IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH- I
KOLKATA
I.A.(IB) 1670/KB/2024
In
C.P.(IB) 51/KB/2024

In the matter of:

An application under Section 99 of the Insolvency and Bankruptcy Code;

Read with

An application under Section 95(1) of the Insolvency and Bankruptcy 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]

In the matter of:

Tata Capital Financial Services Limited

...FINANCIAL CREDITOR

Versus

Arjun Agarwal

...RESPONDENT/PERSONAL GUARANTOR

Versus

Sneh Maheswari

...RESOLUTION PROFESSIONAL/APPLICANT

Coram:

Smt. Bidisha Banerjee : Member (Judicial)

Shri Balraj Joshi : Member (Technical)

Date of Pronouncement of Order: 20/12/2024

Appearances (via video conferencing/physically):

For Financial Creditor-: i) Mr. Avishek Guha, Adv
ii) Ms. Arunika Dutta, Adv

For Personal Guarantor-: i) Ms. Labony Ray, Advocate

ii) Mr. Arkodeb Sinha, Adv.
iii) Ms. Simran More, Adv

For the Resolution Professional-: i) Ms. Sneh Maheswari, RP

O R D E R

Per: Balraj Joshi, Member (Technical)

1. The Court Convened in a hybrid mode.

2. This CP (IB) No.51/KB/2024 has been preferred by the Resolution Professional and the Financial Creditor to seek initiation of Insolvency Process against the Respondent Personal Guarantor to Corporate Debtor Under Section 99 and Section 95(1) of IBC read with Rule 7(2) of IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 ('Personal Guarantors Regulations').

3. The amount in Debt & Default (including any interest or penalties) is Rs.4,77,40,595.75/-(Rupees four crore seventy seven lakhs forty thousand five hundred and ninety five only), Date on debt and default occurred is 19.12.2022.

4. The application is complete as required under Section 95 read with rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019.

5. It is to be noted that Hon'ble Supreme Court in the judgment of **Dilip B. Jiwrajka V/s Union of India & Ors. In WP (civil) No. 1281 of 2021** dated 09.11.2023 has upheld the Constitutional Validity of the Sections 94 to 100 and the propositions that can be culled out from the Judgments inter-alia are as follows:

i. *No judicial adjudication is involved at the stages envisaged in Sections 95 to Section 99 of the IBC;*

ii. *The Resolution Professional appointed under Section 97 serves a facilitative role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under Section 94 or Section 95. The report to be submitted to the* *adjudicatory authority is recommendatory in nature on whether to accept or reject the application;*

iii. *No adjudicatory function of Adjudicating Authority is contemplated at the admission stage. To read in such a requirement at that stage would be to rewrite the statue which is impermissible in the exercise of judicial review;*

iv. *The resolution professional may exercise the powers vested under Section 99(4) of the IBC for the purpose of examining the application for insolvency resolution and CP/IB/337/AHM/2020 12 of 17 to seek information on matters relevant to the application in order to facilitate the submission of the report recommending the acceptance or rejection of the application;*

v. *There is no violation of natural justice under Section 95 to Section 100 of the IBC as the debtor is not deprived of an opportunity to participate in the process of the examination of the application by the resolution professional;*

vi. *No judicial determination takes place until the adjudicating authority decides under Section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the adjudicatory authority when it exercises its jurisdiction under Section 100;*

vii. *The adjudicatory authority must observe the principles of natural justice when it exercises jurisdiction under Section 100 to determine whether to accept or reject the application; CP/IB/337/AHM/2020 13 of 17*

viii. *The purpose of the interim moratorium under Section 96 is to protect the debtor from further legal proceedings; and*

ix. *The provisions of Section 95 to Section 100 of the IBC are not unconstitutional as they do not violate Article 14 and Article 21 of the Constitution.*

6. The Applicant had proposed the name of the Insolvency Professional for appointment as Resolution Professional. In view of the above, **Ms. Sneh Maheshwari**, IBBI Registration No. IBBI/IPA-001/IP-P-01751/2019-2020/12691, email ID: **sneh.maheswari@gmail.com**; was appointed as Resolution Professional, subject to his possessing a valid AFA, in exercise of the power conferred under Section 97 of the IBC, 2016 on this Authority.

7. The Resolution Professional was directed to file declaration within seven days to the effect that he fulfils all the requirements for being appointed as Resolution Professional in the matter which he has given, and to file his report in terms of Section 99 in ten days.

8. The Resolution Professional will be paid a remuneration of Rs.75000/-(Rupees Seventy-Five Thousand Only) for the assigned Job.

9. The Resolution Professional Ms. Sneh Maheshwari has vide his report dated suggested/stated as extracted hereunder:

10. **DETAILED REPORT**

A. An Overview:

14. As per Section 99 of the Code, the Resolution Professional has to ensure the following:

Sl.	Section	Particulars	RP's response
1	99(1)	RP to examine the application u/s 95	RP has examined the application in details
2	99(2)	Where the application has been filed under section 95, the resolution professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor	Debtor has confirmed that it has not made any payment and rather claimed that he is not liable for any payment. This proves the non-payment by the debtor.
3	99(3)	Where the debt for which an application has been filed by a creditor is registered with the information utility, the debtor shall not be entitled to dispute the validity of such debt.	Creditor has confirmed via email that the debt is not registered with the information utility.

4	99(4)	For the purposes of examining an application, the resolution professional may seek such further information or explanation in connection with the application as may be required from the debtor or the creditor or any other person who, in the opinion of the resolution professional, may provide such information	RP has sought information / explanation and documents from both the debtor as well as the creditor and has received responses from both of them.
5	99(5)	The person from whom information or explanation is sought under sub-section (4) shall furnish such information or explanation within seven days of receipt of the request.	RP has sought information / explanation and documents from both the debtor as well as the creditor and has received responses from both of them.

Sl.	Section	Particulars	RP's response
6	99(6)	The resolution professional shall examine the application and ascertain that - (a) the application satisfies the requirements set out in section 94 or 95; (b) the applicant has provided information and given explanation sought by the resolution professional under sub-section (4).	RP has examined the application made u/s 95 and has ascertained the following: (a) The applicant has satisfied the requirement set out in section 95 viz. - Creditor has applied by himself to the AA for initiating an IRP under section 95 - Application has been made against the personal guarantor - Applications against other guarantors of CD also filed before NCLT Kolkata Bench. - Application is accompanied with details and documents relating to the debts owed by the debtor to the creditor; failure by the debtor to pay the debts within a period of 14 days of demand notice; evidence of non-repayment of debt through debtor's acknowledgement of non-repayment. - Debtor received the copy of application and made submissions before the Hon'ble NCLT. - The application was in the prescribed form and paid the requisite fees. (b) the applicant has provided information and given explanation sought by the RP under sub-section (4).

Sl.	Section	Particulars	RP's response
7	99(7)	After examination of the application under sub-section (6), he may recommend acceptance or rejection of the application in his report.	RP is recommending acceptance of the application in this report.
8	99(8)	Where the resolution professional finds that the debtor is eligible for a fresh start under Chapter II, the resolution professional shall submit a report recommending that the application by the debtor under section 94 be treated as an application under section 81 by the Adjudicating Authority.	Present application is u/s 95; debtor does not meet the eligibility criteria u/s 80 of the Code and hence the RP is NOT recommending Fresh Start Process.
9	99(9)	The resolution professional shall record the reasons for recommending the acceptance or rejection of the application in the report under sub-section (7).	RP's reasons for recommending the acceptance of application is recorded in this report.
10	99(10)	The resolution professional shall give a copy of the report under sub-section (7) to the debtor or the creditor, as the case may be.	In compliance with IBBI's circular dated 12.02.2024, the report shall be given to both the debtor as well as the creditor.

11. **RP Recommendation-:**

The Resolution Professional, under the provisions of section 99(7) of the Code ***recommends the acceptance of the said application filed by the Applicant u/s 95(1) of the Insolvency and Bankruptcy Code, 2016****. The Resolution Professional has also recorded the reasons as stated above recommending the acceptance of said application in accordance with the provisions laid down u/s 99(9) of the Code.*

12. We note that no CIRP admittedly and irrefutably has been filed against the principal borrower as yet-: evident from the contention raised by financial creditor in written note that Section 95 petition is maintainable even if no CIRP pending against CD in NCLT-: written notes filed on 20th November, 2024 (page 2, last para).Also, the RP report nowhere mentions initiation of any CIRP against Corporate Debtor.

13. On the question whether an application under section 95(1) of The Insolvency and Bankruptcy Code, 2016 will be maintainable without initiating a proceeding against the principal borrower, we discuss as under:

Analysis and Finding

1. Apart from various other issues, the personal guarantor has raised the issue of maintainability of the petition before this Adjudicating Authority. Therefore, it becomes expedient to address the issue of maintainability first. The contention of the PGs is that unless there is a CIRP initiated or continuing the application for the IRP of the personal guarantor is not maintainable at NCLT as the Adjudicating authority in such cases shall be DRT.

2. In this regard, a starting point shall be a look on the provisions of the Code, on the issue of the Adjudicating authority for PGs. These are Section 60, Section 79 and Section 179 of IBC 2016 read with Relevant rules. These are reproduced hereunder:

3. Chapter VI of the code is titled **" Adjudicating Authority for Corporate Persons"** and starts with Section 60 , which is as under:

"Section 60: Adjudicating Authority for corporate persons.

60. (1) The Adjudicating Authority,* ***in relation to insolvency resolution and liquidation for corporate persons* *including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate persons 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 [liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor] shall be filed before such National Company Law Tribunal.

4. It is thus clear from 60(1) that the Adjudicating Authority **in relation to insolvency resolution and liquidation of the Corporate persons** and Personal guarantor thereof shall be NCLT. It clearly shows links the two proceedings together i.e. One against the Corporate person and the another against Corporate Guarantor and/or Personal guarantor thereof. Evidently when out of two elements that are supposed to be linked together , if one is absent then the other one shall be seen as a plain normal individual who has given a guarantee. This is further borne out of the fact that the term " Personal Guarantor" has been defined as " An individual who is surety in a contract of Guarantee to a Corporate Debtor."

5. It is here that the applicability of Part III of the code dealing with Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms takes stage. Chapter -I thereof contains the following provisions:

78. Application.

*This Part shall apply to matters relating to fresh start, insolvency and bankruptcy of **individuals** and partnership firms where the amount of the default is not less than one thousand rupees:*

Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one lakh rupees.

79. Definitions.

In this Part, unless the context otherwise requires, -

*(1**) Adjudicating Authority means the Debt Recovery Tribunal** constituted under subsection (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institution Act, 1993 (51 of 1993)*

6. Chapter VI of the code deals with the Adjudicating authority for individual and Partnership firms

***Section 179 of the Code** reads as under:*

*(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.*

(2) The Debt Recovery Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain or dispose of—

(a) any suit or proceeding by or against the individual debtor;

(b) any claim made by or against the individual debtor;

(c) any question of priorities or any other question whether of law or facts, arising out of or in relation to insolvency and bankruptcy of the individual debtor or firm under this Code.

(3) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application in the name and on behalf of a debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.

Judicial precedents

7. Let us examine now some of the important judicial preceedants in the matter of jurisdiction of NCLT in the matter relating to Personal Guarantors to the Corporate Debtors.

Madras High Court

In the case of Rohit Nath v. KEB Hana Bank Ltd., Hon'ble Madras High Court while dealing with a civil revision petition filed by a PG against a pending PG Proceeding before the DRT. Herein, the Madras High Court, while dismissing the petition, interpreted Section 60(2) of the Code to mean that Section 60 would apply to PGs only when the Corporate Debtor is undergoing CIRP. Further, it also noted that where no CIRP has been initiated against the Corporate Debtor, PG Proceedings must necessarily be carried only to the jurisdictional DRT and not to any other forum."

NCLAT – Mahinder Jajodia case

In this case Hon'ble NCLAT has held that for maintaining a petition under section 95 , the pendency of a CIRP or liquidation proceeding is not a " sine qua non". There is no doubt that the petition under section 95 is maintainable, even when there is no CIRP or liquidation pending. NCLAT in the subject order has held as under:

"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."

Lalit Jain – Hon'ble Supreme Court

Hon'ble Supreme court in Lalit Kumar Jain v. Union of India 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 thesame forum (though not insolvency provisions) as such corporate debtors".

8. The whole gamut of the codal provisions and the judicial preceedents received the consideration of Hon'ble NCLAT , Chennai bench in Mahendra Kumar Agarwal Vs.PTC India Financial Services Ltd. and Another , In its elaborate judgement, Hon'ble NCLAT Chennai have elaborately dealt with various provisions of law and considered the judgements cited comprehensively dealing with the same and duly distinguishing the applicability to the facts of the case under consideration. In conclusion , the Hon'ble NCLAT , Chennai Bench has held as under:

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'.

9. This is therefore clear that even in the absence of the CIRP or the Liquidation, proceedings against the personal guarantor is maintainable. There is absolute clarity on the issue, but on the issue of Adjudicating Authority for the same, the judgement is silent. The issue has been touched upon by Hon'ble NCLAT in Mahendra Jajodia (supra), however it is respectfully submitted that the issue in that matter was whether a petition under section 95 is maintainable even when there was no CIRP pending or initiated against the Corporate Debtor and further on the applicability of Section 60(2). The answer to the first question is of course a resounding yes as already held by Hon'ble NCLAT, but since the nature of the appropriate forum for the same had not been argued before the Hon'ble NCLAT, the comprehensive view on the same i.e. whether the same is maintainable at NCLT or the DRT still remained open .

10. Having regard to the Preamble of the code which is based on the principal of value maximization, it was expedient that the proceedings in regard to the Corporate Debtor as well to the Corporate Guarantor or even the personal guarantor shall be filed before one entity only which can address the very essence of the value maximization. However, if the Corporate Debtor has already been resolved or even liquidated and there is no scope for further value maximization of the Corporate person, the proceedings against the personal guarantor are relegated to a modus of recovery only and not that of resolution of insolvency. An argument was made that the word " Insolvent " as applied to an individual has legal connotations and an undischarged insolvent may lose upon a number of rights and privileges and therefore it is important to label the person as Solvent or say "not insolvent" and therefore the proceedings against an individual may appear to be a " recovery proceeding ", but it has to be stamped as Insolvency proceedings out of which the individual if emerges victorious, would be a "discharged insolvent" .

11. Be that as it may, the essence of proceedings against a personal guarantor remains a recovery proceeding, which is clear from the words "Repayment Plan" as against a "Resolution Plan", which is so generic a word meant for resolving a corporate person. If that not be the case then the provisions of Section 60(2) would lose their relevance, since it stipulates that when the CIRP or liquidation proceeding is pending before **a** NCLT, an application relating to the Insolvency resolution or liquidation or Bankruptcy of a Corporate guarantor or Personal Guarantor , as the case may be of such Corporate Debtor, shall be filed before such National Company Law Tribunal ostensibly to avoid multiplicity of the judicial fora. However, when this is not so, the proceedings in our humble opinion are **recovery proceedings** only and not being a recovery forum , the NCLT shall not be the Adjudicating authority in such cases. In order to further bolster this assertion we look at Section 60(4), which stipulates that :

> ***The National Company Law Tribunal shall be the vested with all the powers of the Debt Recovery Tribunal as contemplated under part (III) in this code, for the purpose of Sub- section (2).***

Thus it is recognized by the legislature that for Part-III , the Adjudicating authority shall be Debt Recovery Tribunal unless the context otherwise requires. This context has then been clearly laid bare in Section 60(4) above, that in such a context i.e. where the CIRP/liquidation is proceeding before **a** National company Law tribunal, the NCLT shall have powers of the DRT.

12. Next we also examine the provisions of Section 60(5) and the same is set out here:

(5*) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of -*
(a) any application or proceeding by or against the corporate debtor or corporate person;
(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and
(c) any question of priorities or any question of law or facts, ***arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate*** *debtor or corporate person under this Code*

It is clear that NCLT shall have jurisdiction on the matters arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor. In other words if any matter is not related to the insolvency or liquidation proceedings of the corporate debtor or corporate person under this code, NCLT shall not have jurisdiction.

With this conjoint reading of various provisions of law as also after having distinguished various judgements brought out above, we hold that since no application for insolvency has been filed against the Corporate Debtor in the instant case, this petition is not maintainable before us, but may be maintainable at other fora.

14. In this view of the matter, ***I.A.((IB))1670/KB/2024 is dismissed accordingly.*** The Petitioner is, however, at liberty to pursue other recovery measures available under the law.

15. Certified copy of the order may be issued, if applied for, upon compliance of all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

Signed on this 20th day of December, 2024

RSM(LRA)