petitioner shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein and the Resolution Professional shall not proceed with filing of the report.*
>
> *Learned senior counsel for the petitioner has given assurance that the petitioner would not seek any adjournment in the proceedings before the Debt Recovery Tribunal.''*

24. The Learned Counsel for the Appellant, falls back upon the `Order' of this `Tribunal', dated 27.01.2022, in State Bank of India, Stressed Asset Management Branch v. Mahendra Kumar Jajodia (vide Comp. App. (AT) (INS.) No. 60 / 2022 and Comp. App. (AT) (INS.) No. 61 of 2022), wherein, at paragraphs 7 to 11, it is observed as under:

> *7. ``Sub-Section 1 of Section 60 provides that Adjudicating Authority for the corporate persons including corporate debtors and personal guarantors shall be the NCLT. The Sub-Section 2 of Section 60 requires that where a CIRP or Liquidation Process of the Corporate Debtor is pending before 'a' National Company Law Tribunal the application relating to CIRP of the Corporate Guarantor or Personal Guarantor as the case may be of such Corporate Debtor shall be filed before 'such' National Company Law Tribunal. The purpose and object of the sub-section 2 of Section 60 of the Code is that when proceedings are pending in 'a' National Company Law Tribunal, any proceeding against Corporate Guarantor should also be filed before 'such' National Company Law Tribunal. The idea is that both proceedings be entertained by one and the same NCLT. The sub-section 2 of Section 60 does not in any way prohibit filing of proceedings under Section 95 of the Code even if no proceeding are pending before NCLT.*
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> *8. The use of words 'a' and 'such' before National Company Law Tribunal clearly indicates that Section 60(2) was applicable only when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before NCLT. The object is that when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before 'a' NCLT the application relating to Insolvency Process of a Corporate Guarantor or Personal Guarantor should be filed before the same NCLT. This was to avoid two different NCLT to take up CIRP of Corporate Guarantor. Section 60(2) is applicable only when CIRP or Liquidation Proceeding of a Corporate Debtor is pending, when CIRP or Liquidation Proceeding are not pending with regard to the Corporate Debtor there is no applicability of Section 60(2).*
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> *9. Section 60(2) begins with expression 'Without prejudice to sub-section (1)' thus provision of Section 60(2) are without prejudice to Section 60(1) and are supplemental to sub-section (1) of Section 60.*

10. Sub-Section 1 of Section 60 provides that Adjudicating Authority in relation to Insolvency or Liquidation for Corporate Debtor including Corporate Guarantor or Personal Guarantor shall be the NCLT having territorial jurisdiction over the place where the Registered Office of the Corporate Person is located. The substantive provision for an Adjudicating Authority is Section 60, sub-Section (1), when a particular case is not covered under Section 60(2) the Application as referred to in sub-section (1) of Section 60 can be very well filed in the NCLT having territorial jurisdiction over the place where the Registered Office of corporate Person is located.

11. The Adjudicating Authority erred in holding that since no CIRP or Liquidation Proceeding of the Corporate Debtor are pending the application under Section 95(1) filed by the Appellant is not maintainable. The Application having been filed under Section 95(1) and the Adjudicating Authority for application under Section 95(1) as referred in Section 60(1) being the NCLT, the Application filed by the Appellant was fully maintainable and could not have been rejected only on the ground that no CIRP or Liquidation Proceeding of the Corporate Debtor are pending before the NCLT. In result, we set aside the order dated 05th October, 2021 passed by the Adjudicating Authority. The Application filed by the Appellant under Section 95(1) of the Code is revived before the NCLT which may be proceeded in accordance with the law.''

25. The Learned Counsel for the Appellant, relies on the decision of the `Adjudicating Authority' / `Tribunal', dated 20.01.2022, in State Bank of India, through the Resolution Professional, Mahesh Sureka v. Savita Satish Gowda, wherein, at paragraphs 13 to 18, it is observed as under:

13. ``This Bench is of the opinion that be that as it may, the CIRP of the Corporate Debtor was commenced and the Resolution plan was approved by this Tribunal and the jurisdiction to entertain the Petition of the Personal Guarantor is vested by the Tribunal under section 60(1)(2)(3) of the Code. Further the Hon'ble Supreme Court at para 95, have observed that in the event of an ongoing resolution process or liquidation process or bankruptcy of the Personal Guarantor of the Corporate Debtor shall be filed with the concerned NCLT which is seized of the resolution process or liquidation.

14. Hence, the objection of the present Respondent/Personal Guarantor that the CIRP has culminated by way of approval of Resolution Process, by approval of Resolution Plan, is untenable. Once the Corporate Debtor was

admitted into CIRP and Resolution Plan is approved, yet the Tribunal has the territorial jurisdiction to hear any applications filed by the Monitoring Committee and in the instant case, Interim Applications with regard to implementation of Resolution Plan are pending before the Tribunal and therefore this Tribunal is vested with the jurisdiction to entertain the Petition related to Personal guarantees of Corporate Debtor.

15. The Counsel for the Financial Creditor has relied upon the Master Restructuring Agreement dated 30.03.2015 and the Deed of Guarantee dated 30.03.2015, at clause 23 which expressly captures that the Guarantee is in the nature of continuing guarantee and that the Guarantee shall be continuing and shall be valid and in full force and effect till the final settlement deed.

16. The Petitioner has annexed the Balance confirmed, signed by the personal guarantor as on 31.03.2016. The petitioner invoked the guarantees and issued demand notice dated 17.03.2018. Further the notice under Form B was issued on 11.08.2021 and the Form B notice was replied to by the Respondent vide reply dated 25.08.2021.

17. The Respondent filed the I.A. No. 2733 of 2021, challenging the maintainability of present application on the ground that the CIRP has culminated by approval of Resolution Plan and that the Tribunal is not vested with the jurisdiction to entertain petition against the Personal Guarantors of Corporate Debtor in view of the approval of Resolution plan.

18. This Bench "Allows" the Application filed by Mr. Mahesh Sureka, Insolvency Resolution Professional, on behalf of the State Bank of India, Financial Creditor, under Section 95 of the Insolvency & Bankruptcy Code, 2016 read with Rule 7 of the IBC Rules 2019 against Ms. Savita Gowda, the Personal Guarantor of the Corporate Debtor, M/s Sharon Biomedicine Limited in CP No. 1062 of 2021.''

26. The Learned Counsel for the Appellant, seeks in aid of the `Order' dated 06.05.2022 of the Hon'ble Supreme Court of India, in Mahendra Kumar Jajodia, etc. v. State Bank of India, Stressed Asset Management Branch (Respondent), (vide Civil Appeal (s) No. 1871 – 1872 of 2022), wherein, at paragraph 3, it is observed as under:

3. ``We have heard learned Solicitor General and learned senior counsel for the parties and perused the record. We do not see any cogent reason to entertain the Appeals. The judgment impugned does not warrant any interference.''

27. The Learned Counsel for the Appellant, adverts to the `Order' dated 05.04.2022 of the Hon'ble High Court of Karnataka in W.P. No.21626 of 2021 (GM-RES), between Sri. Babu A. Dhammanagi & 2 Ors. v. Union of India, wherein, at paragraph 4, it is observed as under:

4. ``We have considered the submission made by learned counsel for the petitioner. From perusal of the report of resolution professional, it is evident that the insolvency proceedings initiated against the personal guarantor under the Code is a time bound process. The aforesaid procedure contains filing of application under Section 95 of the Code for appointment of resolution professional by the Adjudicating Authority under Section 99 of the Code, submission of the report by the resolution professional under Section 99 of the Code recording reasons for recommending the request for acceptance or rejection of the application and finally the admission or rejection of the application by the Adjudicating Authority. The resolution professional is required to give reasons in support of its recommendation. The Adjudicating Authority is the body, which takes the final decision on the recommendation submitted by the resolution professional. The Adjudicating Authority is not bound by the recommendation made by the resolution professional. There is no element of adjudication on the part of the resolution professional. Therefore, the contention raised by the petitioner that the impugned provisions are arbitrary as no person can be allowed to be a judge in his own case is misconceived. The Supreme Court in GUJURAT URJA VIKAS NIGAM LTD. VS AMIT GUPTA (2021) 7 SCC 209 has negative the contention of the petitioner and has held that the role of Adjudicating Authority is that of a rubber stamp in the context of Section 95, 97, 99 and 100 of the Code. It has further been held by the Supreme Court that Section 95, 97, 99 and 100 of the Code do not suffer from any illegality or any unconstitutionality. As per the procedure prescribed under Section 95 to 100 of the Code, the role of resolution professional is limited to make the appropriate recommendation to the Adjudicating Authority and the final decision of the admission or rejection of the application referred to under Section 95 solely lies with the Adjudicating Authority. It is also pertinent to note that Section 5(27) of the Code read with

the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 defines the expression 'resolution professional'. The aforesaid rule lays down the guidelines for appointment of insolvency professionals including their eligibility criteria and a code of conduct to be followed by insolvency professional. Second application has been made through the resolution professional. It is pertinent to note here that he does not have any personal interest in the application. Therefore, the contention of the petitioner that subsequent appointment of the same resolution professional is arbitrary cannot be accepted. The procedure prescribed under the provisions is fair, rational and reasonable and same cannot be termed to be violative of Article 14.''

28. The Learned Counsel for the Appellant, falls back upon the `Judgement of this `Tribunal', dated 25.08.2022, in Mr. Satyan Kasturi v. State Bank of India, Stressed Assets Management Branch, Egmore, Chennai and 2 Ors. (vide Comp. App (AT) (CH) (INS.) No. 239 of 2022), wherein, at paragraphs 74, 85 to 88 , it is observed as under:

74. ``Be it noted, Section 126 of the Indian Contract Act, 1872, deals with ``contract of guarantee'', ``surety'', ``principal debtor'' and ``creditor''. Section 128 of the Indian Contract Act, 1872, pertains to ``Surety's Liability'', which is co-extensive with that of the ``Principal Debtor'', unless it is otherwise provided by the ``Contract''. Further, this `Tribunal' worth recalls and recollects the decision of the Hon'ble Supreme Court of India in Central Bank of India v. C L Vimla, reported in AIR 2015 SC Page 2280, wherein it is observed as under:

> *``We are of the opinion that the questions that need to be decided by us are regarding the liability of the guarantor under Section 128 of the Indian Contract Act, 1872. The legislature has succinctly stated that the liability of the guarantor is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. This Court has decided on this question, time and again, in line with the intent of the legislature. In Ram Kishun and Ors. v. State of U.P. and Ors., (2012) 11 SCC 511, this Court has held that in view of the provisions of Section 128 of the Contract Act, the liability of the guarantor/surety is co-extensive with that of the debtor. The only exception to the nature of*

the liability of the guarantor is provided in the Section itself, which is only if it stated explicitly to be otherwise in the Contract. In the case of Ram Kishun and Ors. v. State of U.P. and Ors., (2012) 11 SCC 511, this Court has also stated that it is the prerogative of the Creditor alone whether he would move against the principal debtor first or the surety, to realize the loan amount. This Court observed: Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as to how he should make the recovery and pursue his remedies against the principal debtor at his instance. Thus, we are of the view that in the present case the guarantor cannot escape from her liability as a guarantor for the debt taken by the principal debtor. In the loan agreement, which is the contract before us, there is no clause which shows that the liability of the guarantor is not co-extensive with the principal debtor. Therefore Section 128 of the Indian Contract Act will apply here without any exception."

85. A mere running of the eye of Section 95 of the I & B Code, 2016, unerringly points out that the right showered upon a `Financial Creditor' under the I & B Code, 2016, to initiate `Insolvency Resolution Process Proceedings' is an `independent' and `special proceedings', which the `Financial Creditor' can take recourse, despite availability of any other `Fora', in `Law'.

86. It is pointed out that the `Hon'ble High Court of Karnataka, on 05.04.2022, had dismissed the Writ Petition, assailing the Constitutional validity of Section 95, 99 and 100 of the I & B Code, 2016. In fact, the `Application' was filed by the `Financial Creditor' / `Piramal Capital & Housing Finance Limited', before the `Adjudicating Authority' (`Tribunal'), through the Resolution Professional, under Section 95 of the Code for initiation of `Insolvency Resolution Process' against the `Personal Guarantor'. The Hon'ble Court had considered that I & B Code provides a particular eligibility criterion which a `Resolution Professional' must possess and a Code of Conduct is to be followed, which governs their activities.

87. Apart from that, the Hon'ble Supreme Court of India in the decision of State Bank of India (Stressed Asset Management Branch) v. Mahendra Kumar Jajodia had held that the `Financial Creditors' specially Banks may now initiate `Insolvency Proceedings' directly against the `Personal Guarantors' of

`Corporate Debtors', irrespective of pending proceedings in the Court against the `Corporate Debtor' under I & B Code.

88. In the decision in State Bank of India v. Ramakrishnan & Another, the Hon'ble Supreme Court of India has held that Section 14 of the I & B Code, did not apply to `Personal Guarantor', but only applies to the `Corporate Debtor'. The `Creditor' can proceed against the `Assets' of either `Principal Debtor' or `Surety; or both in no particular `Order'.''

29. The Learned Counsel for the Appellant, relies on the decision of the Hon'ble High Court of Delhi in Axis Trustee Services Limited v. Brij Bhushan Singal & Anr., reported in (2021) SCC OnLine Del. 4501, wherein, at paragraphs 16 to 24, it is observed as under:

16. ``This court instead of passing directions in terms of the above provision of Order 37 CPC erroneously and inadvertently by error granted time to the defendant to file written statement. Clearly, the last sentence in the order, namely, "Defendant No. 1 may file written statement within 30 days from today. Reapplication be filed within 30 days thereafter." has been added inadvertently by omission.

17. The question is: Can the court correct the said inadvertent error? In this context reference may be had to Section 152 CPC which reads as follows:-

> *"152. Amendment of judgments, decrees or orders.- Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties."*

18. In this context reference may be had to the judgment of the Division Bench of this court in the case Angle Infrastructure Pvt. Ltd. vs. Ashok Manchanda (supra), relevant portion of which reads as follows:-

> *"100. The statutory prescription is explicit and enables courts to correct "at any time", in judgments and orders, which are "clerical or arithmetical mistakes" as well as "accidental slip or omission". The legislature enables the court to do so on its "own motion" or "on the application by the parties". The exercise of this power has come up for judicial scrutiny and we hereafter note some authoritative precedents*

which set out the parameters within which such powers shall be exercised.

xxxx

104. No reconsideration of the matter on its merits is permissible under Section 152 of the CPC.

105. We may also advert to the pronouncement of the Supreme Court reported at (2003) 1 SCC 197, Lakshmi Ram Bhuyan v. Hari Prasad Bhuyan wherein a question was raised as to the relief granted by a judgment and the preparation of the decree thereon. In order to resolve the conundrum which had resulted, the Supreme Court referred to the power of the court under Section 152 to vary its judgment so as to give effect to its meaning and intention, which observations authoritatively explained the scope of the power under Section 152 in the following terms:

> *14. How to solve this riddle? In our opinion, the successful party has no other option but to have recourse to Section 152 CPC which provides for clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission being corrected at any time by the court either on its own motion or on the application of any of the parties. A reading of the judgment of the High Court shows that in its opinion the plaintiffs were found entitled to succeed in the suit. There is an accidental slip or omission in manifesting the intention of the court by couching the reliefs to which the plaintiffs were entitled in the event of their succeeding in the suit. Section 152 enables the court to vary its judgment so as to give effect to its meaning and intention. Power of the court to amend its orders so as to carry out the intention and express the meaning of the Court at the time when the order was made was upheld by Bowen, L.J. in Swire, Re, Mellor v. Swire [L.R.] 30 Ch. 239 : 53 LT 205 (CA)] subject to the only limitation that the amendment can be made without injustice or on terms which preclude injustice. Lindley, L.J. observed that if the order of the court, though drawn up, did not express the order as intended to be made then "there is no such magic in passing and entering an order as to deprive the court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the court, it would, as it appears to me, be shocking to say that the party*

aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal"."

19. Hence, Section 152 CPC covers errors arising out of accidental slip or omission which may be corrected by the court on its own motion or on an application by any of the parties. In my opinion, this is a fit case for this court to exercise powers under Section 152 CPC to correct the inadvertent error noted above.

20. I may now deal with one of the pleas raised by the learned counsel for the defendant, namely, the delay on the part of the plaintiff in filing the present application. It has been pointed out that this court had passed the said order on 16.04.2021 which is the subject matter of the present application. Now, belatedly in August 2021, the plaintiff has chosen to file the present application seeking rectification of the alleged error in the order dated 16.04.2021.

21. On the issue of delay, I may only note that the learned counsel for the plaintiff has pointed out that after the order was passed by this court on 16.04.2021, a second wave of COVID hit Delhi. There was also change in the manner of functioning of the court as only restricted matters were being heard by the court. It is stated that on 17.08.2021 which was the next date of hearing fixed by the court on 16.04.2021, this aspect was brought to the notice of this court. This court had suggested that an appropriate application be filed. Hence, the present application.

22. I may only note that defendant No. 1 has filed an application being IA No. 11749/2021 wherein it has specifically been stated that learned counsel for the plaintiff for the first time raised objection regarding the direction for filing the written statement in the order dated 16.04.2021 on 17.08.2021 before the court.

23. There is a reasonable explanation explaining the so called delay/laches on the part of the plaintiff in moving the present application for the rectification of the order dated 16.04.2021.

24. The application is accordingly allowed.''

30. The Learned Counsel for the Appellant, refers to the Judgment of this `Tribunal', in Comp. App (AT) (INS.) No. 305 of 2022 etc., in UCO

Bank Flagship Corporate Branch v. Navin Kumar Jain, wherein, at paragraph 22, it is observed as under:

> *22. ``One of the submissions raised before us is that the Application under Section 7 has been filed against the Principal Borrower as is the case in Company Appeal (AT) (Ins.) No. 305 of 2022, hence, the condition under Section 60(2) is also fulfilled. It is submitted that the mere fact that Application is not admitted does not lead to conclusion that Application is not pending. We having already held that there is no pre-condition of pendency of insolvency resolution process or liquidation against the Corporate Debtor for filing an Application under Section 60(1), there is no necessity to dwell on the submission any further.''*

31. The Learned Counsel for the Appellant, cites the decision of the Hon'ble High Court of Punjab and Haryana, in Vijay Kumar Gai v. Pritpal Singh Babbar, reported in (2022) SCC OnLine P & H 1672, wherein, at paragraphs 72 to 87, it is observed as under:

> *72. Consequently, the two questions now before this court are:-*
>
> *(1) Whether in such circumstances the complaint under Section 138 of the Act of 1881 would also fall within the ambit of the phrases "all the debts" and "any legal actions or proceedings pending in respect of any debt" as occur in clauses (a) and (b)(i) of sub-section (1) respectively of Section 96, or would the aforesaid expressions be limited to any debt as is concerned or linked in any manner to the corporate debtor for whom the petitioner stands as a personal guarantor, with the respondent herein not being in any manner concerned with the debt of either the corporate debtor or the personal guarantee furnished by the petitioner in respect of the corporate debtor;*
>
> *(2) If the answer to the aforesaid question is in the affirmative, whether proceedings under Section 138 of the Act would be deemed to have been stayed in terms of Section 96 of the Code in view of the fact that the complaint against the petitioner was filed 8 to 9 years prior to the petitioners' application under Section 94 and even about 6 years before the initiation of proceedings against the corporate debtor by the State Bank of India under Section 7 of the Code.*

73. As regards the first question, there are two ways of interpreting the phrases "all the debts" and "any legal actions or proceedings pending in respect of any debt" as are referred to in Section 96 of the Code.

74. First, that as per a plain reading of the aforesaid phrases in the provision, once a personal guarantor to a corporate debtor has filed an application under Section 94(1) before the Adjudicating Authority, all legal proceedings in respect of any debt that the personal guarantor is facing, would be covered by the interim moratorium and consequently the proceedings in the complaint filed by the respondent herein under Section 138 of the Act also would remain stayed, such proceedings being in respect of a debt alleged to have been incurred by the petitioner qua the respondent, (with such interim moratorium to continue till the application under Section 94 is either rejected or accepted by the Adjudicating Authority. If the application is admitted, proceedings under Section 138 would remain stayed till the proceedings before the Tribunal are taken to their logical conclusion, in terms of Sections 100 and 101 of the Code).

75. The other interpretation that can be given is that the phrases "all legal proceedings" and "any debt", only pertain to debts as are relatable to the corporate debtor in any manner; and any other personal debt incurred by the guarantor to a corporate debtor, as has nothing to do with such corporate debtor or corporate debt, would not be affected in any manner by the application filed under Section 94 by the personal guarantor to a corporate debtor and consequently the complaint filed by the respondent herein under Section 138 of the Act can continue wholly independently of the proceedings before the Adjudicating Authority/NCLT.

76. To further try and understand as to which of the aforesaid two interpretations would apply, the following part of the judgment of the Supreme Court (in paragraph 26.1) of V. Ramakrishnans' case (supra) would need to be looked at again:-

"..... and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor - often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover

such persons, as such moratorium is in relation to the debt and not the debtor."

77. Further, the judgment in Lalit Kumar Jains' case (supra) may also be again referred to wherein, while upholding the distinction created between other individuals and personal guarantors to corporate debtors vide sub-section (2) of Section 60 of the Code (as regards the forum before which a personal guarantor would be required to apply under Section 94), it was thereafter held in paragraph 100 (Law Finder edition = para 113 SCC edition) as follows:-

"100. It is clear from the above analysis that Parliamentary intent was to treat personal guarantors differently from other categories of individuals. The intimate connection between such individuals and corporate entities to whom they stood guarantee, as well as the possibility of two separate processes being carried on in different forums, with its attendant uncertain outcomes, led to carving out personal guarantors as a separate species of individuals, for whom the Adjudicating Authority was common with the corporate debtor to whom they had stood guarantee. The fact that the process of insolvency in Part III is to be applied to individuals, whereas the process in relation to corporate debtors, set out in Part II is to be applied to such corporate persons, does not lead to incongruity. On the other hand, there appear to be sound reasons why the forum for adjudicating insolvency processes - the provisions of which are disparate - is to be common, i.e. through the NCLT. As was emphasized during the hearing, the NCLT would be able to consider the whole picture, as it were, about the nature of the assets available, either during the corporate debtor's insolvency process, or even later; this would facilitate the CoC in framing realistic plans, keeping in mind the prospect of realizing some part of the creditors' dues from personal guarantors."

(Emphasis applied in this judgment only)

78. Hence, it is obviously clear from a reading of the aforesaid part of the said judgment as also from the relevant provisions of the Code as have been reproduced hereinabove, that personal guarantors to corporate debtors are to be treated differently from other categories of individuals who would be covered by Part III of the Code, with it to be again observed that personal guarantors have however only been defined in Section 5(22) falling in Part II thereof and not in Part III.

79. Yet, the rule making authority under Section 239 of the Code (the Central Government) promulgated the Rules of 2019 by invoking jurisdiction under the said provision as also under the other provisions referred to in the preamble to

the rules, and stipulated in Rule 6 therein that an application to be made by such a guarantor under the provisions of Section 94(1) would be submitted in 7terms of the procedure laid down under that Rule.

80. Thus, the application to be made by a personal guarantor to a corporate debtor, even though such a person/individual is referred to in Section 5(22) and Section 60, both falling in Part II of the Code and not in Part III thereof, is to be made under Section 94(1) falling within Part III and with the said application to be made before the NCLT, in terms of Section 60(1) which falls under Part II of the Code.

81. Now in the aforesaid background, if one is to consider Mr. Jaggas' argument that the petitioner having sought his own insolvency under Section 94, all his debts would necessarily have to be considered by the Tribunal, that would seem to be in consonance with what has been observed in paragraph 100 of Lalit Kumar Jains' case (reproduced earlier also, supra), to the effect that:-

> *"As was emphasized during the hearing, the NCLT would be able to consider the whole picture, as it were, about the nature of the assets available, either during the corporate debtor's insolvency process, or even later; this would facilitate the CoC in framing realistic plans, keeping in mind the prospect of realizing some part of the creditors' dues from personal guarantors."*
>
> *(Emphasis applied in this judgment only)*

82. Hence, though in the opinion of this court otherwise a proceeding under Section 138 of the Act, qua a debt as is wholly incurred qua an individual who is not in any manner connected to the corporate debtor that the petitioner stood a personal guarantor for, nor to the corporate debt itself, would need to proceed independently so as not to make the complainant in such proceedings under Section 138 suffer further delays, especially when in the present case he has already suffered a delay of about 10 years since his complaint was initially filed, however, in the light of the aforesaid observations as also the fact that Section 96 of the Code does not specifically carve out any exception qua such a debt as is subject matter of an instrument in the context of which a complaint under Section 138 of the Act has been filed, this court would have to interpret the terms "all the debts" and "any legal action or proceedings pending in respect of any debt" as occur in Section 96 of the Code, to mean that it would cover all such debts including any debt not pertaining to a corporate debtor for whom the accused in such a complaint under Section 138 stood as a personal guarantor to, even in his capacity as a Director of such corporate debtor.

83. This would be further so in the opinion of this court, because a "debt" has been defined in the absolutely generic meaning of the word, in Section 3 (11) of the Code (falling in the preliminary Part-I thereof); and further, as admitted by learned counsel for the respondent, a debt as is subject matter of proceedings under Section 138 of the Act, has not been prescribed to be an "excluded debt" in terms of Section 79(e) of the Code.

84. In this regard, it also needs to be observed here that unless the wordings of a statute are "unworkable" or wholly impractical, nothing extra can be read into a statute or taken away therefrom.

85. As regards the second question posed to itself by this court in paragraph 34 (supra), it would have to be held that by virtue of the term "any legal action or proceedings pending in respect of any debt (as per Section 96), proceedings under Section 138 of the Act, would be deemed to be stayed irrespective of the fact that such proceedings were initiated far before the application under Section 94 of the Code was filed by the personal guarantor to a corporate debtor.

86. In that very context, as regards the dismissal by the Supreme Court of other appeals and writ petitions as were heard with P. Mohanrajs' case (as have been pointed to by Mr. Mehta, learned counsel for the respondent), the dismissal would seem to be on account of the fact that the proceedings under Section 138 against the Directors of the companies as were corporate debtors in those cases, were firstly held to be independent of the proceedings under the Code against the corporate debtor itself and further, there is no interim moratorium referred to in Section 14, with the moratorium mentioned in that provision, being one as has to be declared by the Adjudicating Authority; and consequently the Supreme Court held that such declaration having come at a stage far after the proceedings were initiated under Section 138 of the Act, the moratorium would not apply (obviously also because the Directors were treated different to the corporate debtor itself); which is a wholly different situation to that as is postulated in Section 96, wherein it is an interim moratorium that comes into effect, by which all proceedings qua any debt of the individual/partnership firm etc. would be deemed to have been stayed.

87. Consequently, even though the respondent herein may suffer longer delays due to the stay that would be deemed to be operating on the proceedings in the complaint filed by him under Section 138 of the Act, by virtue of the interim moratorium stipulated in Section 96 of the Code, there would seem to be no option with this court but to allow the petition and set aside the impugned order passed by the learned JMIC, Jalandhar, dated 25.05.2021. It is therefore ordered accordingly.''

32. The Learned Counsel for the Appellant, draws the attention of this `Tribunal', to the Judgment dated 29.07.2022 in Comp. App (AT) (INS.) No. 807 of 2021 with Comp. App (AT) (INS.) No.740 of 2022 (Three Member Bench), between Sudip Dutta @ Sudip Bijoy Dutta v. State Bank of India, Mumbai, wherein, at paragraphs 30 & 31, it is observed as under:

> *30. ``We, thus, do not find substance in the submission of Shri Mukherjee that for enforcing the liability under the Guarantee Deed Bank should initiate proceedings for specific performance of the contract or initiate arbitration. The statutory scheme of the code does not contain any indication that the Personal Guarantor of a Corporate Debtor can escape from its liability under the Personal Guarantee Deed merely on the ground that he is now started residing in another country and acquired citizenship of another country and is no more an Indian citizen. It is well settled principle of statutory interpretation that such interpretation of a statute should be adopted which makes the statute functional and does not make a statute non-functional. Accepting the submission of Shri Mukherjee shall lead to interpretation which shall defeat the object and purpose of the Code.*
>
> *31. The submission of Shri Mukherjee that the Adjudicating Authority has acted beyond the scope of the Code and its action is ultra vires cannot be accepted. The Adjudicating Authority is well within its jurisdictions to initiate insolvency resolution process against the Appellant, the Personal Guarantor of the Corporate Debtor, in accordance with the scheme of Section 95(1) r/w Section 60 of the Code. The Adjudicating Authority in its order dated 16.06.2022 has taken note of the facts and submissions of the Appellant and after considering submissions of the parties has rightly rejected the submission raised on behalf of the Appellant while admitting the application under Section 95(1). The direction issued in Para 29 of the order are consequential to admission of application under Section 95(1). We, thus, are of the view that no grounds have been made out by the Appellant to hold that Adjudicating Authority by the impugned order acted beyond the jurisdiction or committed error in admitting application under Section 95(1) of the Code. There is no merit in this Appeal.''*

33. The Learned Counsel for the Appellant, adverts to the `Order', dated 11.07.2022 of the Hon'ble Supreme Court of India, in Writ Petition (Civil) No. 385 of 2022, etc. Batch, in Vikas Bhawanishankar Sharma, through its Authorized Representative Satish Kumar Tiwari v. Union of India, through its Secretary & Ors., wherein, it is observed as under:

> *``It is submitted that the issues involved in these writ petitions are similar and akin to those involved in other petitions pending in this Court questioning the validity of Sections 95(1), 96(1), 97(5), 99(1), 99(2), 99(4), 99(5), 99(6) and 100 of the Insolvency and Bankruptcy Code, 2016, wherein notices have been issued with interim orders.*
>
> *Issue notice, returnable in six weeks.*
>
> *Tag with W.P (C) No. 307 of 2022.*
>
> *In the meanwhile, petitioner(s) shall not transfer, alienate, encumber or dispose of any of their assets or legal rights or beneficial interest therein; and the Resolution Professional shall not proceed with filing of the report. If the report has been filed, the same shall not be acted upon.''*

34. The Learned Counsel for the Appellant, refers to the `Order' dated 26.08.2022, passed by the `Adjudicating Authority' (NCLT, Principal Bench, New Delhi), in State Bank of India v. Sanjay Singhal, wherein, it is observed as under:

> *``Learned Counsel for the petitioner is present and Ld. Counsel for the Respondent is also present.*
>
> *In view of the fact that the issue with respect to the same is pending for adjudication before the Hon'ble Supreme Court in Writ Petition Civil No. 510 / 2022 and the same is listed before the Hon'ble Supreme Court for consideration, on 31.08.2022, we are inclined to adjourn the matter to 30.09.2022.''*

1st Respondent's Contentions:

35. The Learned Counsel for the 1st Respondent / Financial Creditor / Petitioner submits that the `Appellant', had incorrectly mentioned that `neither any CIRP proceedings nor any Liquidation proceedings, under the Code, have been initiated against the Corporate Debtor, either for the said alleged default or in any other matter'.

36. The Learned Counsel for the 1st Respondent, takes a stand that the `Corporate Insolvency Resolution Process' proceedings, were pending against the `Corporate Debtor', not only on the date when the `Application', was filed before the `Adjudicating Authority' / `Tribunal', as well as on the date, when the `impugned order', was filed, and in fact the `CIRP' proceedings, continued to be `pending', against the `Corporate Debtor', as on date.

37. The Learned Counsel for the 1st Respondent / Financial Creditor / Petitioner, points out that the details of the `Corporate Insolvency Resolution Process', against the `Corporate Debtor', as available on the website of the `Adjudicating Authority' / `Tribunal', are as under:

S. No.	*Company Petition No.*	*Date of Filing & Registration*	*Status*
1	*CP(IB) No.779/9/HDB/2019: KL Steels Pvt Ltd vs. Gati Infrastructure Bhamsey Power*	*25.11.2019*	*Dismissed as withdrawn on 24.12.2021 on the basis of settlement with creditor.*

	Private Limited (under Section 9 of the IBC)		
2	*CP(IB) No.108/9/HDB/2020: Raghavender Yadagirkar vs. Gati Infrastructure Bhamsey Power Pvt. Ltd. (under Section 9 of the IBC)*	*03.02.2020*	*Dismissed on 09.07.2021 for non-prosecution with liberty to revive.*
3	*NCLT Application in the present case:* *CP (IB) No.335/95/HDB/2020*	*06.08.2020*	*Admitted on 21.07.2022.*
4	*CP (IB) No.203/7/HDB/2022 State Bank of India vs. Gati Infrastructure Bhamsey Power Pvt. Ltd. (under Section 7 of the IBC)*	*21.06.2022*	*Pending as on date.*

38. The Learned Counsel for the 1st Respondent, projects an argument that what is required is only `initiation of Insolvency Proceedings', by filing an `Application', under Section 7 or 9 of the I & B Code, 2016, and not an `admission' of such `Proceedings'. Also, it is pointed out on behalf of the 1st Respondent `a Proceeding is pending, from the date, it is instituted, till the date, it is `Disposed of'.

39. The Learned Counsel for the 1st Respondent, forcefully comes out with a stance, that the `Validity' of a `Petition', must be judged on the facts, as they were, at the time of its `Presentation'. Moreover, on the date when the `Application', was filed, before the `Adjudicating Authority' / Tribunal', `Corporate Insolvency Resolution Process' proceedings, were pending, against the `Corporate Debtor', under `Section 60 (2) of the Code', as well, the `1st Respondent', was bound to initiate `Insolvency Proceedings', against the `Appellant', before the very same `Adjudicating

Authority' / `Tribunal'. In this connection, it is projected on the side of the `1st Respondent' that `two of the proceedings', were `Settled' and later `Withdrawn', will not affect the `Maintainability' of the `Application', on the day, it was filed.

40. It is the version of the 1st Respondent / Financial Creditor that the `Adjudicating Authority' / `Tribunal', has jurisdiction, to entertain `Insolvency Proceedings', against the `Personal Guarantors', even when the `CIRP' proceedings, are not pending against the `Corporate Debtor'.

41. The Learned Counsel for the 1st Respondent contends that the `Report' of the `Working Groups', on `individual Insolvency', is not a precedent, but, instead an `opinion of the Author', and these `Reports', have `no binding / precedential value', in `Law', and cannot be considered, contrary to the reasoned Judgements, passed by the `Hon'ble Courts' / `Tribunals'.

42. The Learned Counsel for the 1st Respondent, points out that in the decision of the Hon'ble Supreme Court of India, in Lalit Kumar Jain v. Union of India, reported in (2021) 9 SCC at Page 321, the provisions of the I & B Code, 2016, in relation to `Personal Guarantors', were upheld.

43. The Learned Counsel for the 1st Respondent, refers to Section 128 of the Indian Contract Act, 1872, that the `Guarantor's Liability', is

co-extensive with that of the `Principal Debtor', and that the `Personal Guarantee', in the instant case, clearly mentions that the `Guarantee', is an independent obligation of the `Guarantor', and on 08.03.2019, the `Personal Guarantee', was invoked on behalf of all the `Lenders', including the `1st Respondent'.

44. The Learned Counsel for the 1st Respondent, brings it to the notice of this `Tribunal', that the `Appellant', had filed Transfer Petition (C) No. 1235 of 2020, seeking the same `reliefs', as sought to be agitated in the present proceedings, Viz. `Transfer of Proceedings', before the `Adjudicating Authority', in the present case, to the `Debt Recovery Tribunal'. As a matter of fact, the `Transfer Petition' was `Dismissed as Withdrawn', by an `Order', dated 21.01.2022, passed by the Hon'ble Supreme Court of India, and in reality, the filing of the `Transfer Petition', was not disclosed by the `Appellant'.

45. The Learned Counsel for the 1st Respondent, comes out with a plea that the 1st Respondent / Financial Creditor's remedies, against the `Appellant', are independent and absolute remedies in `Law', and are not and cannot be dependent on whether, any remedy is exhausted against the `Corporate Debtor'.

46. The Learned Counsel for the 1st Respondent points out that in the decision of the Hon'ble Madras High Court in Rohit Nath v. KEB Hana

Bank Limited (2021) SCC OnLine Mad. 2734, the issue was whether `Insolvency Proceedings', against a `Personal Guarantor', as initiated by the `Creditor', before the `Debt 'Recovery Tribunal', can be dismissed, and in this regard, it was held that the `Liability' of the `Personal Guarantor' and `Corporate Debtor', are co-extensive and the `Guarantor', cannot be permitted to escape its liability solely on the premise that no proceedings were initiated against the `Corporate Debtor'. Furthermore, the point / issue, whether in the absence of `CIRP' proceedings, against the `Corporate Debtor', `Insolvency Proceedings', against the `Personal Guarantor', can be initiated, before the ``Adjudicating Authority' / `Tribunal', was not before the `Hon'ble High Court'.

47. The Learned Counsel for the 1st Respondent, comes out with a plea that `IFCI' and `State Bank of India, had initiated `Recovery Proceedings', and not `Insolvency Proceedings', before the `Debt Recovery Tribunal', and they are limited to the extend of `Debt', due to `IFCI' and `State Bank of India'. In short, the `Debt Recovery Tribunal' proceedings, have no relation whatsoever, to the `1st Respondent / Financial Creditor / Petitioner'.

48. In any event, pursuant to the `impugned order', there is a `Moratorium', on the Proceedings, before the `Debt Recovery Tribunal', and there is `no premature determination' of the `Quantum of Default', as

alleged or otherwise. Furthermore, the `Quantum of Debt', due to the `1st Respondent / Financial Creditor', is an admitted fact by the `Appellant' himself and it is a matter of record.

49. The Learned Counsel for the 1st Respondent submits that there is no challenge, to the admitted facts that all requirements, contained in the I & B Code, 2016, for `initiation of Insolvency Proceedings', against the `Appellant', admittedly stands satisfied, and therefore, the `impugned order', was rightly passed by the `Adjudicating Authority', as per the `existing / prevailing Law'.

50. The Learned Counsel for the 1st Respondent, while rounding up, prays for a `Dismissal' of the instant Comp. App (AT) (CH) (INS.) No. 8 of 2023, filed by the `Appellant'.

1st Respondent's Citations:

51. The Learned Counsel for the 1st Respondent, relies on the `Judgment' of the Hon'ble Supreme Court of India, in Rajahmundry Electric Supply Corporation Ltd. v. A. Nageshwara Rao & two Ors., reported in AIR 1956 SC at Page 213, 26 Comp. Cas 91, wherein, at Paragraph 5, it is observed as under:

> *5. ``This point is not dealt with in the judgment of the trial court, and the argument before us is that as the objection went to the root of the matter and struck at the very maintainability of the application, evidence should have been taken on the matter and a finding, recorded thereon. We do not find any*

substance in this contention. Though the objection was raised in the written statement, the respondents did not press the same at the trial, and the question was never argued before the trial Judge. The learned Judges before whom this contention was raised on appeal declined to entertain it, as it was not pressed in the trial court, and there are no grounds for permitting the appellant to raise it in this appeal. Even otherwise, we are of opinion that this contention must, on the allegations in the statement, assuming them to be true, fail on the merits. Excluding the names of the 13 persons who are stated to be not members and the two who are stated to have signed twice, the number of members who had given consent to the institution of the application was 65. The number of members of the Company is stated to be 603. If, therefore, 65 members consented to the application in writing, that would be sufficient to satisfy the condition laid down in section 153-C, subclause (3)(a)(i). But it is argued that as 13 of the members who had consented to the filing of the application bad, subsequent to its presentation, withdrawn their consent, it thereafter ceased to satisfy the requirements of the statute, and was no longer maintainable. We have no hesitation in rejecting this contention. The validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was valid when presented cannot, in the absence of a provision to that effect in the statute, cease to be maintainable by reason of events subsequent to its presentation. In our opinion, the withdrawal of consent by 13 of the members, even if true, cannot affect either the right of the applicant to proceed with the application or the jurisdiction of the court to dispose of it on its own merits.''

52. The Learned Counsel for the 1st Respondent, relies on the `Judgment' of this `Tribunal', dated 18.01.2023, in the matter of Shapoorji Pallonji Finance Pvt. Ltd. v. Rekha Singh & Ors. (vide Comp. App (AT) (INS.) Nos. 397, 398 and 399 of 2022), wherein, at Paragraphs 31 to 35, it is observed as under:

31. ``The objection of the Respondent that application filed by the Financial Creditor under Section 95 is not maintainable since no insolvency proceedings are pending against the Principal Borrower has already been overruled by the Adjudicating Authority. The issue is fully covered by judgment of this Tribunal in "Company Appeal (AT) (Ins.) No. 60 of 2022, State Bank of India vs. Mahendra Kumar Jajodia, decided on 27.01.2022",

where interpreting Section 60(2) of the Code following was laid down in Paras 8, 9, 10 and 11:

> *"8. The use of words 'a' and 'such' before National Company Law Tribunal clearly indicates that Section 60(2) was applicable only when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before NCLT. The object is that when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before 'a' NCLT the application relating to Insolvency Process of a Corporate Guarantor or Personal Guarantor should be filed before the same NCLT. This was to avoid two different NCLT to take up CIRP of Corporate Guarantor. Section 60(2) is applicable only when CIRP or Liquidation Proceeding of a Corporate Debtor is pending, when CIRP or Liquidation Proceeding are not pending with regard to the Corporate Debtor there is no applicability of Section 60(2).*
>
> *9. Section 60(2) begins with expression 'Without prejudice to sub-section (1)' thus provision of Section 60(2) are without prejudice to Section 60(1) and are supplemental to sub-section (1) of Section 60.*
>
> *10. Sub-Section 1 of Section 60 provides that Adjudicating Authority in relation to Insolvency or Liquidation for Corporate Debtor including Corporate Guarantor or Personal Guarantor shall be the NCLT having territorial jurisdiction over the place where the Registered Office of the Corporate Person is located. The substantive provision for an Adjudicating Authority is Section 60, sub-Section (1), when a particular case is not covered under Section 60(2) the Application as referred to in subsection (1) of Section 60 can be very well filed in the NCLT having territorial jurisdiction over the place where the Registered Office of corporate Person is located.*
>
> *11. The Adjudicating Authority erred in holding that since no CIRP or Liquidation Proceeding of the Corporate Debtor are pending the application under Section 95(1) filed by the Appellant is not maintainable. The Application having been filed under Section 95(1) and the Adjudicating Authority for application under Section 95(1) as referred in Section 60(1) being the NCLT, the Application filed by the Appellant was fully maintainable and could not have been rejected only on the ground that no CIRP or Liquidation Proceeding of the Corporate Debtor are pending before the NCLT. In result, we set aside the order dated 05th October, 2021 passed by the Adjudicating Authority. The Application filed by the Appellant under Section 95(1) of the Code is revived before the NCLT which may be proceeded in accordance with the law."*

32. It is further noted that the above judgment of this Tribunal dated 27.01.2022 was appealed before the Hon'ble Supreme Court by means of "Civil Appeal No. 1871-1872/2022, Mahendra Kumar Jajodia vs. State Bank of India Stressed Asset Management Branch", which Appeal has been dismissed by order dated 06.05.2022, which is to the following effect:

"O R D E R

We have heard learned Solicitor General and learned senior counsel for the parties and perused the record. We do not see any cogent reason to entertain the Appeals. The judgment impugned does not warrant any interference.

The Appeals are dismissed."

33. The question is as to whether the Section 95 application which was filed by the Financial Creditor against the Personal Guarantor was maintainable or not.

34. We having held that on the date when application was filed under Section 95 by the Financial Creditor against the Personal Guarantor an application could have filed against the Financial Service Provider on the basis of last Balance Sheet which had asset size of more than Rs.500, the application filed by the Financial Creditor against the Personal Guarantor was fully maintainable.

35. In view of the foregoing discussion, we hold that the Adjudicating Authority has committed error in allowing the applications filed by the Personal Guarantors and dismissing the Company Petitions. All the Appeals are allowed. Order of the Adjudicating Authority dated 22.02.2022 is set aside. The Company Petitions CP No. (IB) - 25/95/JPR/2021, CP No. (IB) - 26/95/JPR/2021 and CP No. (IB) - 27/95/JPR/2021 are held maintainable and are revived before the Adjudicating Authority to be proceeded in accordance with law.''

53. The Learned Counsel for the 1st Respondent, relies on the decision of the Hon'ble High Court of Delhi in Axis Trustee Services Limited v. Brij Bhushan Singal, reported in (2022) SCC OnLine Del. 3634, wherein, at paragraphs 17, 21 to 29, it is observed as under:

17. ``To appreciate the aforesaid submissions, a reference may be made to the relevant provisions of the IBC. Part II of the IBC deals with "INSOLVENCY RESOLUTION AND LIQUIDATION FOR COPORATE PERSONS" and Section 60 of the IBC occurs in Chapter VI of Part II of the IBC titled "ADJUDICATING AUTHORITY FOR CORPORATE PERSONS." The relevant portion of Section 60 of the IBC is set out below:

> *60. (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.*
>
> *(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such National Company Law Tribunal.*
>
> *(3) An insolvency resolution process or bankruptcy proceeding of a personal guarantor of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.*
>
> *(4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).''*
>
> *....*

21. A reference may also be made to Section 179 of the IBC, which is a part of Chapter VI of the IBC dealing with "ADJUDICATING AUTHORITY FOR INDIVIDUALS AND PARTNERSHIP FIRMS":

> *``179. (1) Subject to the provisions of section 60, the Adjudicating Authority, in relation to insolvency matters of individuals and firms shall be the Debt Recovery Tribunal having territorial jurisdiction over the place where the individual debtor actually and voluntarily resides or carries on business or personally works for gain and can entertain an application under this Code regarding such person.''*

22. The interplay between Section 60 and Section 179 of the IBC came up for consideration before the Supreme Court in Embassy Property Development (supra), wherein the Supreme Court observed that in respect of personal

guarantors of corporate persons, the NCLT would be the adjudicating authority. The relevant observations of the Supreme Court are set out below.

> *``33. Sub-section (4) of Section 60 of the IBC, 2016 states that the NCLT will have all the powers of the DRT as contemplated under Part III of the Code for the purposes of sub-section (2). Sub-section (2) deals with a situation where the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor of a corporate debtor is taken up, when CIRP or liquidation proceeding of such a corporate debtor is already pending before NCLT. The object of sub-section (2) is to group together (A) the CIRP or liquidation proceeding of a corporate debtor, and (B) the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor of the very same corporate debtor, so that a single forum may deal with both. This is to ensure that the CIRP of a corporate debtor and the insolvency resolution of the individual guarantors of the very same corporate debtor do not proceed on different tracks, before different fora, leading to conflict of interests, situations or decisions.*
>
> *34. If the object of sub-section (2) of Section 60 is to ensure that the insolvency resolutions of the corporate debtor and its guarantors are dealt with together, then the question that arises is as to why there should be a reference to the powers of the DRT in sub-section (4). The answer to this question is to be found in Section 179 of the IBC, 2016. Under Section 179(1), it is the DRT which is the adjudicating authority in relation to insolvency matters of individuals and firms. This is in contrast to Section 60(1) which names the NCLT as the adjudicating authority in relation to insolvency resolution and liquidation of corporate persons including corporate debtors and personal guarantors. The expression ``personal guarantor'' is defined in Section 5(22) to mean an individual who is the surety in a contract of guarantee to a corporate debtor. Therefore the object of subsection (2) of Section 60 is to avoid any confusion that may arise on account of Section 179(1) and to ensure that whenever a CIRP is initiated against a corporate debtor, NCLT will be the adjudicating authority not only in respect of such corporate debtor but also in respect of the individual who stood as surety to such corporate debtor, notwithstanding the naming of the DRT under Section 179(1) as the adjudicating authority for the insolvency resolution of individuals. This is also why subsection (2) of Section 60 uses the phrase ``notwithstanding anything to the contrary contained in this Code.''*

23. The NCLAT in its judgement dated 27th January, 2022 in Company Appeal (AT) Insolvency No. 60/2022 titled State Bank of India, Stressed Asset Management Branch v. Mahendra Kumar Jajodia discussed the provisions of Section 60 of the IBC and held that even if the CIRP in respect of the corporate debtor is not pending before the NCLT, the NCLT would be the appropriate forum for adjudicating an application under Section 95 in respect of a personal guarantor. ...

24. The statutory appeal, being Civil Appeal No(s).1871-1872/2022, filed against the aforesaid order of the NCLAT, was dismissed by the Supreme Court vide order dated 6th May, 2022.

25. In view of the legal position elucidated above, it clear that Section 179(1), which provides the jurisdiction for the DRT with respect to insolvency matters of individuals and firms, is subject to Section 60 of the IBC. Sub-section (1) of Section 60 of the IBC provides that in relation to insolvency resolution for corporate persons, including corporate debtors and personal guarantors, the Adjudicating Authority shall be the NCLT. Sub-section (2) of Section 60 provides that where the CIRP of a corporate debtor is pending before an NCLT, an application relating to the insolvency of a personal guarantor of such corporate debtor shall be filed before the same NCLT. Sub-section (3) of Section 60 further provides that the insolvency resolution process in respect of a personal guarantor pending in any Court or Tribunal, shall stand transferred to the adjudicating authority dealing with the insolvency resolution process of the corporate debtor.

26. On behalf of the plaintiff, reliance has been placed on sub-section (2) of Section 60 to contend that insolvency proceedings in respect of a personal guarantor of a corporate debtor shall be filed in the NCLT only if the CIRP is pending in respect of corporate debtor before the NCLT. In view of the fact that the CIRP in respect of corporate debtor, Bhushan Steel already stands concluded, insolvency proceedings in respect of its guarantors have to be filed before the DRT and not the NCLT. The aforesaid submission overlooks the fact that sub-section (2) of Section 60, IBC starts with words without prejudice to sub-section (1)'. Clearly, sub-section (2) of Section 60 is supplemental to sub-section (1) of Section 60 and has to be read along with sub-section (1) of Section 60. A harmonious reading of the aforesaid provisions would lead to the conclusion that sub-section (1) of Section 60 applies in respect of insolvency proceedings in respect of personal guarantors of corporate debtors irrespective of the fact whether CIRP is pending against the corporate debtor. The objective of sub-sections (2) and (3) is that where proceedings in respect of a corporate debtor have been initiated in one NCLT and those against a guarantor before another NCLT or another court or tribunal while the CIRP is

pending in respect of the corporate debtor before a particular NCLT, the proceedings against the personal guarantor should also be before the same NCLT.

27. It may also be relevant to mention here that in term of Rule 3(1)(a) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors), Rules, 2019, it has specifically been provided that the adjudicating authority for the purposes of Section 60 would be the NCLT. No distinction has been made under different sub-sections of Section 60 of the IBC in this Rule with regard to the competent adjudicating authority.

28. On behalf of the plaintiffs, it was further contended that the defendant no.2 himself had objected to the maintainability of the aforesaid application filed against the defendant no.2 under Section 95 of the IBC on the ground that the NCLT does not have jurisdiction. In my view, even if such a stand has been taken by the defendant no.2, the same would not constitute an estoppel against the defendant no.2 as it was a legal objection taken by the defendant no.2 and an admission in law cannot be held to be binding against a party. An estoppel can be in respect of admissions made on facts, however, there can be no estoppel on admissions based on law. In any event, the legal position has emerged only after the dismissal of the appeal by the Supreme Court in Mahendra Kumar Jajodia (supra). Therefore, the judgment in Union of India v. N. Murugesan (2022) 2 SCC 25 would not be of any assistance to the plaintiffs in the present case.

29. In view of the discussion above, I am of the view that the NCLT would be the appropriate adjudicating authority in respect of insolvency proceedings initiated against the defendants in their capacity as personal guarantors for the corporate debtor, Bhushan Steel.''

54. The Learned Counsel for the 1st Respondent, relies on the decisions; (i) Bank of Bihar Ltd. v. Dr. Damodar Prasad and Anr.: AIR 1969 SCR 620 (ii) State Bank of India v. Index Port Registered: AIR 1992 SC 1740 (iii) Industrial Investment Bank of India v. Biswanath Jhunjhunwala: (2009) 9 SCC 478; and (iv) United Bank of India v. Satyawati Tondon and Ors.: AIR 2010 SC 3413 and (V) Ferro Alloys v.

Rural Electrification : Company Appeal (AT) (Ins.) No. 92 of 2017 decided on 08.01.2019; upheld by the Hon'ble Supreme Court by its Order dated 11.02.2019, for the proposition that there is `no need in Law', for a `Creditor', to initiate `Proceedings', against the `Debtor', before initiating `Proceedings', against the `Guarantor'.

Gist of Status Report Filed by the 2nd Respondent / Resolution Professional:

55. In the `Status Report', filed by the `2nd Respondent / Resolution Professional', among other things, it is mentioned that the `Personal Guarantor', had failed to `Repay' the `Debt' Amount of the `Financial Creditor', and because of the said `Default', the `Financial Creditor', had filed a `Petition', before the `Adjudicating Authority' / `Tribunal', under Section 95 (1) of the I & B Code, 2016, demanding a Sum of Rs.1,76,75,60,935/- as on 15.01.2020.

56. It comes to be known that a `Resolution Professional', was appointed by the `Adjudicating Authority', on 08.07.2021, and a `Report', was directed to be filed within a month. The `Resolution Professional', had submitted his `Report', recommending the `Admission' of an `Application'. Also that the `Insolvency Petition', was admitted on 21.07.2022, wherein a `Resolution Professional', was appointed and a direction was issued, to conduct the `Process', as per the `Code'.

57. The last date for submission of Claims, as per Section 102 of the I & B Code, 2016, was 21.08.2022, and that the `Resolution Professional' was required, to receive the `Repayment Plan', from the `Debtor', and submit the same along with his `Report', to the `Adjudicating Authority' / `Tribunal', on 11.09.2022.

58. It transpires that the Applicant's, instead of submitting the `Repayment Plan', sent an email on 03.09.2022, informing the `Resolution Professional', that an `Appeal', was filed before the `Appellate Tribunal', and that the `Resolution Professional', was left with no option, but to file IA/955/2022, since he has not received any `Repayment Plan'.

59. The `Adjudicating Authority', on 16.09.2022, had `Reserved Orders', in IA/955/2022, and passed the `Order', on 27.09.2022, `allowing' the `Application', and closed the `Insolvency Process', by grating `Liberty', to the `Financial Creditors', to take further steps, as per `Law'. There was no discussion on any `Plan', because `no Repayment Plan', was given by the `Appellant / Personal Guarantor', and therefore, `No Meeting of Creditors', was required to be `conducted'.

60. That apart, the `Appellant / Personal Guarantor', had filed IA/1042/2022 in CP (IB) No. 335 / 95 / HDB / 2020, to set aside the

`Order' dated 16.09.2022, and on 10.10.2022, the said IA/1042/2022, was closed as `Infructuous' one. Later, the `1st Respondent / Financial Creditor', had filed an `Appeal', before the `Adjudicating Authority' (`NCLT', Bench – I, Hyderabad) in CP (IB) No. 389 / 121 / HBD / 2022, for initiation of `Bankruptcy Process' of the `Personal Guarantor', and the said `Bankruptcy Proceedings', are presently in progress, before the `Adjudicating Authority' / `Tribunal'.

Feature of Insolvency Law Committee Report – Mar'2018:

61. Section 60 of the I & B Code, 2016, requires that the `Adjudicating Authority', for `Corporate Debtor' and `Personal Guarantors', should be the `National Company Law Tribunal', which has `Territorial Jurisdiction', over the place, where the `Registered Office' of the `Corporate Debtor', is located, which in turn creates a link between the `Insolvency Resolution' or `Bankruptcy Processes' of the `Corporate Debtor', and `Personal Guarantors', such that the `matters', relating to the same `Debt', are dealt with in the same `Tribunal'.

62. It was decided that Section 60 of the `Code', may be suitably amended, to provide for the same `National Company Law Tribunal', to deal with the `Insolvency Resolution' or `Liquidation Processes' of the `Corporate Debtor' and its `Corporate Guarantor'.

Discussions:

63. Before the `Adjudicating Authority' / `Tribunal', the `1st Respondent / Financial Creditor / Petitioner', had filed CP (IB) No. 335 / 95 / HDB / 2020 (under Section 95 (1) of the I & B Code, 2016 read with Rule 7 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, wherein, among other things, it is mentioned as under:

> *``PFS sanctioned financial assistance of Rs.125,00,00,000 of which Rs.116,07,13,161 was disbursed for the project. However, due to failure of the Corporate Debtor in achieving financial closure of cost overrun and failure in equity infusion, the project got stalled. Moreover, the Corporate Debtor was classified as Non Performing Asset (NPA) on 31.03.2018 by PFS. Thereafter a recall notice dated 11.02.2019 was issued by IFCI (Lead Lender of the Consortium), on behalf of the Lenders to GIBPPL, wherein a sum of Rs.150,08,42,949/-, due as on 15.01.2019 was demanded on behalf of PFS. Further, on behalf of the Lenders IFCI issued two Letters dated 08.03.2019 invoking Personal Guarantee against Mr. Mahendra Kumar Agarwal and Corporate Guarantee against TCI Finance Ltd. respectively, demanding a sum of Rs.150,08,42,949/-, due as on 15.01.2019 for PFS.*
>
> *Looking at the seriousness of the matter, PFS issued a demand notice dated 12.03.2020 to the Personal Guarantor Mr. Mahendra Kumar Agarwal demanding a sum of Rs.1,76,75,60,935/-.''*

and that the 1st Respondent / Financial Creditor, had preferred the instant CP (IB) No. 335 / 95 / HDB / 2020, demanding a Sum of Rs.1,76,75,60,935/- as on 15.01.2020.

64. The Appellant / Respondent / Personal Guarantor in his `Preliminary Reply', to CP (IB) No. 335 / 95 / HDB / 2020, filed by the 1st Respondent / Financial Creditor / Petitioner, had among other things mentioned that a reading of Section 60 and 179 of the I & B Code, 2016, make it clear that the provisions, deal with the `priority' of `preferences' of the `Tribunal', over `Insolvency Proceeding', instituted against the `Personal Guarantor' / `Individual' / `Corporate Debtor'. Moreover, if the `Insolvency', relates to the `Corporate Debtor', the `Adjudicating Authority' / `Tribunal', has supremacy and for that, the `Adjudicating Authority' / `Tribunal', possess all those `Powers' of `Debt Recovery Tribunal', as well, whereas, if `Insolvency', relates to a `Personal Guarantor / Individual / Partnership Firm', the `Debt Recovery Tribunal', has supremacy and for that, the `Debt Recovery Tribunal', possess all those `Powers' of the `Adjudicating Authority' / `Tribunal', as well.

65. According to the Appellant / Personal Guarantor, that the `period of Limitation', for triggering `Insolvency and Bankruptcy Proceedings', is `Three Years', and that, it is to be noted from the `Date of Default', only, under no circumstances, from the `Date of Enactment', coming in force'. Furthermore, in the `Information Utility', the `Date of Default', is mentioned as 15.05.2017 and that the present `Application', was filed on 30.07.2020, which is beyond the `Limitation Period'.

66. Added further, it is the stand of the Appellant / Personal Guarantor that the `Lenders Claim', vis-à-vis the `Respondent's Claim', for the `non-disbursal of the Sanctioned Loan', which caused it `Loss of Property', as well as `Project', for which, entire `Agreement', was made, is pending `Adjudication', before the `Debt Recovery Tribunal', Delhi and because of the `Disputes', being raised by the `Principal Borrower', the present `Application', is `not maintainable'.

67. In the `Rejoinder', before the `Adjudicating Authority', the `1st Respondent / Financial Creditor', inter alia, had averred that the `Period of Limitation', was extended by the Hon'ble Supreme Court, through its Order dated 23.03.2020, and hence the main `Company Petition', filed by the `1st Respondent / Financial Creditor', is well within the `Three Years Limitation Period', from 15.05.2017.

68. Also, according to the 1st Respondent / Financial Creditor, `no Dispute', exists on the `Debt' due, and the `Personal Guarantor's Liability', to repay the said `Debt', was `admitted' and absolute and the `Liability' of the `Personal Guarantor', has no relation to the `Liability' of `GATI Infra', and hence the `Personal Guarantor', had failed to put forth any `valid defence / objection', to the main Petition.

69. Be it noted, that on the `Date', when the `Application', was filed before the `Adjudicating Authority' / `Tribunal', since `Corporate

Insolvency Resolution Process' proceedings, were pending in the `Tribunal', against the `Corporate Debtor', as per Section 60 (2) of the I & B Code, 2016, as well, the `1st Respondent / Financial Creditor / Petitioner', was bound to initiate `Insolvency Proceedings', against the `Appellant / Personal Guarantor', before the very same `Adjudicating Authority' / `Tribunal'. To put it precisely, the two of those proceedings, were `Settled' and later `Withdrawn', will not affect the `Maintainability' of `Petition / Application', on the `Date', when it was `projected'.

70. It cannot be gainsaid that the `pendency' of the `Corporate Insolvency Resolution Process' proceedings, against the `Corporate Debtor', is not a `condition precedent', for initiation of `Insolvency Proceedings', against the `Personal Guarantor'. Therefore, it is crystalline clear that the `Insolvency Proceedings', can be initiated against the `Personal Guarantor' of a `Corporate Debtor', even if, `no Insolvency Proceedings', are pending against the `Corporate Debtor'.

71. In so far as the challenge to any provision, in a `separate proceeding', has no bearing whatsoever, to the instant Comp. App (AT) (CH) (INS.) No. 8 of 2023 and it is to be remembered that the provisions of I & B Code, 2016, pertaining to `Personal Guarantors', were `upheld',

as `Valid', by the Hon'ble Supreme Court's decision in the matter of Lalitkumar Jain v. Union of India, reported in (2021) 9 SCC 321. In an event, as on today, the ingredients of Section 95 to 120 of the I & B Code, 2016, pertaining to `Personal Guarantors', are `Valid', and do have a `Binding Force', in `Law',

72. The other vital fact, which cannot be brushed aside in the instant case on hand, before this `Tribunal', is that, the `IFCI' Limited, a `Lead Lender', had issued a `Recall Notice', to the `Corporate Debtor', and on 08.03.2019, had invoked the `Personal Guarantee', on behalf of all the `Lenders', including the `1st Respondent / Financial Creditor / Petitioner'.

73. Dealing with the aspect of the `Appellant / Personal Guarantor', as `Petitioner', has filed a `Transfer Petition (C) No.1235 of 2020', before the Hon'ble Supreme Court, against the `1st Respondent / Financial Creditor / Petitioner' (`PTC India Financial Services Ltd.', New Delhi), praying for `allowing of the Transfer Petition' (under Article 139A of the Constitution of India, read with Section 25 of the Civil Procedure, 1908, and Order XLI of the Supreme Court Rules, 2013), seeking `Transfer' of main CP (IB) No. 335 / 95 / HDB / 2020, titled as `PTC India Financial Services Ltd. v. Mahendra Kumar Agarwal', pending before the `National Company Law Tribunal', Hyderabad, Telangana, to the `Debt Recovery

Tribunal', Delhi, the said `Transfer Petition', was `Dismissed' by the Hon'ble Supreme Court as `Withdrawn', through an `Order', dated 21.01.2022.

74. In `Law', `Guarantee', is an `independent obligation' of the `Guarantor', which is evident from the `Personal Guarantee', and that there is `no requirement', enabling a `Person', to `exhaust', any `remedy', against a `Corporate Debtor', prior to the issuance of `Demand', in terms of `Personal Guarantee' and in the present case, Clauses 3, 4 and 6 of the `Personal Guarantee', cannot be lost sight off. In reality, Section 60 of the Code, provides for only a `Single Fora', in respect of an `adjudication' of `Insolvency Proceedings', against both the `Corporate Debtor' and the `Personal Guarantor' of the `Corporate Debtor', Viz. `Adjudicating Authority' / `Tribunal'.

75. In the present case, it is brought to the notice of this `Tribunal', on `Record' that the `Corporate Insolvency Resolution Process' proceedings, against the `Corporate Debtor', were pending, on the `Date', when the `Petition', was filed before the `Adjudicating Authority' / `Tribunal', by the `1st Respondent / Financial Creditor', and on the `Date', when the `impugned order', came to be passed, as on date, they continued to be pending.

76. It is well settled by now, that the `Insolvency Proceedings', can be initiated against the `Personal Guarantor', even when `no proceedings', are pending against the `Corporate Debtor'.

77. Going by the ingredients of Section 60 (1) of the I & B Code, 2016, it is quite clear, that for `Insolvency Resolution' and `Liquidation', for `Corporate Persons', including `Corporate Debtors' and `Personal Guarantors', the `National Company Law Tribunal' (`Adjudicating Authority'), having `territorial jurisdiction', over the place, where the `Registered Office' of the `Corporate Person', is located, and in the instant case, in the `State of Telangana', the `Corporate Debtor's Registered Office', is situated, which comes within the `ambit of territorial jurisdiction' of the `Adjudicating Authority' (`National Company Law Tribunal', Bench – I, Hyderabad).

78. One cannot remain in oblivion of a prime fact that the Hon'ble Supreme Court of India, in Lalit Kumar Jain v. Union of India & Ors., reported in (2021) 9 SCC at Page 321, at Spl Pgs: 365, 394-395, 397-400, wherein at Paragraphs 63, 114, & 121 to 125, it is observed as under:

> *63. ``Section 78(3) of the Code states that the adjudicating authority, for the purpose of Part III (that deals with insolvency resolution and bankruptcy of individuals and partnership firms) would be the Debt Recovery Tribunal*

(``DRT'') that was established under the RDBFI Act. The adjudicating authority for corporate insolvency (companies, LLPs and limited liability entities), on the other hand, is NCLT. The appeal from NCLT lies to the National Company Law Appellate Tribunal (``NCLAT''). The appeal from the DRT lies to the Debt Recovery Appellate Tribunal (``DRAT''). This court hears appeals from both the NCLAT and the DRAT.''

114. In view of the above discussion, it is held that the impugned notification is not an instance of legislative exercise, or amounting to impermissible and selective application of provisions of the Code. There is no compulsion in the Code that it should, at the same time, be made applicable to all individuals, (including personal guarantors) or not at all. There is sufficient indication in the Code by Section 2(e), Section 5(22), Section 60 and Section 179 indicating that personal guarantors, though forming part of the larger grouping of individuals, were to be, in view of their intrinsic connection with corporate debtors, dealt with differently, through the same adjudicatory process and by the same forum (though not insolvency provisions) as such corporate debtors. The notifications under Section 1(3), (issued before the impugned notification was issued) disclose that the Code was brought into force in stages, regard being had to the categories of persons to whom its provisions were to be applied. The impugned notification, similarly inter alia makes the provisions of the Code applicable in respect of personal guarantors to corporate debtors, as another such category of persons to whom the Code has been extended. It is held that the impugned notification was issued within the power granted by Parliament, and in valid exercise of it. The exercise of power in issuing the impugned notification under Section 1(3) is therefore, not ultra vires; the notification is valid.

121. In Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta[15] (the ``Essar Steel case'') this court refused to interfere with proceedings initiated to enforce personal guarantees by financial creditors; it was observed as follows: (SCC pp. 615-16, para 106)

> *``106. Following this judgment in V. Ramakrishnan case [SBI v. V. Ramakrishnan, (2018) 17 SCC 394], it is difficult to accept Shri Rohatgi's argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile Directors of the corporate debtor. So far as the present case is concerned, we hasten to add that we are saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, NCLAT judgment[66] being contrary to Section*

31(1) of the Code and this Court's judgment in V. Ramakrishnan case [SBI v. V. Ramakrishnan, (2018) 17 SCC 394], is set aside.''

122. It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantors liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this Court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In Maharashtra State Electricity Board (supra) the liability of the guarantor (in a case where liability of the principal debtor was discharged under the Insolvency law or the Company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realize the same from the guarantor in view of the language of Section 128 of the Contract Act, 1872 as there is no discharge under Section 134 of that Act. This court observed as follows: (SCC pp. 362-63, para 7)

``7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Contract Act, 1872, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under Section 134 of the Indian Contract Act, 1872 by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability (see Jagannath Ganeshram Agarwale v. Shivnarayan Bhagirath [AIR 1940 Bom 247; see also Fitzgeorge In re [(1905) 1 KB 462]).

123. This legal position was noticed and approved later in Industrial Finance Corpn. of India Ltd. v. Cannanore Spg. & Wvg. Mills Ltd.[69] An earlier decision of three Judges, Punjab National Bank v. State of U.P.[31] pertains to the issues regarding a guarantor and the principal debtor. The court observed as follows:

> *``1. The appellant had, after Respondent 4's management was taken over by U.P. State Textile Corporation Ltd. (Respondent 3) under the Industries (Development and Regulation) Act, advanced some money to the said Respondent 4. In respect of the advance so made, Respondents 1, 2 and 3 executed deeds of guarantee undertaking to pay the amount due to the Bank as guarantors in the event of the principal borrower being unable to pay the same.*
>
> *2. Subsequently, Respondent 3 which had taken over the management of Respondent 4 became sick and proceedings were initiated under the Sick Textile Undertakings (Nationalisation) Act, 1974 (for short ``the Act''). The appellant filed suit for recovery against the guarantors and the principal debtor of the amount claimed by it.*
>
> *3. The following preliminary issue was, on the pleadings of the parties, framed:*
>
> > *`Whether the claim of the plaintiff is not maintainable in view of the provisions of Act 57 of 1974 as alleged in para 25 of the written statement of Defendant 2?'*
>
> *4. The trial court as well as the High Court, both came to the conclusion that in view of the provisions of Section 29 of the Act, the suit of the appellant was not maintainable.*
>
> *5. We have gone through the provisions of the said Act and in our opinion the decision of the courts below is not correct. Section 5 of the said Act provides for the owner to be liable for certain prior liabilities and Section 29 states that the said Act will have an overriding effect over all other enactments. This Act only deals with the liabilities of a company which is nationalised and there is no provision therein which in any way affects the liability of a guarantor who is bound by the deed of guarantee executed by it. The High Court has referred to a decision*

of this Court in Maharashtra SEB v. Official Liquidator [(1982) 3 SCC 358] where the liability of the guarantor in a case where liability of the principal debtor was discharged under the Insolvency law or the Company law, was considered. It was held in this case that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realise the same from the guarantor in view of the language of Section 128 of the Contract Act, 1872 as there is no discharge under Section 134 of that Act.

6. In our opinion, the principle of the aforesaid decision of this Court is equally applicable in the present case. The right of the appellant to recover money from Respondents 1, 2 and 3 who stood guarantors arises out of the terms of the deeds of guarantee which are not in any way superseded or brought to a naught merely because the appellant may not have been able to recover money from the principal borrower. It may here be added that even as a result of the Nationalisation Act the liability of the principal borrower does not come to an end. It is only the mode of recovery which is referred to in the said Act.''

124. In Kaupthing Singer and Friedlander Ltd.[34] the UK Supreme Court reviewed a large number of previous authorities on the concept of double proof, i.e. recovery from guarantors in the context of insolvency proceedings. The court held that: (AC p. 814, para 11)

"11. The function of the rule is not to prevent a double proof of the same debt against two separate estates (that is what insolvency practitioners call "double dip''). The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. It is for that reason sometimes called the rule against double dividend. In the simplest case of suretyship (where the surety has neither given nor been provided with security, and has an unlimited liability) there is a triangle of rights and liabilities between the principal debtor (``PD''), the surety (``S'') and the creditor (``C''). PD has the primary obligation to C and a secondary obligation to indemnify S if and so far as S discharges PD's liability, but if PD is insolvent S may not enforce that right in competition with C. S has an obligation to C to answer for PD's liability, and the secondary right of obtaining an indemnity from PD. C can (after due notice) proceed against either or both of PD and S. If both PD and S are in insolvent liquidation, C can prove against each for 100p in the pound but may not recover more than 100p in the pound in all.''

125. In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.''

79. Be that as it may, in view of the detailed foregoing qualitative discussions, this `Tribunal', keeping in mind the respective contentions advanced on either side, and considering the facts and circumstances of the instant case, in a conspectus manner, comes to a resultant conclusion that the `Adjudicating Authority' / `Tribunal', has `jurisdiction', to `entertain'/`initiate', the `Insolvency Proceedings' of the `Personal Guarantors', even when `no Corporate Insolvency Resolution Process' proceedings, is `pending', against the `Corporate Debtor', and in any event, the `Corporate Insolvency Resolution Process' proceedings, is pending, and continued to be pending, against the `Corporate Debtor'. Viewed in that perspective, the `impugned order', dated 21.07.2022, in CP (IB) No. 335 / 95 / HDB / 2020, passed by the `Adjudicating Authority' (`National Company Law Tribunal', Bench – I, Hyderabad), is free from any `Legal Flaws'. Resultantly, the instant `Appeal' fails.

Disposition:

In fine, the instant Comp. App (AT) (CH) (INS.) No. 8 of 2023 is `Dismissed'. No costs. The connected pending `Interlocutory Applications', if any, are `Closed'.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

01 / 08 / 2023

SR / NG